

(Of the Bar of the State of California)
By Permission of the Court
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, NA, WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts),

**Appellate
Case No.:
2020-02716**

Petitioners,

(For Continuation of Caption See Inside Cover)

BRIEF FOR APPELLANTS-RESPONDENTS DW PARTNERS LP AND ELLINGTON MANAGEMENT GROUP, L.L.C. (THE “ELLINGTON AND DW PARTIES”)

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DW Partners LP and Ellington
Management Group, L.L.C. (the
“Ellington and DW Parties”)*

For Judicial Instructions under CPLR Article 77
on the Distribution of a Settlement Payment

Appellants-Respondents

AEGON USA INVESTMENT MANAGEMENT, LLC, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, FEDERAL HOME LOAN BANK OF ATLANTA, FEDERAL HOME LOAN MORTGAGE CORP., FEDERAL NATIONAL MORTGAGE ASSOCIATION, GOLDMAN SACHS ASSET MGMT L.P., VOYA INVESTMENT MGMT LLC, INVESCO ADVISERS, INC., KORE ADVISORS, L.P., METROPOLITAN LIFE INS. CO., PACIFIC INVESTMENT MGMT COMPANY LLC, TEACHERS INS. AND ANNUITY ASSOC. OF AMERICA, TCW GROUP, INC., THRIVENT FINANCIAL FOR LUTHERANS and WESTERN ASSET MGMT. CO.
(the “Institutional Investors”)

– and –

Appellants-Respondents

AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
(the “AIG Parties”)

– and –

Appellants-Respondents

ELLINGTON MANAGEMENT GROUP, L.L.C. and DW PARTNERS LP
(the “Ellington and DW Parties”)

– and –

Appellants-Respondents

TILDEN PARK INVESTMENT MASTER FUND LP on behalf of itself and its advisory clients, TILDEN PARK MANAGEMENT I LLC on behalf of itself and its advisory clients and TILDEN PARK CAPITAL MANAGEMENT LP on behalf of itself and its advisory clients
(the “Tilden Park Parties”)

– and –

Appellants-Respondents

PROPHET MORTGAGE OPPORTUNITIES LP, POETIC HOLDINGS VI LLC, POETIC HOLDINGS VII LLC and U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Indenture Trustee for the Prophet and Poetic Trusts
(the “Prophet and Poetic Parties”)

– and –

Appellant-Respondent

AMBAC ASSURANCE CORPORATION
(“Ambac”)

– and –

Appellants-Respondents

U.S. BANK NATIONAL ASSOCIATION, as NIM Trustee, U.S. Bank, solely in its
capacity as Indenture Trustee for the HBK Trusts
(the “HBK Parties”)

– against –

Respondent

NOVER VENTURES, LLC
 (“Nover”)

– and –

Respondent

D.E. SHAW REFRACTION PORTFOLIOS, L.L.C.
 (“D.E. Shaw”)

– and –

Respondent

STRATEGOS CAPITAL MANAGEMENT, LLC
 (“Strategos”)

– and –

Respondents

OLIFANT FUND, LTD., FFI FUND LTD. and FYI LTD.
 (the “Olifant Parties”)

– and –

Respondents

GMO OPPORTUNISTIC INCOME FUND
 and GMO GLOBAL REAL RETURN
 (the “GMO Parties”)

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PRELIMINARY STATEMENTS AND SUMMARY OF ARGUMENTS

Pursuant to the Briefing Schedule Stipulation dated September 24, 2020, Appellants-Respondents Ellington Management Group, L.L.C. (“Ellington”) and DW Partners LP (“DW”), by their undersigned counsel, submit this Response Brief (the “Response Brief”)¹ in support of their opposition to the points raised in the Opening Brief submitted by U.S. Bank National Association, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in certain RMBS trusts and solely at the direction of HBK Master Fund L.P. (collectively, “HBK”), dated November 2, 2020 (the “HBK Brief”).²

A. ELLINGTON

Ellington’s arguments in this Response Brief pertain specifically to the GreenPoint Mortgage Funding Trust 2006-AR1, Mortgage Pass-Through Certificates, Series 2006-AR1 (the “GPMF 2006-AR1 Trust”), in which Ellington

¹ As set forth in the governing Briefing Schedule Stipulation (NYSCEF Doc. No. 23), the purpose of this Response Brief is to permit DW and Ellington to each respond “to opening briefs filed by other Appellants.” As set forth in greater detail herein, DW and Ellington are presenting their own respective responses to an opening brief filed by an Appellant, HBK, Doc. 59. For the avoidance of any confusion, DW does not join in Ellington’s position, and Ellington does not join in DW’s position. This Response Brief is organized in such a manner so as to reflect the same.

² As the Court is aware from the Opening Briefs, the HBK Brief appeals from certain portions of the Decision and Order of the Supreme Court for the County of New York (Friedman, J.), entered February 13, 2020.

holds an interest. The terms of the Governing Agreements for the GPMF 2006-AR1 Trust are substantially identical to the relevant terms of the HBK Trusts³ with respect to the order of operations for distribution of the Settlement Payment and “writing up” certificates upon receipt of the Settlement Payment (the “Exhibit D Issue”).⁴

As the trial court recognized in its Decision and Order—and HBK agreed (*see* HBK Brief at 8)—Section 3.06(a) of the Settlement Agreement requires the Petitioners to follow the order of operations provided by each Trust’s Governing Agreements. A30-35. The trial court further held that if a Trust’s Governing Agreements lack an order of operations, the Settlement Agreement provides a “gap-filler” rule: that the relevant Petitioners should follow the Pay-First Method. A34. Thus, each Trust’s Governing Agreements individually determine whether the relevant Petitioner should apply the Pay-First Method or the Write-Up First Method when distributing the Allocable Shares of the settlement to such Trust, and there is no uniform rule that applies across the board to all Settlement Trusts.

The trial court correctly held that the Governing Agreements for the HBK Trusts and the GPMF 2006-AR1 Trust addressed here require that write-ups occur before distributions. The HBK Brief fails to raise any arguments that call that

³ The term “HBK Trusts” as used herein shall have the definition ascribed to it in the HBK Brief.

⁴ HBK is the only party that submitted an appeal with respect to the trial court’s holding on the Exhibit D Issue.

holding into question or warrant its reversal; moreover, HBK has expressly limited its appeal on the Exhibit D Issue to the HBK Trusts, which do not include the GPMF 2006-AR1 Trust. (*See* HBK Brief at 1 n. 1, Doc. 59.) As such, there has been no appeal of the Exhibit D Issue with respect to the GPMF 2006-AR1 Trust and there is no basis to reverse the trial court’s opinion with respect to the Exhibit D Issue as to the GPMF 2006-AR1 Trust. In this regard, to the extent this Court reverses the trial court’s holding with respect to the Exhibit D Issue, such reversal should be limited to the HBK Trusts only, as HBK, the only party to appeal such issue, has expressly limited its appeal to the HBK Trusts.

Ellington files this Response in an abundance of caution, both to note this fact and to make clear that—should the Court disagree and review the Exhibit D Issue as to Trusts other than the HBK Trusts—the Court still should affirm the trial court’s opinion with respect to this Issue. In support of same, Ellington joins in the arguments contained in Section I of the response brief of Appellant-Respondent Tilden Park⁵ (filed December 2, 2020) (“Tilden’s Response Brief”), setting forth the bases for this Court to affirm the trial court’s opinion as to the Exhibit D Issue.

⁵ As used here, “Tilden Park” means Tilden Park Investment Master Fund LP on behalf of itself and its advisory clients, Tilden Park Management I LLC on behalf of itself and its advisory clients, and Tilden Park Capital Management LP on behalf of itself and its advisory clients.

B. DW

DW's arguments in this Response Brief pertain specifically to the Bear Stearns Asset Backed Securities I Trust 2006-HE3, Asset-Backed Certificates, Series 2006-HE3 (the "BSABS 2006-HE3 Trust"), in which DW holds an interest,⁶ and to the issue of whether "zero balance" or "retired" certificates are entitled to be written-up upon receipt of the Settlement Payment (the "Exhibit G Issue").

The trial court correctly held that certificates with zero balances should be written up to reflect the Settlement Payment (A64), and the HBK Brief fails to raise any arguments that demonstrate that such holding was incorrect or warrant its reversal. Thus, this Court should affirm the trial court's opinion with respect to the Exhibit G Issue. In support of same, DW joins in the arguments contained in Section II of Tilden's Response Brief, setting forth the bases for this Court to affirm the trial court's opinion as to the Exhibit G Issue.

COUNTERSTATEMENTS OF THE QUESTIONS PRESENTED

1. *On Ellington's behalf:* Whether the Governing Agreements for the HBK Trusts require the Petitioners to use the "Write-Up First Method" of applying the Settlement Payment to write up the at-issue Certificates' Principal Balances before distribution, given that those Governing Agreements' definition of

⁶ The BSABS 2006-HE3 Trust is included in the HBK Trusts, as that term is defined in the HBK Brief.

“Certificate Principal Balance” requires write-ups to occur before the “Certificate Principal Balance” is calculated and used to make distributions?

Answer: The trial court correctly answered in the affirmative.

2. *On DW’s behalf:* Whether “zero balance” or “retired” certificates for the HBK Trusts are entitled to be written up, given that: (a) the Settlement Agreement explicitly requires all certificates to be written up (regardless of certificate principal balance); (b) the Governing Agreements’ write-up rules contain no exceptions for zero balance certificates; and (c) the clauses in the Governing Agreements that HBK cites as prohibiting such write-ups, in fact do not prohibit such write-ups?

Answer: The trial court correctly answered this question in the affirmative.

COUNTERSTATEMENTS OF THE CASE AND ARGUMENTS

I. ELLINGTON SUBMITS THAT THE TRIAL COURT CORRECTLY HELD THAT THE HBK TRUSTS REQUIRE THE WRITE-UP FIRST METHOD

As stated above, in all aspects relevant to the Exhibit D Issue, the Governing Agreements for the GPMF 2006-AR1 Trust are substantially similar to the Governing Agreements for the HBK Trusts. As such, Ellington joins in all of the arguments raised in Tilden’s Response Brief with respect to the Exhibit D Issue, and adopts by reference Tilden Park’s Counterstatement of the Case with respect to such

Issue.⁷ For the reasons stated in Tilden’s Response Brief, the trial court’s ruling with respect to the Exhibit D Issue should be affirmed. (*See* Tilden’s Response Brief, Section I at 11-21.) Namely, the trial court correctly ruled that the definition of “Certificate Principal Balance” in the HBK Trusts’ Governing Agreements requires the use of the write-up first method, as that definition requires that the Petitioners account for, and apply, write-ups before any distributions of principal occur. A55-56.

The relevant term, “Current Principal Amount,” in the Governing Agreements for the GPMF 2006-AR1 Trust is analogous to the term, “Certificate Principal Balance,” in the Governing Agreements for the HBK Trusts and is defined in a substantially identical manner. In particular, the definition of Current Principal Amount in the PSA for the GPMF 2006-AR1 Trust similarly dictates a write-up first order of operations. The full definition of Current Principal Amount provides that:

With respect to any Class A, Class M or Class B Certificate as of any Distribution Date, the initial principal amount of such Certificate . . . plus, in the case of the Subordinate Certificates, any Subsequent

⁷ Ellington does not, however, join in footnote 2 of Tilden’s Response Brief. As detailed in Ellington’s Counterstatement of the Case in this Response Brief, HBK specifically limited its appeal to the HBK Trusts, and no party appealed the Exhibit D Issue with respect to any other Trusts. Thus, it is Ellington’s position that to the extent this Court adopts the arguments advanced by HBK and reverses the trial court’s holding with respect to the Exhibit D Issue, such holding would apply only to the HBK Trusts and no others. To wit, the Exhibit D Issue, which all parties and the trial court recognized was a Trust-specific issue dictated by a particular Trust’s Governing Agreements (A30-35), has not been placed at issue with respect to any Trusts other than the HBK Trusts.

Recoveries added to the Current Principal Amount of such Certificate pursuant to Section 6.02([b]), and reduced by (i) all amounts distributed on previous Distribution Dates on such Certificate with respect to principal and (ii) any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates. . . .

A13813, GPMF 2006-AR1 Trust PSA § 1.01 (definition of “Current Principal Amount”). Because the allocation of Subsequent Recoveries must be applied to calculate the Current Principal Amount of a certificate “as of” the Distribution Date, and thus before any distributions are made, the write-up first order of operations must apply.

To the extent this Court holds that the trial court’s ruling should be reversed with respect to the Exhibit D Issue, such holding should be limited to the HBK Trusts and not applied to any other Settlement Trusts, including without limitation the GPMF 2006-AR1 Trust. Critically, the “HBK Trusts,” to which the HBK Brief explicitly limits its appeal, do not include the GPMF 2006-AR1 Trust. (*See* HBK Brief at 1 n. 1, Doc. 59.) Accordingly, the Exhibit D Issue has not been placed at issue in this appeal with respect to the GPMF 2006-AR1 Trust or any Settlement Trusts other than the “HBK Trusts” (HBK Brief at 1 n. 1, Doc. 59). *See Harabedian v. New York Hosp. Medical Center*, 35 A.D.3d 915, 916 (3rd Dep’t 2006) (holding the issues on appeal were limited by the appellant’s brief); *Ali Saleh Moshad Ali v. City of New York*, 122 A.D.3d 888, 889-890 (2nd Dep’t 2014) (holding plaintiffs appeal were limited only to those portions of the order raised in plaintiff’s brief);

Shakespeare v. Fine Arts Development Laboratories Co-op., Inc., 71 A.D.2d 592 (1st Dep't 1979) (holding issues not argued in the brief are deemed waived and abandoned).

II. DW SUBMITS THAT UNDER BOTH THE SETTLEMENT AGREEMENT AND THE RELEVANT GOVERNING AGREEMENTS, ZERO BALANCE CERTIFICATES ARE ELIGIBLE FOR WRITE-UPS AND DISTRIBUTIONS

DW joins in all of the arguments raised in Tilden's Response Brief with respect to the Exhibit G Issue and adopts by reference Tilden Park's Counterstatement of the Case with respect to such Issue. For the reasons stated in Tilden's Response Brief, the trial court's ruling on the Exhibit G Issue should be affirmed. (*See* Tilden's Response Brief, Section II at 22-36.) Namely, the trial court correctly held that certificates with zero balances should be written up to reflect the Settlement Payment, pursuant to the terms of the applicable Governing Agreements. In the alternative, DW agrees with Tilden Park, and joins in Tilden Park's position, that this Court should affirm the trial court's holding with respect to the Exhibit G Issue on the basis that the Settlement Agreement controls write-ups and requires that the relevant Petitioners write up all certificates in the reverse order of previously applied losses, whether or not those certificates have zero balances or are purportedly "retired." (*Id.* at 23-24.)

CONCLUSION

Ellington respectfully submits that, for the reasons set forth herein, and those set forth in Tilden's Response Brief with respect to the Exhibit D Issue (Section I at 11-21), which are adopted herein by reference, this Court should affirm the trial court's ruling with respect to the Exhibit D Issue.

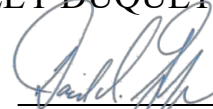
In the alternative, to the extent this Court agrees with HBK's interpretation of the Exhibit D Issue for the HBK Trusts and determines that the Settlement Agreement pay first order of operations applies to the HBK Trusts, Ellington submits that such holding should be limited to the HBK Trusts only, as no party has appealed the Exhibit D Issue with respect to any Settlement Trusts other than the HBK Trusts.

DW respectfully submits that, for the reasons set forth herein, and those set forth in Tilden's Response Brief with respect to the Exhibit G Issue (Section II at 22-36), which are adopted herein by reference, this Court should affirm the trial court's ruling with respect to the Exhibit G Issue.

Ellington and DW additionally respectfully request any and all other relief that is just and proper in connection with their respective responsive positions as set forth herein.

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PRINTING SPECIFICATION STATEMENT

Ellington and DW hereby specify pursuant to Rule 1250.8(j) of the Rules of Procedure for the Appellate Division of the Supreme Court, First Judicial Department, that this brief was prepared in Microsoft Word using fourteen-point Times New Roman font and double spacing. Ellington and DW further specify that, as calculated by Microsoft Word, this brief contains 2,201 words, excluding the table of contents, the table of authorities, and any addenda.