SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

In the matter of the application of	:	Appellate Div. No. 2020-02716
WELLS FARGO BANK, NATIONAL ASSOCIATION, et al.,	:	New York County Clerk's Index No. 657387/2017
Petitioners,	:	
For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	:	

Opposition By AIG Investors And Institutional Investors To Motions of Tilden Park (Reargument or Leave to Appeal) And HBK (Leave to Appeal)

The AIG Investors[1] and the Institutional Investors[2] file this opposition to (i) the September 30, 2021 motion for reargument or, in the alternative, leave to appeal to the Court of Appeals from the Court's August 19, 2021 Decision and Order, by Respondent-Appellants Tilden Park Investment Master Fund LP, Tilden Park

[1] The AIG Investors are: 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.

[2] The sixteen Institutional Investors are: 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.

Management I LLC, and Tilden Park Capital Management LP (collectively, "Tilden Park") (Dkt. 116, the "Tilden Park Motion"), and (ii) the motion for leave to appeal to the Court of Appeals from the foregoing Decision and Order filed by Appellant-Respondent U.S. Bank National Association, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in the HBK Trusts ("HBK") (Dkt. 114, the "HBK Motion") (collectively, the "Reargument/Leave Motions"). These Motions are without merit and should be denied for at least three reasons.

First, these Motions present two narrow and straightforward contract interpretation issues that have already been unanimously and correctly resolved against Tilden Park and HBK in well-analyzed decisions by five jurists (*i.e.*, by a Panel of this Court and the IAS Justice). For its part, Tilden Park argues for the third time that the settlement agreement supersedes or overrides the underlying contracts governing the RMBS Trusts (the "Governing Agreements") in the event of a conflict between the two. This argument is frivolous.

The Panel correctly affirmed the IAS Court's ruling in favor of the Institutional Investors—the parties who negotiated the $4.5 billion settlement agreement—that by the explicit terms of the settlement agreement it cannot supersede the Governing Agreements' distribution or write-up provisions in the

event of a conflict. The Panel rested this holding on several grounds[3]: (i) Section 3.06(a) of the settlement agreement directs Petitioners to distribute the settlement funds "in accordance with the distribution provisions of the respective Governing Agreements" (R.418); (ii) Section 7.05 of the settlement agreement states 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); and (iii) the settlement agreement's write-up provision in section 3.06(b) was a mere "'gap filler' intended only to apply where the governing agreement is silent . . . ."[4]

Petitioners themselves have also long understood they are required to follow the Governing Agreements if they conflict with the settlement agreement with respect to the write-up method, explaining in the Petition, for example, that "[f]or Settlement Trusts with Governing Agreements that clearly specify a particular order of operations, … Petitioners are required and intend to follow the provisions of the Governing Agreements for such Settlement Trusts." (R.370 [Petition ¶ 23].)

In sum, the plain text of the settlement agreement, obtained by the below-signed Institutional Investors, mandates that the settlement agreement does not and

[3] *See* Decision at 2-3. For additional briefing by the Institutional Investors and AIG Parties in this regard, *see* the Responsive Brief of the Institutional Investors and AIG Parties (Dkt. No. 76, filed Dec. 2, 2020, at 5-7) (joining the Responsive Brief of the GMO Parties on this issue (Dkt. No. 78, filed Dec. 2, 2020)).

[4] *Id.* at 2.

cannot supersede the Governing Agreements' distribution or write-up provisions, and the Panel correctly rejected all of Tilden Park's arguments to the contrary.

Similarly, HBK argues for the third time that a provision generally found in Section 5.04(a) of the relevant Governing Agreements, which precludes "distributions" to "retired classes," prevents the write-up of classes of certificates with zero balances—which have generally been written down to zero as a result of past realized losses (the "Retired Class Provision"). The Panel, however, explained in its Decision that Section 5.04(b) clearly provides for the write-up of all certificates (including zero-balance certificates), and that the distribution term set out in Section 5.04(a) is limited to certificates that have been withdrawn from the market and not actively traded (indisputably not the case for zero-balance certificates).[5]

The Panel reached this holding by properly harmonizing the plain language of Sections 5.04(a) and (b), as required by New York law.[6] The Panel further explained that it made commercial sense to permit write-ups of zero-balance certificates when subsequent recoveries are received by the trusts because "subsequent recoveries are intended to function as reversals of prior realized losses on the certificates."[7] That

[5] Decision at 5-6.

[6] *Id.* (harmonizing these two provisions in accordance with New York law mandating that "contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (citing *Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 A.D.3d 127, 134 [1st Dept 2017])).

[7] *Id.*

reasoning is correct, and the plain text of the Governing Agreements, which the Panel interpreted consistently with New York law, mandated this result.

Second, there is no basis whatsoever for both HBK and Tilden Park to argue that all five jurists who have unanimously rejected their arguments failed to apprehend and apply New York's "plain meaning" rule of contract interpretation.[8] As shown above, the Panel and the IAS Court committed no such error. Nor is there any validity (or relevance) to Tilden Park's argument that the Panel's Decision conflicts with New York law on parties' ability to alter their contracts through settlement agreements.[9] No such issue is raised here because, as noted above, the settlement agreement states that the Governing Agreements dictate the distribution of the settlement payment, and that the settlement agreement is not intended to amend any provision of the Governing Agreements.

Third, the two contract interpretation issues presented in the Reargument/Leave Motions do not involve novel legal questions or a matter of public concern. The issues raised concern a *sui generis* issue of little import beyond

[8] *See* HBK Motion at 2-3 ("Where the contractual terms are unambiguous, they must be applied as written, and courts cannot substitute their own intuitions as to what the contracts *should* say for the actual contractual text … The First Department disregarded this basic principle of contractual interpretation here.") & Tilden Park Motion at 20 ("Finally, the Court's decision cannot be reconciled even with the fundamental proposition that contracts "must be enforced according to the plain meaning of [their] terms.").

[9] *See* Tilden Park Motion at 3 (noting that the first allegedly novel question of law to be reviewed on appeal is "whether contracting parties may settle disputes without following amendment procedures specified in their original contract").

the one-time distribution of the remaining settlement funds to these particular RMBS trusts. The time is long past for Tilden Park and HBK to accept the rulings of this Court and the IAS Court on those issues. The interests of judicial economy and fairness, and Article 77 more generally, are ill served by the further unnecessary proceedings generated by the motions of Tilden Park and HBK; those motions only further delay the distribution of the remaining $1.1 billion settlement funds, which are currently held in escrow. Those substantial funds have languished in low-interest money-market funds for nearly four years since Petitioners filed this Article 77 in December 2017, depriving investors of the significantly higher returns they could have received had those funds been reinvested in higher-yielding securities—including the RMBS securities issued by these trusts.

Even worse, Petitioners filed the previous Article 77 proceeding concerning the approval of the settlement itself in August 2014—over seven years ago.[10] Delaying this proceeding any further to entertain meritless legal arguments that have been unanimously rejected undermines the purpose of Article 77 as an expedited proceeding to efficiently resolve matters of trust administration.[11]

[10] *U.S. Bank Nat'l Ass'n v. Fed. Home Loan Bank of Bos.*, No. 652382/2014, 2016 WL 9110399, at *1 (Sup. Ct. N.Y. Cnty. Aug. 12, 2016).

[11] "The purpose of [Article 77] is to provide for a special proceeding, as an alternative to the procedure by action, in trust accountings in the interests of expedition and economy. In other words, the purpose is to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures." Vincent C. Alexander, Practice Commentaries C401:1 (2010) (footnote omitted).

Conclusion

The AIG Investors and the Institutional Investors respectfully request that this Court quickly deny the Reargument/Leave Motions, so that this long-delayed settlement may be implemented.

October 15, 2021

Respectfully submitted,

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