To be Argued by:
KEVIN REED
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK,

(For Continuation of Caption See Inside Cover)

Appellate Case No.: 2020-02716

JOINT REPLY BRIEF FOR THE INSTITUTIONAL INVESTORS, AIG PARTIES, AND ELLINGTON AND DW PARTIES

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

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,

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 STATEMENT

The IAS Court[1] erred in holding, at Nover's urging, that the Governing Agreements for the Exhibit E Trusts prohibit write-ups for Senior Certificates. In its brief in opposition to the Investors' appeal (the "Response Brief"), Nover not only fails to defend persuasively the IAS Court's holding, it actually backs away from that holding by conceding that, in at least one circumstance, such write-ups are permitted. This purported exception to the supposed blanket prohibition on Senior Certificate write-ups has no basis in the text of the Governing Agreements. It is a pure invention on Nover's part, reflecting Nover's recognition that prohibiting write-ups for Senior Certificates produces results contrary to what was intended by the parties to the Governing Agreements. It also strongly undermines the position Nover persuaded the IAS Court to adopt, by admitting there is no blanket prohibition on Senior Certificate write-ups in the Governing Agreements. If such write-ups are permitted in one circumstance, they are permitted in all, because the Governing Agreements provide no basis to conclude otherwise.

Nover also proves unable to reconcile that, notwithstanding the Section 6.02(h) Provision's silence on senior write-ups, the Governing Agreements'

[1] Unless otherwise noted, all capitalized terms have the meaning ascribed to them in the Investors' Opening Brief, filed November 4, 2020 ("Opening Brief").

provisions specifying that "any" certificates are eligible for Realized Loss reversals necessarily mean that "any" certificates, including Senior Certificates, are eligible for write-ups. This conclusion flows from the indisputable fact that the reversal of a Realized Loss allocated to a certificate is accomplished through a write up of that certificate. *A fortiori,* if a certificate is eligible to have its Realized Losses reversed, it is eligible to be written up. The IAS Court erred in failing to recognize this, and Nover cannot show otherwise. Likewise, Nover cannot articulate any rational reason why the parties to the Governing Agreements would have intended to upend the fundamental structure of the Exhibit E Trusts, under which Senior Certificates are not supposed to suffer any losses while the Subordinate Certificates are outstanding, by providing for write-ups of Subordinate Certificates only.

If the Section 6.02(h) Provision's silence on senior write-ups is read to mean that the write-up of Senior Certificates is prohibited, it renders the Governing Agreements internally inconsistent and, therefore, ambiguous. In light of this ambiguity, the Court should have considered the record evidence of the parties' course of performance, which demonstrates the parties' clear, unmistakable intent to write up all Certificates that suffered losses, including Senior Certificates, upon the Exhibit E Trusts' receipt of Subsequent Recoveries. The Court should reverse the Decision and Order and hold that all certificates that have suffered Realized Losses in the Exhibit E Trusts are eligible to have those losses reversed through

certificate write-ups. In the alternative, the Court should remand this matter to the IAS Court to allow the Investors to present additional extrinsic evidence of the parties' intent with respect to this issue, to the extent required.

ARGUMENT

A. THE PSAS FOR THE EXHIBIT E TRUSTS UNAMBIGUOUSLY PERMIT SENIOR CERTIFICATE WRITE-UPS.

The subject of this appeal is the IAS Court's holding that the Exhibit E Trusts' PSAs categorically prohibit Senior Certificate write-ups. (R.58-60 [holding that the PSAs "expressly limit[] the write-up to specified subordinate certificates" and that "PSA provisions similar to BALTA 2006-3 section 6.04(h)[2] … must be applied to permit write-up only of those subordinate certificates"].) Nover was the only party below to urge this result (*id.* at 31 ["Nover alone contends that certain Governing Agreements, by their terms, do not permit [senior certificate] write-up[s]."]), and is the only party to defend it on appeal. For the reasons discussed below, Nover's arguments are unconvincing. Importantly, Nover now concedes that Senior Certificates are indeed eligible for write-ups in at least one circumstance. (Response Brief at 36 n 10.) This concession cannot be reconciled with the IAS Court's holding

[2] The provision in question is referred to throughout the Investors' briefs as the "Section 6.02(h) Provision" because it is typically found in Section 6.02(h) of the Exhibit E Trusts' PSAs. However, the provision discussed by the IAS Court in its Decision and Order is the BALTA 2006-3 Trust PSA's equivalent of the Section 6.02(h) Provision, found in Section 6.04(h).

that the Section 6.02(h) Provisions categorically prohibit Senior Certificate write-ups. (R.58-59.)

The Investors have long noted that prohibiting Senior Certificate write-ups leads to a series of absurd consequences that the Governing Agreements' drafters could not have intended. Among these is the possibility that the magnitude of Subsequent Recoveries received by a Trust could exceed the losses previously allocated to Subordinate Certificates. In that circumstance, the prohibition of Senior Certificate write-ups would cause the Trusts to become structurally imbalanced, as their assets would exceed their liabilities. (Opening Brief at 25-26.)

In its Response Brief, Nover recognizes that this outcome would be untenable and thus now concedes that Petitioners "should write-up the senior certificates" in that situation. (Response Brief at 36 n 10.) Nover, however, does not and cannot cite any provision of the Governing Agreements that limits write-ups of Senior Certificates to that situation. Instead, Nover simply conjures out of thin air a purported exception to the supposed blanket prohibition of Senior Certificate write-ups in an effort to mitigate the absurdity. But, obviously, Nover is not allowed to add terms to the Governing Agreements to make its reading of them more defensible. Nover has long argued the PSAs for the Exhibit E Trusts categorically prohibit write-ups of Senior Certificates, and the IAS Court erroneously agreed. Nover cannot explain how its late-breaking change of position can be harmonized with the IAS

Court's finding. Instead, it constitutes a concession that the IAS Court's challenged holding leads to illogical and unintended results.[3]

1. The PSAs' Definition of Realized Loss Specifies that "Any Certificate" is Eligible for Realized Loss Reversals, Which Necessarily Makes Senior Certificates Eligible for Write-ups.

The plain language of the Governing Agreements provides that "any Class of Certificate[]" that receives Subsequent Recoveries is eligible to have any Realized Losses it has suffered reversed by the amount of such Subsequent Recoveries. Such reversals consist of, and can only be effectuated through, certificate write-ups. (*See* Opening Brief at 9-11.) One need look no further than the definition of Realized Loss itself, which provides that "to the extent the Servicer receives Subsequent Recoveries . . . the amount of the Realized Loss with respect to that Mortgage Loan will be reduced to the extent such recoveries are applied to reduce the Current Principal Amount of any Class of Certificates on any Distribution Date." (*See* R.5905 [definition of Realized Loss for BSARM 2005-4].) This definition does not

[3] Nover seeks to minimize this concession by arguing that the Investors have not identified a Settlement Trust where this condition would be met and argues that the condition would not be met for the SAMI 2006-AR5 trust. (Response Brief at 35.) This misses the fundamental point of the Investors' argument: that the drafters did not create, and never would have created, PSAs that allowed for the structural imbalances that would result from a prohibition on Senior Certificate write-ups. The absurd possibility of such imbalances spurred Nover's new concession, which cannot be squared with the IAS Court's holding that Senior Certificates are categorically prohibited from receiving write-ups.

limit reversal of Realized Losses to either Senior or Subordinate Certificates. Rather, "any Class" of certificates is eligible for a Realized Loss reversal—i.e., a certificate write-up—when the Exhibit E Trusts receive Subsequent Recoveries, as they will when they receive their Allocable Share of the Settlement Payment.

The IAS Court erred by failing to harmonize this provision with the Section 6.02(h) Provisions, which expressly discuss certificate write-ups to Subordinate Certificates but contain no prohibition on write-ups of Senior Certificates. (R.379.) Apparently under the mistaken belief that Realized Loss reversals are an altogether different concept than certificate write-ups, the IAS Court rejected the definition of Realized Loss out-of-hand as "not address[ing] the write-up of balances of certificates to account for subsequent recoveries." (R.58.) But the definition of Realized Loss does speak to write-ups upon receipt of Subsequent Recoveries: it states that "to the extent the Servicer receives Subsequent Recoveries . . . the amount of the Realized Loss" will be reduced to the extent the Subsequent Recoveries are paid to "any Class" of Certificates—i.e., both Senior and Subordinate Certificates. (R.5905 [definition of Realized Loss for BSARM 2005-4].) Such Realized Loss reversals for "any Class" of Certificates can only be effectuated through certificate write-ups.

Nover does not address the operative terms in the definition of Realized Loss, which provides that "any Class" of certificates is therefore eligible for a Realized

Loss reversal, nor can Nover dispute that Realized Losses can only be reversed through certificate write-ups. Instead, Nover dismisses the term altogether by arguing that Realized Loss is a "loan level" concept that does not apply "at the certificate level." (Response Brief at 30-31.)

Nover is plainly wrong that Realized Loss is merely a "loan level" concept and not a "certificate level" one. Realized Losses, and Realized Loss reversals are aggregated and expressly allocated to certificates. The PSAs make this abundantly clear. (*See* R.5905 [BSARM 2005-4 PSA § 6.02(b) ("With respect to any Certificates [and] any Distribution Date, the principal portion of each Realized Loss on a Mortgage Loan in a Loan Group shall be allocated as follows…[listing Classes of Certificates, from junior to senior]")]; R.5905 [GPMF 2005-AR4 PSA (definition of "Realized Loss" provides, "[t]he principal portion of Realized Losses with respect to the Mortgage Loans shall be allocated to the REMIC I Regular Interests as follows…[listing Classes of Certificates]")]; R.9667 [BALTA 2006-2 ProSupp (definition of "Applied Realized Loss" provides, "[w]ith respect to any class of Group I Offered Certificates and as to any distribution date, the sum of the Realized Losses with respect to the related Mortgage Loans, which have been applied in reduction of the Certificate Principal Balance of such class . . . .")].) Because a write-up is simply the application of a negative Realized Loss (which is how the parties to the Exhibit E Trusts have been treating write-ups for years (*see, e.g.*,

R.10456-10458 [showing Senior Certificates are allocated negative Realized Losses to reduce their prior Realized Losses upon receipt of Subsequent Recoveries])), senior write-ups are clearly contemplated and permitted under various provisions of the Governing Agreements. The IAS Court erred in failing to consider these provisions, which exhibit the parties' intent to write of all certificates upon the receipt of Subsequent Recoveries.

2. The IAS Court Ignored the Senior/Subordinate Structure and Failed to Recognize the Absurd Consequences That Would Result from Prohibiting Senior Certificate Write-Ups.

As set out in the Investors' Opening Brief, the defining feature of the senior/subordinate structure is the allocation of losses first to Subordinate Certificates and second to Senior Certificates. The key provisions of the ProSupps discussing the senior/subordinate structure describe this mechanism, whereby Subordinate Certificates absorb the first losses as "loss protection" for Senior Certificates. (*See, e.g.,* 9631 [BALTA 2006-2], 10411 [SAMI 2006-AR5], 10416 [GPMF 2006-AR1].) The IAS Court erred by ignoring these provisions, and Nover repeats that oversight by failing to cite the key language from the ProSupps in its Response Brief, which summarize the "credit enhancement" provided to the Senior Certificates as follows[4]:

[4] Under New York law, all writings forming a part of a single transaction are read together. (*See BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 493 NYS2d 1, 3 [1st Dept

> Subordination provides the holders of Offered Certificates in a Loan Group having a higher payment priority with protection against Realized Losses on the related mortgage loans. In general, this loss protection is accomplished by allocating any Realized Losses in a Loan Group in excess of available Excess Spread and any current overcollateralization (if any) for such loan group among the related Subordinate Certificates, beginning with the Subordinate Certificates with the lowest payment priority until the Current Principal Amount of that subordinate class has been reduced to zero.

(*E.g.*, R.10399 [BSMF 2006-AR1 ProSupp]; *see also* R.10399, 10417, 9632 (clarifying that Realized Losses are to be applied to Senior Certificates only after all Subordinate Certificates' principal balances are reduced to zero.) Nover thus cannot dispute that Subordinate Certificates are designed to provide "loss protection" to Senior Certificates by ensuring that Senior Certificates will not absorb losses unless the Subordinate Certificates are no longer able to do so. In fact, Nover concedes that, without exception, the Governing Agreements "provide that . . . the 'junior' classes of certificates absorb losses first." (Response Brief at 25.)

Rather than grapple with the absurdity of upending the senior/subordinate structure that is fundamental to the Exhibit E Trusts, Nover suggests that no such structure exists, because the PSAs do not uniformly give Senior Certificates first payment priority. (*See id*. at 33.) While Nover is correct that Senior Certificates are not always given first payment priority, that is irrelevant, because the key to the

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1985]; *accord Wells Fargo Bank, N.A. v. Fin. Sec. Assur. Inc.*, 504 Fed App'x 38, 40 [2d Cir 2012] [summary order].)

senior/subordinate structure of the Exhibit E Trusts is the order in which their certificates suffer losses.

A certificate's relative priority in receiving principal funds merely impacts the speed at which such certificates will receive principal payments. In contrast, when certificates suffer Realized Losses, the issue is not the relative speed of payments, but whether the certificates will receive their payments at all. When a certificate is written down by the amount of a Realized Loss, it is barred from receiving that written-down principal; i.e., it is potentially permanently impaired. The one exception is the distribution of Subsequent Recoveries, which reverse the previous impairment through certificate write-ups, entitling the certificate to once again receive the principal amounts that were written down.[5] For these reasons, the order in which certificates are allocated Realized Losses is the central feature of the senior/subordinate structure—not the relative speed at which certificates receive principal payments.

By categorically prohibiting Senior Certificate write-ups, the IAS Court's holding upsets the Subject Exhibit E Trusts' fundamental senior/subordinate

[5] For the same reasons, though Nover argues that Senior Certificates will still be entitled to receive significant portions of the Settlement Payment, Nover ignores entirely that prohibiting Senior Certificate Write-ups will forever limit Senior Certificates' ability to have a renewed claim to the principal that has already been written off down through prior Realized Losses. That entitlement to principal proceeds would instead be transferred to the Subordinate Certificates.

structure, something Nover ignores entirely. If Realized Loss reversals are barred, Senior Certificates will continue to be impaired going forward, permanently capping their claim to the Trusts' principal. The benefit of Realized Loss reversals would instead be shifted to Subordinate Certificates, which were indisputably intended to absorb all Realized Losses before Senior Certificates first became impaired. The following numerical example helps to illustrate the point:

Assume that a particular mortgage held by one of the Settlement Trusts ("Mortgage A") had a $100 outstanding principal balance and went through a foreclosure sale, yielding $75 in proceeds that were passed through to a Trust, and necessitating the recognition of a $25 Realized Loss. Further assume that all of the Trust's Subordinate Certificates previously had been written down to zero due to Realized Losses on different mortgage loans, and that Petitioners must therefore allocate a Realized Loss of $25 entirely to the Trust's senior-most, "A1" certificate. Finally, assume that, months later, Petitioners discover that Mortgage A violated JPMorgan's representations and warranties and convince JPMorgan to make the trust whole for the $25 Realized Loss that was allocated to the A1 certificate, which is then distributed as a Subsequent Recovery. The receipt of this Subsequent Recovery requires a corresponding $25 write-up of the Trust's overall certificate balance.

In these circumstances, the Trust as a whole would not suffer a loss with respect to Mortgage A, but under the IAS Court's holding—which precludes allocation of the $25 write-up to the A1 certificate and requires that it instead be allocated to Subordinate Certificates—the A1 certificate would nonetheless be saddled with a non-reversible $25 Realized Loss attributable to Mortgage A.[6] At the same time, the Subordinate Certificates would receive a $25 windfall, as the $25 write-up they receive would give them a renewed $25 claim to the Trust's principal payments going forward, even though they never suffered a loss in relation to Mortgage A and had previously been written down to zero.

Importantly, this hypothetical largely mirrors the actual situation of the Exhibit E Trusts. Those Trusts have suffered such extensive losses (as a result of JPM's breaches, for which it is compensating the Trusts through the Settlement Agreement), that the Subordinate Certificates are now, for the most part, completely wiped out and the Senior Certificates have suffered Realized Losses. Yet, under the Court's Decision and Order, several classes of Subordinate Certificates will have their principal balances written up from zero to a positive principal balance while the Senior Certificates remain permanently impaired (i.e., entitled to less of the

[6] The A1 certificate would receive the $25 Subsequent Recovery, but that will cause the principal balance of the A1 certificate to be written down and so does not offset the $25 Realized Loss.

Trusts' future cash flows than they otherwise would be) by the allocation of Realized Losses that are being reimbursed via the Settlement Payment. Such a result—the allocation of Realized Losses to Senior Certificates while Subordinate Certificates have a positive balance—turns the senior/subordinate structure on its head and is in direct conflict with the plain terms of the Governing Agreements. (*See* R.11710 [PSA for BSARM 2005-1 § 6.02(b) (indicating that Realized Losses are only to be applied to Senior Certificates once all Subordinate Certificates have been reduced to zero)].) Petitioners' longstanding practice of writing up Senior Certificates upon receipt of Subsequent Recoveries avoids these absurdities. Tellingly, all investors except Nover agree that such absurdities should never occur, and that Petitioners should continue writing up Senior Certificates. Nover, moreover, fails to offer any economic rationale for limiting certificate write-ups to Subordinate Certificates, much less a contractual or commercially reasonable one.

New York law requires that courts interpret contractual terms to reflect the parties' commercial purposes, with the overarching goal of effectuating the parties' bargain. Courts should read a contract "as a harmonious and integrated whole to determine and give effect to its purpose and intent." (*Nomura Home Equity Loan, Inc.*, 30 NYS.3d at 524; *accord Abdullayeva v. Attending Homecare Servs. LLC*, 928 F3d 218, 222 [2d Cir 2019] (applying New York law).) "Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a

whole and the intention of the parties manifested thereby." (*Kolbe v. Tibbetts*, 22 NY3d 344, 353 [NY 2013]; *accord Abdullayeva*, 928 F3d at 222.) Put another way, a "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (*Matter of Lipper Holdings v. Trident Holdings*, 1 AD3d 170, 171, 766 NYS.2d 561 [1st Dept 2003].) Here, the IAS Court violated these principles by analyzing the Section 6.02(h) Provision in a vacuum,[7] dismissing the definition of Realized Loss altogether, failing to discuss the language in the Prospectus Supplements explaining that loss allocation is essential to the senior/subordinate structure, failing to grapple with Petitioners' decades-long practice of writing up Senior Certificates, and failing to confront the myriad absurdities that would follow if Petitioners did not write up Senior Certificates. The Investors, therefore, respectfully request that this Court reverse the IAS Court's holding with respect to this issue and interpret the Governing Agreements to reflect the parties' clear intent to permit the write-up of all Classes of Certificates in the Exhibit E Trusts.

[7] It is notable that Nover does not and cannot dispute that while the Section 6.02(h) Provisions do expressly discuss Subordinate Certificate write-ups, they do not contain prohibitions on Senior Certificate write-ups.

B. IF THE SECTION 6.02(h) PROVISION IS DEEMED TO PROHIBIT SENIOR CERTIFICATE WRITE-UPS, THE GOVERNING AGREEMENTS ARE RENDERED AMBIGUOUS.

If the Section 6.02(h) Provision's silence on senior write-ups is incorrectly read to mean that the write-up of Senior Certificates is prohibited, as the IAS Court did in the Decision and Order, the Governing Agreements are rendered internally inconsistent and, therefore, ambiguous. In light of this ambiguity, the Court should have considered extrinsic evidence, most notably, evidence of the parties' course of performance submitted by the Investors.

1. The IAS Court's Ruling Rendered the PSAs Ambiguous and Compelled Consideration of Extrinsic Evidence.

Nover misconstrues the Investors' argument when it contends that, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (Response Brief at 38 [*quoting W.W.W. Assocs. v. Giancontiere*, 77 NY2d 157, 163 (1990)].) The Investors do not contend that course of performance evidence is admissible to "create" an ambiguity; instead, the IAS Court's reading of the Section 6.02(h) Provision prohibiting senior write-ups (which is not in line with the clear intent of the parties, as exhibited by the several other provisions of the Governing Agreements discussed herein) itself renders the Governing Agreements internally inconsistent and ambiguous, requiring consideration of extrinsic evidence, such as evidence of the parties' course of performance.

Specifically, reading the Section 6.02(h) Provision's silence on senior write-ups as a blanket prohibition on same conflicts with several provisions of the Exhibit E Trusts' Governing Agreements providing for Realized Loss reversals and for Subordinate Certificates to absorb losses first. (*See* Opening Brief at 8 and Section A, *supra*.) (*See Chimart Assocs. v. Paul*, 66 NY2d 570, 573 [1986] [ambiguity in a contract exists where "the agreement on its face is reasonably susceptible of more than one interpretation."].) In particular, the Court's interpretation cannot be squared with the definition of "Realized Loss" in the Exhibit E Trusts' Governing Agreements, which makes clear that, upon the Trusts' receipt of Subsequent Recoveries, "any Class of Certificate[]"is eligible to have its Realized Losses reversed—a reversal that is accounted for as a negative Realized Loss and results in a write-up. (*See* Section A.1, *supra*; R.5905 [definition of Realized Loss for BSARM 2005-4].)

The IAS Court should have acknowledged the inconsistency created by such interpretation and considered extrinsic evidence of the parties' intent. (*Federal Ins. Co. v. Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999]; *see also Collins v. Harrison-Bode*, 303 F3d 429, 433, 34 [2d Cir 2002].) There is no stronger evidence of intent than that which establishes how the parties carried out their agreement "for any considerable period of time." (*Old Colony Trust Co. v. City of Omaha*, 230 US 100, 118 [1913]; *see also Federal Ins. Co.*, 258 AD2d at 44;

Restatement [Second] of Contracts § 202, comment g.) As set forth in Section B.3 of the Investors' Opening Brief, the record evidence establishes that the parties to the Governing Agreements consistently wrote up Senior Certificates upon the receipt of Subsequent Recoveries. Accordingly, the IAS Court ignored the "most persuasive" evidence available to interpret the Section 6.02(h) Provisions. (*Federal Ins. Co.*, 258 AD2d at 44.)

Contrary to Nover's contention, the IAS Court did not find, "that the Governing Agreements were neither ambiguous nor 'internally inconsistent.'" (Response Brief at 39.) In fact, the IAS Court made no finding at all as to whether the Governing Agreements were ambiguous,[8] and instead ignored both the ambiguity created by its ruling and DW and Ellington's proffered evidence of course of performance. This warrants reversal.

2. The Investors Submitted Unrebutted Evidence of Discrepancies Between PSAs and ProSupps on Senior Certificate Write-Ups.

Nover argues that the ProSupps largely support its argument that only Subordinate Certificates should be written up when distributing Subsequent Recoveries to the Exhibit E Trusts. Without any citation to the Record, Nover makes the wholly unsupported claim that: "Of Nover's 48 Trusts that contain the

[8] Nover cites to pages 34-35 (R.60-61) of the IAS Court Order, but, upon review of that portion of the Order and the Order as a whole, it contains no discussion of ambiguity or any finding that the Governing Agreements are unambiguous.

Subordinate Write-Up Provision, all but three have prospectus supplement language that matches the language found in the Governing Agreements." (Response Brief at 39-40.) Nover then admits that the ProSupps for the SAMI 2005-AR1, SAMI 2006-AR5 and SAMI 2007-AR2 Trusts (the "SAMI Trusts") contain language indicating that the principal balances "of each class of Certificates that has been reduced by the allocation of a Realized Loss . . . will be increased," but dismisses such ProSupps as mere "outliers." (R.10412 [SAMI 2006-AR5]; Response Brief at 40, n 13.) While Nover criticizes the Investors for citing to only a few ProSupps as examples of those that wholly contradict the Section 6.02(h) Provisions, Nover is only able to cite to a single ProSupp—that for the BALTA 2006-2 Trust—attempting to support its sweeping and otherwise wholly conclusory statement.[9]

Moreover, Nover fails to recognize that the ProSupp for the BALTA 2006-2 Trust, and several other ProSupps in the Record, contradict the IAS Court's reading of the Section 6.02(h) Provision in another respect: they incorporate language exhibiting the parties' clear intent to abide by the senior/subordinate structure, under which Senior Certificates are intended to be the most protected

[9] If this Court determines that review of additional ProSupps is warranted, the Investors intend to present, on remand, additional examples of ProSupps for Exhibit E Trusts providing that all Certificates would be eligible for write-ups.

class in the RMBS waterfall, with Subordinate Certificates providing such protection by absorbing all Realized Losses until their principal balances have been reduced to zero. (*See* Section A.2., *supra,* at 8-9.) As noted, in order to give effect to the senior/subordinate structure outlined in the ProSupps, senior write-ups must be permissible—otherwise, absurdity and unintended consequences result. (*See* Section A.2., *supra,* at 8-14.)

In short, the record evidence presented to this Court shows numerous examples of ProSupps containing language inconsistent with a reading of the Section 6.02(h) Provision as a prohibition on senior write-ups.

3. Any Conflict between the PSAs and ProSupps Warrants Consideration of Extrinsic Evidence.

Nover is incorrect that, in the event of a conflict between the ProSupp and the PSA, "the PSA controls" and the cases Nover cites do not support its contention. (Response Brief at 40-41.) *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.* (No. 2:11-CV-07166-MRP, 2012 WL 10731957 [CD Cal June 29, 2012]) simply recognized the differing functions of a ProSupp and a PSA and did not find any conflict between the PSA and ProSupp—in fact, it found they were wholly consistent. (*See id*. at *4 ["[E]ach portion of the [ProSupp cited] matches a portion of the PSA."].) In *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG* (38 Misc. 3d 1214(A), 966 N.Y.S.2d 349 [N.Y. Sup. 2012]), the second case cited by Nover, the court simply recognized that a prospectus supplement, on

its own, is not a contract. (*See id*. at *5.) But the Investors do not contend that ProSupps are separate contracts, only that they are part of the Governing Agreements, along with the PSAs.

As writings forming part of a single transaction, the ProSupps and PSAs are to be "read together as one." (*PETRA CRE 2007-1 CDO, Ltd. v. Morgans Group LLC*, 84 AD3d 614, 615 [1st Dept 2011]; *see also Nau v. Vulcan Rail & Construction Co.*, 286 NY 188, 197 [1941]; *Wells Fargo Bank, N.A. v. Fin. Sec. Assur. Inc.*, 504 Fed Appx 38, 40 [2d Cir 2012].) Indeed, New York courts have held that, "[w]here there is a conflict between the Offering Documents and the Indenture, that conflict suggests to anyone reading the suite of documents that there has been a mistake in either the Offering Documents or the Indenture." (*In re Trusteeship Created by American Home Mortg. Inv. Trust 2005-2* (No. 14 Civ. 2494, 2014 WL 3858506 [SDNY July 24, 2014].) Such "inconsistency creates doubts and ambiguities," allowing a court to "consider parol evidence to determine the contracting parties' intent." (*Id*. ¶ 65.) This is precisely what the Court should do here should it determine the Governing Agreements are ambiguous.

In light of the inconsistencies in the ProSupps, particularly when viewed in conjunction with the other provisions of the PSAs that conflict with the IAS Court's interpretation of the Section 6.02(h) Provision, the IAS Court should have either (1) harmonized the various Governing Agreement provisions by reading the

Section 6.02(h) Provision's silence on senior write-ups as exactly that—silence—or (2) recognized the ambiguity created by its interpretation and considered the available extrinsic evidence of the parties' intent. As set forth in the following Section, such extrinsic evidence would have demonstrated the parties' intent to permit the write-up of Senior Certificates.[10]

C. THE UNCONTROVERTED COURSE OF PERFORMANCE EVIDENCE COMPELS THAT SENIOR CERTIFICATE WRITE-UPS ARE REQUIRED.

As noted, the Petitioners' course of performance is the "most persuasive evidence of the agreed intention of the parties." (*Federal Ins. Co.*, 258 AD2d at 44 [citation omitted.]) In failing to consider such evidence, which was unambiguous and unrefuted, the IAS Court erred, and its holding must be reversed.

Nothing in Nover's response compels a different result. In fact, Nover is unable to point to any evidence in the record to refute the unequivocal course of performance evidence presented to the IAS Court, showing that Senior Certificates were consistently written up upon the receipt of Subsequent Recoveries in the Exhibit E Trusts. Absent any countervailing evidence, Nover is left to argue only that because the Investors have not presented such evidence as to *all* Exhibit E

[10] At a minimum, because Nover admits that the three SAMI Trusts do present this ambiguity (*see* Response Brief at 40, n 13), there is no dispute that course of performance evidence should be considered at least as to those three trusts in light of inconsistencies among the various provisions of the Governing Agreements.

Trusts, the clear course of performance should not necessarily dictate what the Court does here. (*See* Response Brief at 41-42.) These arguments fail, as the authority Nover cites in support of its proposition is both unpersuasive and easily distinguishable. Ultimately, Nover cannot overcome the unrebutted record evidence.

1. Nover's Authority with Respect to Course of Performance Evidence Is Inapposite.

Nover cites only two cases in support of the proposition that this Court should reject the course of performance evidence proffered by the Investors. In *Shionogi Inc. v. Andrx Labs, LLC*, the Court was considering the appeal of the Supreme Court's dismissal of the plaintiff's case against a manufacturer to recover lost profits under a manufacturing and supply agreement ("MSA"). (132 NYS 3d 419, 419-20 [1st Dept 2020]). This Court rejected the plaintiff's argument that course of performance evidence should be considered to show that the parties had a particular understanding of their MSA. (*Id*. at 421.) This Court reasoned that:

> [f]ar from seeking to merely interpret the licensing agreement (for which purpose extrinsic evidence might be admissible to resolve ambiguity), plaintiff seeks to add to the licensing agreement by adding an affirmative obligation on the part of defendants to continue to sell generic Fortamet. Even assuming ambiguity, the merger clause would preclude resort to course of performance evidence to add an entirely new obligation to the contract.

(*Id.*)

Here, unlike in *Shionogi*, the Investors are not attempting to add a new obligation to the Governing Agreements. As discussed at length, several provisions of the Governing Agreements indicate the drafters' clear intent to write up Senior Certificates. Indeed, there is no dispute that Petitioners have an obligation to write up Certificates upon the receipt of Subsequent Recoveries; the only dispute is whether Senior Certificates are entitled to such write-ups. To the extent the Section 6.02(h) Provision is read to preclude senior write-ups, in conflict with other provisions of the Governing Agreements, the Investors' course of performance evidence should be considered to resolve that ambiguity and inconsistency. As such, the only portion of this Court's holding in *Shionogi* that has any bearing here is this Court's recognition that course of performance evidence may be introduced to resolve ambiguities.

The other case Nover cites in support of its effort to discount the course of performance evidence is equally inapposite. In *General Elec. Capital Commercial Automotive Fin. v. Spartan Motors*, the Second Department reversed the lower court for failing to consider course of performance evidence, noting that "[g]enerally, the express terms of an agreement and a differing course of performance . . . 'shall be construed whenever reasonable as consistent with each other.' Only when a consistent construction would be 'unreasonable' must express

terms control over course of performance . . . ." (246 AD2d 41, 51 [2d Dept 1998].)

Though *General Elec.* concerned an agreement governed by the UCC (in which context parties are permitted to introduce course of performance evidence in any instance to determine the meaning of the agreement), to the extent it is applicable at all, it illustrates the importance of considering course of performance evidence and provides for the reversal of a lower court for failing to do so. In fact, the *General Elec.* court held that the express terms of an agreement should only prevail over the parties' course of performance when that course of performance would result in an "unreasonable" construction of the agreement. Nover has failed to argue, let alone demonstrate, that Petitioners' course of performance here would result in an "unreasonable" construction of the Governing Agreements. To the contrary, as discussed at length above and in the Investors' Opening Brief, interpreting the Section 6.02(h) Provision consistently with this unwavering course of performance would be wholly consistent with the Governing Agreements' provisions (1) requiring Subordinate Certificates to absorb all losses until they are reduced to zero, before Senior Certificates absorb any losses and (2) providing that Senior Certificates are eligible to be written up through Realized Loss reversals. (*See* Section A, *supra*.)

Conversely, as discussed above in Section A.2, Nover has provided absolutely no explanation for why the drafters of the Governing Agreements would have intended for the senior/subordinate structure to be disregarded entirely when it comes to the reduction or reversal of Realized Losses (i.e., that only Subordinate Certificates would have such Losses reversed), while preserving the senior/subordinate structure when it comes to applying Realized Losses in the first place (i.e., that such Losses would be applied to the most Subordinate Certificates first). In fact, far worse than subordinating the interests of the Senior Certificates to those of the Subordinate Certificates by placing them in line for write-ups behind the Senior Certificates, the IAS Court's interpretation of the Section 6.02(h) Provision means that Senior Certificates will *never* receive write-ups, as such write-ups are purportedly prohibited entirely. Even Nover acknowledges that this result makes little sense. (*See* Response Brief at 36 n. 10 (conceding that Petitioners "should write-up the senior certificates" once all Subordinate Certificate losses have been reversed.)

Any interpretation of the Section 6.02(h) Provision as prohibiting Senior Certificate write-ups renders the Governing Agreements ambiguous and internally inconsistent, compelling consideration of the Petitioners' extensive course of performance. This evidence reveals an expectation and understanding of the parties to the Governing Agreements—which only Nover disputes (R.56)—that all

classes of certificates that had suffered losses are eligible to be written up upon the receipt of Subsequent Recoveries; the IAS Court erred in holding otherwise.

2. Nover Has Failed to Present any Evidence Refuting the Clear and Compelling Evidence of the Petitioners' Course of Performance.

Nover attempts to use against the Investors the fact that the course of performance evidence applies to only five Exhibit E Trusts. This point falls flat, especially because Nover can point to no instance or example—as none exists in the record—where Petitioners only wrote-up the balances of Subordinate Certificates upon the receipt of Subsequent Recoveries when there were Senior Certificates with outstanding losses. The Investors first presented this evidence to the IAS Court in their brief on the merits of the Petition. (*See* R.10336, 10456-10462.) Two more rounds of briefing followed during which Nover could have presented its own evidence to counter the Investors' course of performance evidence. Nover failed to do so. As such, the record evidence is uncontroverted, and demonstrates that several different Petitioners,[11] over several years and in

[11] The course of performance evidence submitted by DW and Ellington shows Senior Certificate write-ups by Petitioners The Bank of New York Mellon; Wells Fargo Bank, National Association; and U.S. Bank National Association. (R.10349-10350, 10454, 10456-10462.)

several different Exhibit E Trusts, consistently interpreted the Governing Agreements to require the write-up of Senior Certificates upon the receipt of Subsequent Recoveries. Nover's failure to present any evidence to the contrary conspicuously undercuts its argument that the Investors' "cherry-picked sample" is "necessarily, insufficient." (Response Brief at 42.)[12]

Additionally, the length of time during which Petitioners have been performing these contracts—over a decade since these Trusts were created—militates heavily in favor of interpreting the Governing Agreements consistently with this course of performance. New York courts historically have avoided interpreting ambiguous agreements in a manner contrary to the parties' performance over many years, finding "an interpretation that would override a longstanding course of performance and settled expectations is disfavored." (*See Matter of Bank of New York Mellon as Tr. for 278 Residential Mortg.-Backed Securitization Trusts*, 68 Misc 3d 1206(A), 129 NYS3d 628, at 10, 12 [Sup Ct NY Cty 2020] [holding that the parties' "decade-long performance here… without

[12] Of note, there are 82 different Settlement Trusts listed on Exhibit E to the Petition; it would have been entirely impractical for the Investors to have reviewed and then presented to the IAS Court evidence involving over ten years' worth of remittance reports for each and every Exhibit E Trust. This is particularly true where no contrary evidence was presented, rendering such a burdensome effort entirely unnecessary. Of course, if this Court deems it necessary, the Investors can prepare and present such evidence upon remand, and are confident the resulting course of performance evidence will be substantively identical.

objection from certificate holders – offers 'the best evidence of [their] intent.'"] [*quoting Waverly Corp. v. City of New York*, 48 AD3d 261, 265 [1st Dept 2008]; *see also In re Buffalo Schools Renovation Program*, 54 Misc3d 1204(a) 2016 WL 7638485 at *5 [Sup Ct NY Cty, Dec. 8, 2016] [noting that the first challenge to the agreement in question came 12 years after the effective date and that "[b]y accepting certifying, and paying 265 consecutive payment applications over the course of twelve (12) years . . ., the District conceded this interpretation of the [agreement], as well as LPC's compliance with it].)

Conversely, ignoring the course of performance evidence presented to the IAS Court and applying the Settlement Payment to write-up only Subordinate Certificates will result in a significant disruption of the senior/subordinate structure of the Exhibit E Trusts, with critical consequences moving forward. Indeed, while Nover at times tries to suggest that impact of the IAS Court's holding has little practical importance (*e.g.*, Response Brief at 25), the opposite is true. The GPMF 2006-AR1 Trust is illustrative.

Prior to the IAS Court issuing its Decision and Order, the parties engaged in an exercise to model for the IAS Court the consequences of the various outcomes of the disputed issues for certain Settlement Trusts. The GPMF 2006-AR1 Trust was chosen as one of the models for the Exhibit E Trusts, and the modeling showed that if only the Subordinate Certificates received a write-up upon receipt of

such Trust's Allocable Share, the Certificate Principal Balance of the M1 certificates—i.e., the senior-most Subordinate Certificate—would be written up by the full amount the trust's Allocable Share, or nearly $25.5 million, while the Senior Certificates received zero write-up. (*See* R.15089 [GPMF 2006-AR1 Deal Model showing the effect of the write up if applied only to Subordinate Certificates].) Not only did this mean that approximately $94 million in previously allocated Realized Losses to Senior Certificates would never be reversed, it also meant that the M1 Certificates would go from having a principal balance of zero to a principal balance of over $25 million. (*Id.*) The practical impact of this result was that while the Senior Certificates would remain permanently impaired over the life of the deal (as their previously allocated losses could never be reversed), the M1 Certificates could recover the entirety of their new $25 million balance, plus interest, all other things being equal.

Thus, the record evidence demonstrates both the course of performance contrary to the IAS Court's Decision and Order and the practical importance of same. IAS Court erred by ignoring such evidence, and this Court should correct that error.

D. IN THE EVENT THIS COURT DETERMINES THE 6.02(H) PROVISION IS AMBIGUOUS BUT DETERMINES THE COURSE OF PERFORMANCE EVIDENCE SUBMITTED BY THE INVESTORS IS INSUFFICIENT TO DETERMINE THE INTENT OF THE PARTIES, IT SHOULD REMAND THIS MATTER TO THE IAS COURT FOR FURTHER PROCEEDINGS.

Should this Court consider the course of performance evidence in the record, it will demonstrate that the parties to the Exhibit E Trusts interpreted the relevant Agreements consistently to require the write-up of Senior Certificates. (*Id.*) However, to the extent this Court is not prepared to rule that the Governing Agreements are unambiguous and permit the write-up of Senior Certificates or, if the Governing Agreements are ambiguous, that the course of performance evidence presented to the IAS Court sufficiently demonstrates the intent of the parties, the Investors and Nover agree that this Court should remand this matter to the IAS Court for further proceedings to allow the parties to present further extrinsic evidence of the intent of the parties to the Governing Agreements.

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