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

In the matter of the application of WELLS FARGO BANK, NATIONAL ASSOCIATION, ET AL., Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	Appellate Division Case/Docket No. 2020-02716 Originating Court Index No. 657387/2017

OLIFANT FUNDS' MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR LEAVE TO APPEAL AND FOR REARGUMENT

Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (the "Olifant Funds") respectfully submit this memorandum of law in opposition to the motions by Appellant-Respondent U.S. Bank N.A., solely in its capacity as NIM Trustee for the HBK Trusts ("HBK"), and Appellants-Respondents Tilden Park Investment Master Fund LP, Tilden Park Management I LLC, and Tilden Park Capital Management LP (collectively, "Tilden Park") seeking reargument and/or leave to appeal the decision and Order of this Court, dated August 19, 2021, *Wells Fargo Bank v. Aegon USA Inv. Mgmt., LLC*, No. 2020-02716, 2021 WL 3668441 (1st Dep't Aug. 19, 2021) (Manzanet-Daniels, J.P., Kapnick, Mazzarelli, Oing, JJ.) (the "Decision"), which unanimously affirmed an order of Supreme Court, New York County.

PRELIMINARY STATEMENT[1]

Across their two motions, HBK and Tilden Park ("Appellants") fail to identify any legitimate basis for further review of this Court's thorough and well-reasoned decision, which unanimously affirmed a thorough and well-reasoned decision by the IAS Court below. Both decisions were run-of-the-mill applications of New York's longstanding rules of contract interpretation. Thus, this case does

[1] Capitalized terms have the same meaning as used in the Petition. "HBK Br." refers to HBK's Motion for Permission to Appeal to the Court of Appeals, which was filed with this Court on Sept. 30, 2021. *See* Dkt. No. 114.

not present any novel question of statewide importance which merits consideration by the Court of Appeals. There is no need to waste additional judicial resources on this case so that Appellants may have another opportunity to rehash the same arguments that have already been considered and rejected twice, thereby further delaying implementation of the Settlement Agreement at issue. That agreement was executed seven years ago and *over $1 billion* of the settlement proceeds have yet to be distributed to investors. It is time to finally resolve this matter so that settlement proceeds can be paid in full.

COUNTERSTATEMENT

The $4.5 billion Settlement Agreement at issue in this case was executed in 2014 and received court approval in 2016. *See Matter of U.S. Bank N.A. v. Federal Home Loan Bank of Boston*, No. 652382/2014, 2016 WL 9110399 (Sup. Ct., N.Y. Cnty., Aug. 12, 2016) (Dkt. 113). In 2017, Petitioners then initiated this Article 77 proceeding seeking judicial instruction concerning the proper method by which to distribute the Settlement Trusts' shares of the settlement payment.

On February 13, 2020, the IAS Court issued a 46-page decision addressing the various contractual interpretation issues raised in the Petition. As relevant here, the IAS Court rejected the argument put forth by HBK and others that the so-called "Retired Class Provision" in certain trusts' Governing Agreements prohibits zero-balance certificates from receiving write-ups and distributions relating to the

settlement payment. In addition, the IAS Court held that, where the write-up instructions in the trusts' Governing Agreements differ from those in the Settlement Agreement, the Governing Agreements control, rejecting Tilden Park's argument to the contrary.

Numerous parties appealed the IAS Court's rulings on a plethora of issues. After voluminous briefing involving over a dozen parties and a lengthy oral argument, this Court unanimously affirmed the IAS Court's decision in all respects on August 19, 2021. It did so by conducting its own careful analysis of the contractual language while applying New York's standard rules of contract interpretation. *See* Decision at 4-10.

On September 30, 2021, Appellants HBK and Tilden Park, respectively, filed a Motion for Permission to Appeal to the Court of Appeals and a Motion for Reargument or for Permission to Appeal to the Court of Appeals.

ARGUMENT

Appellants cannot identify any issue in this case which merits further consideration by this Court or by the Court of Appeals. They argue that leave to appeal should be granted because this case presents the question of whether contracts must be enforced according to their terms in New York State. That is, of course, a settled question for which the Court of Appeals has already provided "crystal-clear guidance." HBK Br. at 12. Appellants nowhere demonstrate that

this Court has misapprehended the law; rather, they argue that the Court misapplied these rules to the contracts at issue in this case. But as the Court of Appeals' own guidance makes clear, the Court does not typically hear cases where the general principles of law are settled and the case involves the mere application of that settled law to particular facts.[2]

That the rules of contract interpretation involved in this case are settled is an understatement. It is a "familiar and eminently sensible proposition of law [] that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). The other basic rules of contract interpretation that have arisen in this appeal—that contract provisions should be harmonized so as to not leave any provision without force and effect, or that the best evidence of contracting parties' intent is the contract's language—are also "well-established," as the Court of Appeals has reiterated. *See, e.g., Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 403 (2009). Appellants may disagree with this Court's application of these rules of contract interpretation in this particular instance, but the Court of Appeals' docket would be

[2] *See* The New York Court of Appeals Civil Jurisdiction and Practice Outline (Sept. 2000) at 16, available at: https://www.nycourts.gov/ctapps/forms/civiloutline.pdf.

backlogged for *decades* if every party that disagreed with this Court's interpretation of their contract were granted leave to appeal.

Moreover, HBK's argument that this Court disregarded the relevant contractual language concerning zero-balance certificates—and, instead, relied on vague notions of the parties' "intent," HBK Br. at 14—is entirely baseless. The Court conducted a page-long analysis of the contract language which harmonized the relevant provisions. *See* Decision at 8-9 ("[C]ontract 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 Dep't 2017)). HBK references a single sentence of the Court's analysis explaining why the relevant provisions "make sense" in the context of the trusts' operation in an attempt to argue that the Court based its entire analysis on "what made 'sense' rather than on the actual contractual terms." HBK Br. at 14. Even a cursory review of this Court's Decision demonstrates the speciousness of HBK's claim.

The Settlement Agreement was entered into in 2014, and yet large portions of the settlement proceeds have still not been paid out because of this ongoing litigation. Having failed to find any issues that make the Decision worthy of

consideration by the Court of Appeals or reargument,[3] Appellants rehash arguments that have already been rejected by the IAS Court and by every Justice of this Court that heard them. Enough is enough. Both Appellants' motions should be denied.

Date: October 15, 2021

Respectfully submitted,

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[3] *See* 22 NYCRR 500.22(b)(4); CPLR 2221(d)(2).