To Be Argued By: JOSHUA S. STURM
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),

Petitioners,

Appellate Division No. 2020-02716

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

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENTS GMO OPPORTUNISTIC FUND AND GMO GLOBAL REAL RETURN

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New York County Clerk's Index No. 657387/17

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
("Tilden Park")

- 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 Funds")

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INTRODUCTION

This appeal will determine how value from a multi-billion dollar settlement between hundreds of trusts and JPMorgan Chase & Co. will flow to different classes of certificates within a subset of those trusts. Each of the relevant trusts has its own governing agreement, which establishes the relative rights of different classes and gives instructions to "write up" certificate principal balances following the JPMorgan settlement according to specified class "payment priority."

The decision below focused on two provisions of the settlement agreement between the trustees and JPMorgan that are especially relevant to that subset of "payment priority trusts." The first provides that the settlement agreement shall not be deemed to "constitute an amendment of any term" of the settlement trusts' own governing agreements. The second is a write-up instruction that conflicts with the write-up instruction in the payment priority trusts' governing agreements.

The governing agreements for the majority of the settlement trusts are unaffected by the decision below because their write-up instructions match those in the settlement agreement. For at least ten of the trusts that are part of the JPMorgan settlement, the governing agreements provide no write-up instructions, so all parties agree that the settlement agreement write-up instruction applies. But for the payment priority trusts, applying the settlement agreement write-up

instruction would lead to a different allocation of settlement value among certificate classes.

COUNTERSTATEMENT OF THE QUESTION ON APPEAL

For payment priority trusts, does the JPMorgan settlement agreement's write-up term override or supersede the write-up terms in these trusts' own governing agreements?

The Supreme Court of the State of New York, County of New York (Friedman, J.) (the "IAS Court") held it does not. The IAS Court reasoned that the "unequivocal" meaning of Section 7.05 of the JPMorgan settlement agreement is that the agreement "does not supersede or override the [settlement trusts'] Governing Agreements." R.53–54. Therefore, the write-up approach in Subsection 3.06(b) of that settlement agreement "does not apply" where it conflicts with the governing agreement of a settlement trust. *Id*. Tilden Park appealed from this ruling. *See* Doc. No. 58 (Opening Brief for Tilden Park ("Tilden Park Br.")).

COUNTERSTATEMENT OF THE NATURE OF THE CASE AND RELEVANT FACTS

The "Settlement Agreement" was executed in November 2013 by certain investors (the "Institutional Investors") holding a plurality of the certificates issued by more than 300 residential mortgage-backed securities trusts (the "Settlement Trusts") and JPMorgan Chase & Co. ("JPMorgan"). *See U.S. Bank N.A. v. Fed. Home Loan Bank of Boston*, No. 652382/2014, 2016 WL 9110399, at *1 & n.2

(Sup. Ct. N.Y. Cty., Aug. 12, 2016) ("JPMorgan I"); Tilden Park Br. at 3. The agreement released JPMorgan from "repurchase" and other contract claims relating to JPMorgan's role in certain securitizations. R.416–17, Settlement Agreement ("SA") § 3.02; R.64. In exchange, JPMorgan agreed to make a multi-billion dollar payment to the Settlement Trusts (the "Settlement Payment"). R.415–16, SA § 3.01; R.26–27. The Settlement Agreement provides instructions for the trustees of the Settlement Trusts (the "Trustees") to allocate that Settlement Payment among the Settlement Trusts. R.417–18, SA § 3.05; R.27.

In July 2014, the Trustees accepted the Settlement Agreement on behalf of their hundreds of trusts and loan investor groups. JPMorgan I at *1–2. In August 2016, the Settlement Agreement was implemented and became binding on those investors through approval by New York Supreme Court CPLR Article 77 proceedings. *See generally id.* (approving settlement).

Following the JPMorgan I decision, the Trustees petitioned the IAS Court under CPLR Article 77, requesting guidance on multiple issues relating to the application of the Settlement Agreement and the interaction between the Settlement Agreement's provisions and the terms of the Settlement Trusts' individual governing agreements (the "Governing Agreements"). R.359–98. The only issue that Tilden Park disputes in this appeal relates to the "meaning and applicability of the Settlement Agreement's write-up instructions" for Settlement

Trusts under Governing Agreements that contain their own write-up instruction conflicting with the one in the Settlement Agreement. Tilden Park Br. at 8; R.51–56; R.378–80 at ¶¶ 41–48.

KEY CONTRACT PROVISIONS

Governing Agreements' Write-Up Terms.

The hundreds of Governing Agreements contain different types of instructions for writing up principal balances of classes of investors resulting from the Settlement Payment.[1] Many Governing Agreements provide that class certificate balances should be written up in the reverse order of previously allocated losses (the "Previous Loss Approach"). R.378 at ¶ 41. At least ten Governing Agreements are silent on write-up mechanics (the "Silent Governing Agreements"). R.5909. The Governing Agreements of the group of Settlement Trusts that are the subject of this appeal (the "Payment Priority Trusts") direct that investor class balances should be written up in the order of "payment priority" specified under each particular Governing Agreement (the "Payment Priority Approach").[2] R.381 at ¶ 50; R.51; Tilden Park Br. at 8.

[1] The applicable Governing Agreement write-up instructions are triggered by the receipt of "subsequent recoveries." The Settlement Agreement provides that the Settlement Payment should be treated as a "subsequent recovery" under all of the relevant Governing Agreements. R.418, SA § 3.06(a); R.53 n.18.

[2] The GMO Funds hold Class A-1 Certificates in one of the Payment Priority Trusts, the Bear Stearns Asset Backed Securities 1 Trust 2007-AQ1.

Settlement Agreement Write-Up Term.

The beginning of Subsection 3.06(b) of the Settlement Agreement instructs that Settlement Payment write-ups should follow the Previous Loss Approach. R.418–19, SA § 3.06(b). There is no dispute that this instruction conflicts with the Payment Priority Approach and would "have an impact on the classes of certificates that are written up and the order in which the write-up is applied to the various classes" of the Payment Priority Trusts. R.51. Tilden Park acknowledges that the choice between these two write-up approaches would "change the inputs used in the distribution provisions," and "alter [] the amounts that are distributed to each class" of investors in Payment Priority Trusts. Tilden Park Br. at 33.

Settlement Agreement Write-Up Clarification.

The final sentence in Subsection 3.06(b) provides:

> "For the avoidance of doubt, this Subsection 3.06(b) is intended only to increase the balances of the related classes of securities, as provided for herein, and shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)."

R.419.

Settlement Agreement, Section 7.05.

Section 7.05 provides:

> "The Parties agree that this Settlement Agreement reflects a compromise of disputed claims and is not intended to, and shall not be

argued or deemed to constitute, an amendment of any term of any Governing Agreement."

R.424.

Settlement Agreement, Section 7.13.

The final sentence in Section 7.13 provides:

"*Subject to Section 7.05*, all prior agreements and understandings between the Parties concerning the subject matter hereof are superseded by the terms of this Settlement Agreement."

R.425 (emphasis added).

ARGUMENT

I. Section 7.05 unequivocally states that the Settlement Agreement's write-up term cannot supersede Governing Agreements' write-up terms.

The IAS Court correctly recognized that the text of Section 7.05 is "unequivocal[]." R.53. There is no dispute that the Governing Agreements for Payment Priority Trusts specify that write-ups should follow the Payment Priority Approach. Tilden Park Br. at 14. Section 7.05 says that the Settlement Agreement "is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." R.424. Therefore, where a Governing Agreement specifies a particular write-up term, the IAS Court interpreted Section 7.05 to mean that "[b]y its terms, the Settlement Agreement does not supersede or override the Governing Agreements." R.53.

The IAS Court correctly rejected Tilden Park's alternative reading of Section 7.05—that the Settlement Agreement could somehow change Governing

Agreement terms without "amending" those terms. R.54–55. That alternative interpretation fails both because it ignores the plain meaning of Section 7.05's text and because it renders Section 7.05 "meaningless." R.53.

First, Tilden Park discerns from the Settlement Agreement's selection of the phrase "amendment of any term," instead of other words like "supersede" or "override," that "amendment" should carry a "specific meaning [applied] in the Governing Agreements with which the Settlement Agreements' drafters would have been familiar," *i.e.*, the formal process for amending a Governing Agreement, such as securing a majority vote. Tilden Park Br. at 27. But New York courts have regularly held that, "when interpreting a contract, words and phrases used by the parties must be given their plain meaning." *DDS Partners, LLC v. Celenza*, 6 A.D.3d 347, 348 (1st Dep't 2004). The Settlement Agreement does not define the term "amend" and the text of Section 7.05 gives no indication it is using a specialized definition, so the plain language definition applies. The full phrase the drafters selected for Section 7.05, "amendment of any *term*," confirms that the drafters referred to altering particular terms of the Governing Agreements rather than the formal process for amending those overall agreements.

Second, the IAS Court correctly rejected Tilden Park's interpretation of Section 7.05 because it would render that contract term "meaningless." R.53. Tilden Park posits that this contract term served only a toothless "clarifying

function," valuable for the "benefit the Trustees *presumably* believed this clarification provided." Tilden Park Br. at 28 n.8 (emphasis added). But it is axiomatic that no clause in a contract should be interpreted in such a way that it is rendered "meaningless or without force or effect." *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017) ("[A] contract must be construed in a manner which gives effect to each and every part[.]"); *see also MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 20 (1st Dep't 2018), *leave to appeal denied*, 32 N.Y.3d 912 (2018) (holding that contractual interpretation which "fails to give meaning" to particular provision "must be rejected").

Tilden Park's supposition—that the Trustees were concerned that the Settlement Agreement would have triggered a formal amendment process and the Trustees could then be faulted for failing to follow the process's requirements, Tilden Park Br. at 28 n.8—is also farfetched. The next several paragraphs of Tilden Park's brief explain that case law has established clearly that "there was no need for the Settlement Agreement to amend the Governing Agreements." *Id*. at 28–30. And the Settlement Agreement itself provided that the Trustees' acceptance of the Settlement Agreement would become effective only after extensive procedures for obtaining "Final Court Approval" for their entry into the Settlement Agreement. R.411–13, SA § 2.03.

Minimizing the importance of Section 7.05 is also inconsistent with the text's emphatic language. The drafters went further than just saying that the Settlement Agreement should not be "deemed to constitute" an amendment of any term; they added that this was not the drafters' intention and went so far as to stipulate that position "shall not be argued." R.424, SA § 7.05. That strong framing is much more consistent with the plain meaning of Section 7.05—a clear provision assuring thousands of investors, who were not at the negotiating table, that the Settlement Agreement does not change the core economic terms of each of their trusts' existing Governing Agreements.

II. Other Settlement Agreement provisions confirm that the Settlement Agreement's write-up term cannot supersede the Governing Agreements' write-up terms.

A. Section 7.13 makes the Settlement Agreement's power to supersede the Governing Agreements "subject to Section 7.05."

The Parties agree that the focus of this dispute is whether a term in the Settlement Agreement (Subsection 3.06(b)) supersedes a term of certain Governing Agreements. Section 7.13 of the Settlement Agreement describes how that is supposed to work: "*Subject to Section 7.05*, all prior agreements and understandings between the Parties concerning the subject matter hereof are superseded by the terms of this Settlement Agreement." R.425, SA § 7.13 (emphasis added). Tilden Park agrees, as it must, that the Governing Agreements are one type of prior agreement covered by Section 7.13. Tilden Park Br. at 29 n.9.

Therefore, the Settlement Agreement's authority to supersede Governing Agreements is expressly made "subject to" the terms of Section 7.05 discussed above.

Tilden Park interprets the phrase "subject to" to mean "conditional on or depending on," and paraphrases the meaning of Section 7.13's introductory condition as follows:

> Sections 7.05 and 7.13 draw a simple distinction: On the condition that the Settlement Agreement should not be deemed to "amend" the Governing Agreements, the Settlement Agreement supersedes the parties' other agreements—including, if necessary, the Governing Agreements—to the extent they concern the subject matter of the Settlement Agreement.

Id. That meaning of "subject to" makes no sense in this context. Section 7.05 is not some contingent event that may or may not occur, such as future court approval of an agreement. It is a provision of the Settlement Agreement that, by its terms, applies to the entire Settlement Agreement at all times. At best, Tilden Park's interpretation of Section 7.13 would render yet another clause of the Settlement Agreement redundant.[3]

[3] The introductory clause of Section 7.13 also undermines Tilden Park's interpretation of Section 7.05 as referring only to formal contract amendment. If that were correct, there would be no reason to reference Section 7.05 in Section 7.13, which expressly addresses how the Settlement Agreement supersedes prior agreement terms.

In this provision, the plain and far more natural meaning of "subject to" is to establish the priority between contractual terms. That is the way the Settlement Agreement uses that phrase in two other places. *See* R.418, SA § 3.06(a) (making certain distribution instructions "*subject to Section 3.04,*" which governs JPMorgan's waiver of participation in the Settlement Payment); R.419, SA § 3.06(d) (same). This Court has also frequently held that when one contractual provision is made "subject to" a second provision, the second provision takes priority over and limits the applicability of the first.[4] In Section 7.13, the instruction that the Settlement Agreement supersedes preexisting understandings or agreements between the parties is therefore limited by Section 7.05's instruction that the Settlement Agreement does not amend terms of particular existing agreements: the Governing Agreements.

B. If the Settlement Agreement write-up term supersedes the Governing Agreements, the final sentence of Subsection 3.06(b) becomes incorrect.

[4] *See, e.g.*, *John B. Stetson Co. v. Joh. A. Benckiser GmbH*, 81 A.D.3d 559, 559–60 (1st Dep't 2011) (where contractual definition of "territory' was made *subject to* another section governing "Foreign Territories," the section governing "Foreign Territories" took precedence); *Slattery Skanska Inc. v. Am. Home Assur. Co.*, 67 A.D.3d 1, 11–12 (1st Dep't 2009) (where general insurance coverage provision was made *subject to* a second provision defining "insured property," damage to a structure which did not qualify as "insured property" was accordingly not covered by the first provision); *cf. Berkeley Research Grp., LLC v. FTI Consulting, Inc.*, 157 A.D.3d 486, 488–89 (1st Dep't 2018) (where contractual provision setting out parties' rights to "immediately terminate" agreement was made *subject to* a provision of another contract that referred to "a revocation period as well as the parties' intention to work together to serve the best interests of certain of the parties' clients," breach of contract action for one party's unilateral termination of the agreement could not be dismissed on the pleadings).

The IAS Court recognized that preventing Subsection 3.06(b)'s write-up provisions from overriding conflicting terms of Governing Agreements is consistent with the final sentence of Subsection 3.06(b), while Tilden Park's interpretation is not. R.55. The last sentence of Subsection 3.06(b) states, "[f]or the avoidance of doubt, this Subsection 3.06(b) is intended only to increase the balances of the related classes of securities, as provided for herein, and *shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)*." R.419, SA § 3.06(b) (emphasis added).

Again fighting against a provision's plain meaning, Tilden Park argues that "the distribution provided for in Section 3.06(a) is not 'affected' simply because the amount of that distribution may change as a result of Subsection 3.06(b)'s write-up instructions." Tilden Park Br. at 35–36. Tilden Park does not explain this proposed distinction between "chang[ing]" the amount of a distribution made pursuant to Subsection 3.06(a) and "affecting" the distribution provided for in Subsection 3.06(a); it is hard to think of something that affects a distribution more than changing the amount of that distribution.

Tilden Park's argument depends on treating the Settlement Trusts' distribution and write-up mechanics as abstract, unrelated concepts. But Tilden Park does not—and cannot—dispute the IAS Court's finding that, because write-up and distribution mechanics intertwine, the "write-up provisions of the

Governing Agreements are integral to the distribution of a subsequent recovery pursuant to the Agreements." R.53–54. Tilden Park's assertion that the IAS Court incorrectly ascribed independent meaning to a "for the avoidance of doubt" sentence, Tilden Park Br. at 36, misses the mark. The IAS Court's interpretation, which makes that clarifying sentence accurate, is preferable to Tilden Park's interpretation, which renders that clarifying sentence wrong.

III. The structure of the Settlement Agreement demonstrates that Governing Agreements' write-up terms control.

A. The IAS Court correctly interpreted Subsection 3.06(a) to support the interpretation that Governing Agreements' write-up terms control.

Tilden Park focuses on Subsection 3.06(a) as proof that Settlement Agreement terms supersede Governing Agreement terms. Tilden Park Br. 17–19. But the IAS Court analyzed Subsection 3.06(a) carefully and (i) found textual contrasts confirming why Subsection 3.06(b) should not be interpreted to supersede Governing Agreement terms even if Subsection 3.06(a) could, and (ii) concluded that Subsection 3.06(a) should be read harmoniously with Subsection 3.06(b) to ensure that Governing Agreement terms control distribution. R.54–55.

"Section 3.06(a) [first] tells the Trustees to generally distribute Settlement Payment funds 'pursuant to the terms of the Governing Agreements.'" Tilden Park Br. at 18–19. It then specifies an alternative to that rule to avoid a specific type of

payment which becomes possible under a term in the Governing Agreements of some Settlement Trusts:

> If distribution of a Settlement Trust's Allocable Share would become payable to a class of REMIC residual interests . . . under the Governing Agreement for such Settlement Trust, such payment shall be maintained in the collection or distribution account for distribution on the next distribution date according to the provisions of this Subsection 3.06(a).

R.416, § SA 3.06(a). Tilden Park explains that JPMorgan and its affiliates frequently held these REMIC residual interests under SEC regulations, so this treatment served an "essential purpose" and "was critical to ensure that JPMorgan Chase would not receive portions of its own settlement payment." Tilden Park Br. at 19.

1. In contrast to Subsection 3.06(a), Subsection 3.06(b) does not reference the Governing Agreements or expressly indicate an intent to supersede their terms.

The IAS Court anticipated and rejected Tilden Park's argument—that Subsection 3.06(a)'s exception to a particular term in some Governing Agreements means 3.06(b) should supersede Governing Agreements—because differences between those provisions are greater than their similarities. R.54. Subsection 3.06(a) expressly refers to the Governing Agreements; Subsection 3.06(b)'s write-up "instructions do not refer to the write-up rules in the trusts' Governing Agreements." Tilden Park Br. at 16. Subsection 3.06(a) gives a detailed direction explaining how it alters one specific conflicting version of a term in some

Governing Agreements; Subsection 3.06(b) provides no clue it is meant to override any Governing Agreements, let alone particular conflicting terms. As the IAS Court recognized, if the drafters intended to create an exception to Governing Agreement terms in Subsection 3.06(b), "they could and should have included an express term to that effect." R.54.

Moreover, Tilden Park explains why the exception in Subsection 3.06(a) was negotiated with JPMorgan to ensure that JPMorgan did not reap a windfall from its own Settlement Payments.[5] Tilden Park Br. at 19. In contrast, Tilden Park's interpretation of Subsection 3.06(b) would reorder the relative economic rights of classes within individual trusts, including mostly investors who, unlike JPMorgan, never negotiated the Settlement Agreement directly. Tilden Park proposes no commercial reason why senior classes—not likely to be JPMorgan or its affiliates—would agree to diminish their right to value from the Settlement Payments.

2. Write-up instructions are integral to Settlement Payment distributions, so Subsections 3.06(a)'s express instruction to

[5] The exception to Section to 3.06(a) also reflects the drafters' goal to guard against a windfall to JPMorgan by integrating with—not replacing—the Governing Agreements' existing distribution waterfalls. Rather than attempting to direct where a particular payment that would otherwise go to JPMorgan should be distributed, Subsection 3.06(a) only delays that payment before distributing it according to existing Governing Agreement waterfalls. In contrast, Tilden Park advocates interpreting Subsection 3.06(a) to be a wholesale replacement of the write-up instructions in Payment Priority Trusts with a conflicting instruction.

follow Governing Agreement distribution terms should be respected.

The IAS Court also concluded that Subsection 3.06(a) affirmatively requires the Governing Agreements' write-up instructions to control. It recognized that Subsection 3.06(b)'s write-up instructions are integral to the distribution of the Settlement Payments because, among other reasons, "[t]he distribution provisions of the Governing Agreements . . . refer to the write-up provisions in those Agreements and require their application." R.54. Because the beginning of Subsection 3.06(a) expressly directs distribution of the Settlement Payment "in accordance with the distribution provisions of the Governing Agreements," R.418, the IAS Court concluded that the Settlement Agreement's write-up instruction should not be interpreted to conflict with that express instruction. R.54.

Tilden Park argues that, even if distributions and write-ups are intertwined, write-up terms need not follow the Governing Agreements because they are still "distinct processes handled by distinct provisions." Tilden Park Br. at 33. This interpretation ignores the practical reality that write-ups and distributions are two parts of the same payment process. It also fails to explain why Subsection 3.06(b) needed a sentence to clarify that its write-up cannot "affect" distributions under Subsection 3.06(a) if those "distinct processes" are unrelated.

B. The exception in Section 3.07 preserves terms of Governing Agreements, and, unlike Subsection 3.06(b), refers to those Governing Agreement terms expressly.

Tilden Park also argues that Section 3.07 "specifically overrides the Governing Agreements." Tilden Park Br. at 20. That section provides:

> Neither the Settlement Payment nor any allocation or application thereof pursuant to Section 3.06, nor the receipt of any payments pursuant to Section 3.06, *shall be deemed to reverse the occurrence of any transaction-related trigger in any Settlement Trust*.

R.419, SA § 3.07 (emphasis added). Tilden Park is correct that, unlike Subsection 3.06(b), this provision identifies specific terms governing certain Settlement Trusts that it addresses. But this provision functions primarily to *preserve* those Governing Agreements' terms, rather than to override them. It assures that distributions and mechanics of distributing the unexpected Settlement Payment established by the Settlement Agreement do not disrupt calibrated triggers in Governing Agreements that would not have accounted for those payments. *See* R.55 (IAS Court noting that the settlement is "unquestionably an exceptional event that differs from ordinary course distributions and was unanticipated by the Governing Agreements"). Even if Section 3.07 arguably modifies those Governing Agreement triggers, the example of one Settlement Agreement provision doing that with express language cannot demonstrate that Subsection 3.06(b) modifies Governing Agreement terms without expressly saying it does so.

C. Settlement Agreement terms for allocating Settlement Payments across Settlement Trusts do not overlap with Governing Agreement terms applicable only within individual Settlement Trusts.

The two other Settlement Agreement terms that Tilden Park characterizes as "clearly overrid[ing] the Governing Agreements," Tilden Park Br. 18–21, do not even overlap with operation of the Governing Agreements. The Settlement Payment reaches trust investors through a two-step process. The first step is the allocation of the Settlement Payment across the hundreds of Settlement Trusts. Sections 1.16 and 3.05, respectively, supply a defined term and a formula for calculating that "method for allocating settlement funds *across* [Settlement Trusts]." Tilden Park Br. at 20 (emphasis added); R.417–18, SA § 3.05; R.409, SA § 1.16. The second step occurs after each Settlement Trust receives its allocable Settlement Payment share, when the Trustees apply each trust's Governing Agreement to write-up and distribute those proceeds among classes of the particular trust's certificateholders. Sections 1.16 and 3.05 do not address this second step, so it was practical and appropriate for those provisions to "provide[] a uniform procedure that does not refer to the Governing Agreements." Tilden Park Br. at 21.[6]

[6] Tilden Park's two other structural arguments are also misguided. Tilden Park argues that the Settlement Agreement explicitly says whenever it is adopting terms from the Governing Agreements. Tilden Park Br. at 21–23. That places the burden backwards. The Settlement Agreement does not purport to be a restatement of the Governing Agreements; the whole point of Section 7.05 and the proviso introducing Section 7.13 is to establish the default that the Settlement Agreement does not disturb Governing Agreements. Tilden Park also cites one gap-filling provision of the Settlement Agreement, in Subsection 3.06(a), and extrapolates that this is the only formulation for a gap-filling function. *Id*. 23–24. As discussed in Part III.A.1, *supra*, that segment of Subsection 3.06(a) is part of a broader, surgical effort to integrate and align the

D. The IAS Court Applied Principles of Contract Interpretation Correctly to Give Meaning to All Settlement Agreement Terms.

Tilden Park's argument that the IAS Court failed to apply a rule of contract construction—where there is a conflict between a specific and general provision, the specific controls, Tilden Park Br. at 31–32—is wrong for at least three reasons.

First, Tilden Park's premise that the IAS Court "read[] 3.06(b) to conflict with Section 7.05," *id*. at 31, is flawed. *Id.* at 31. The IAS Court harmonized those two provisions by applying Subsection 3.06(b) to a number of Settlement Trusts with Silent Governing Agreements *without* conflicting with Section 7.05's mandate.

Second, Section 7.05 is not a mere "catchall" provision; it expressly applies to all of the Settlement Agreement and emphatically provides that amending terms of the Governing Agreements was not the intent of the drafters and even "should not be argued" as a possibility. R.424, SA § 7.05.

Third, and most importantly, both of the cases Tilden Park cites for this rule of contract construction preceded it with another cardinal rule that guided the IAS Court's analysis: Courts are required "to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect." *Muzak Corp. v Hotel Taft,* 1

Settlement Agreement distribution mechanics with those already in the Governing Agreements; Subsection 3.06(b), by contrast, makes no reference to Governing Agreements.

N.Y.2d 42, 46 (1956); *see also Ambac Assurance Corp. v. Countrywide Home Loans, Inc*., 31 N.Y.3d 569, 583 (2018) (rejecting reasoning that "would render the sole [contractual] remedy provision meaningless"). One of the main reasons supporting the IAS Court's conclusion was that its interpretation gives meaning to both Sections 7.05 and 3.06(b), whereas under Tilden Park's interpretation, Section 7.05 "would be rendered meaningless." R.43.

IV. Circumstances under which the Settlement Agreement was executed make it implausible that Subsection 3.06(b) intended to override Governing Agreement terms.

Even if a contract is unambiguous, as the Settlement Agreement is with respect to the disputed issue, it is appropriate to "'consider the relation of the parties and the circumstances under which [the agreement] was executed'" in determining the "'construction which will carry out the plain purpose and object of the agreement.'" *Kass v. Kass*, 91 N.Y.2d 554, 566–67 (1998) (alteration omitted) (quoting *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519 (1927); *Williams Press v. State of New York*, 37 N.Y.2d 434, 440 (1975)). These considerations are especially relevant for this Settlement Agreement and militate against Tilden Park's proposed interpretation of Subsection 3.06(b).

Unlike most contract disputes, the parties that negotiated the Settlement Agreement do not disagree on the meaning of Subsection 3.06(b). The Institutional Investors believe they negotiated for the Governing Agreements'

write-up provisions to control, *see* R.5412–5413, and JPMorgan has not expressed any view on the subject. The only party arguing that Subsection 3.06(b) controls, Tilden Park, did not participate in negotiating the Settlement Agreement.

The Settlement Agreement was implemented through the JPMorgan I CPLR Article 77 proceeding, and required notice "be provided to the applicable Investors in a form and by a method . . . approved by the court overseeing the judicial instruction proceeding [], and [that] such Investors [] be given an opportunity to object and to make their position known." R.412, SA § 2.03(c). In that circumstance, if the Settlement Agreement purported to modify a critical economic term of the Governing Agreements, that modification would need to be expressed clearly for investors to have any meaningful opportunity to object.[7] Subsection 3.06(a)'s express engagement with specific terms of certain Governing Agreements suggests that provision was drafted with this goal of providing notice to investors in mind.[8]

[7] Tilden Park argues that the Trustees would have had authority to modify Governing Agreement terms like subsequent recovery write-up instructions. Tilden Park Br. at 28–31. That is not the subject of this appeal. But the cases cited by Tilden Park support only the much narrower, non-controversial proposition that a trustee's settlement of trust claims against third-parties on behalf of the entire trust does not constitute an "amendment" of a governing agreement. Modifying intra-certificateholder terms of a trust agreement, especially those that have no direct relationship to the third-party settlement, is a different legal issue. If investors had anticipated Tilden Park's interpretation of Subsection 3.06(b), they might have challenged the reduction of their economic rights in JPMorgan I.

[8] Indeed, in JPMorgan I, a party objected to approval of Subsection 3.06(a), and the IAS Court overruled that objection, concluding that applying the Governing Agreements' provisions

Subsection 3.06(b)'s write-up instructions do not suggest the same intention. The Institutional Investors that negotiated the Settlement Agreement did not believe that provision was modifying corresponding terms of Governing Agreements. R.5412–13 (arguing to the IAS Court below that, for Settlement Trusts whose Governing Agreements include write-up terms that differ from Subsection 3.06(b), "the Trustees should simply follow the Governing Agreements"). Section 7.05 says expressly that Governing Agreements are not an amendment of any terms of the Settlement Agreement. R.424, SA § 7.05. Section 7.13 has a proviso confirming that. R.425, SA § 7.13. Subsection 3.06(b) itself has a sentence aimed at dispelling any investors' doubts that it could "affect" distributions. R.418–19, SA § 7.05. Even the IAS Court interpreted Subsection 3.06(b) to preserve existing write-up instructions in Governing Agreements. It would have been unrealistic for a drafter to expect any investor, even a sophisticated one that reviewed the Settlement Agreement closely, to intuit Tilden Park's interpretation.

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for "subsequent recoveries" to the Settlement Payment was consistent with the Governing Agreements and certificateholder expectations. R.52 n.17 (citing JPMorgan I at *16)). While that ruling is not determinative of our question, R.52, it confirms the Settlement Agreement's overarching goal of applying the Settlement Payment through implementation of the existing terms in the Governing Agreements.

CONCLUSION

For the foregoing reasons, this Court should affirm the IAS Court's order that the Settlement Agreement's write-up term does not apply if it conflicts with a Governing Agreement's write-up terms.

Dated: New York, New York
December 2, 2020

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PRINTING SPECIFICATIONS STATEMENT

This computer-generated brief was prepared using a proportionally spaced typeface.

Processing system: Word

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any required addendum, is 5171.