

**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

**HBK PARTIES’ REPLY MEMORANDUM  
OF LAW IN FURTHER SUPPORT OF MOTION  
FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS**

On September 30, 2021, U.S. Bank National Association, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in the HBK Trusts and solely at the direction of HBK (the HBK Parties”), moved for permission to appeal to the Court of Appeals this Court’s Order entered February 13, 2020 (the “Motion,” NYSCEF #114).

On October 15, 2021, the AIG Investors and the Institutional Investors (as defined in their opposition submission, NYSCEF #119, at 1) and Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (collectively, the “Olifant Parties”) opposed the Motion (NYSCEF # 119 and NYSCEF #120, together, the “Oppositions”). On October 7,

2021, all parties to this appeal executed a briefing stipulation authorizing this reply (NYSCEF #118, at 2). The HBK Parties submit this reply in further support of the Motion.<sup>1</sup>

### **ARGUMENT**

The Oppositions seek to obscure the key and only remaining issue here: Are distributions to Zero Balance Classes permitted under contracts that explicitly state that such classes “will no longer be entitled to distributions” on any distribution date after their Certificate Principal Balances have been reduced to zero. Consistent with the oral argument presentations, the Oppositions do not engage with this language at all. Instead, they focus on issues separate from distribution (retirement) and introduce impermissible extrinsic evidence, espouse general principles of appellate review, and express frustration that an appeal filed in June 2020 is not yet final.

But, notably, nowhere in the Oppositions do the AIG Investors, the Institutional Investors, or the Olifant Parties address the contractual language at issue here. Such omission is understandable because they have no answer, and the

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<sup>1</sup> All capitalized terms not defined herein shall have the meaning set forth in the Brief accompanying the Motion. As explained in footnote 1 of the notice of Motion (which footnote the HBK Parties incorporate here by reference), U.S. Bank, solely in its capacity as Indenture Trustee of the HBK NIM Trusts (the “NIM Trustee”), and solely at the direction of HBK, submits this memorandum reflecting the positions of HBK. Further, U.S. Bank’s capacity in its role as NIM Trustee hereunder is a separate and distinct capacity from that of U.S. Bank in its role as Petitioner and Trustee of the RMBS trusts at issue in the underlying settlement.

Oppositions' inability to address the primary argument made in support of the Motion only further emphasizes the need for additional review. As the HBK Parties showed in their opening brief, the Order's interpretation of the Zero-Balance Class Provision, which permits distributions to Zero Balance Classes, cannot be reconciled with the unambiguous contractual language expressly prohibiting such distributions. This error of law matters—not only to the outcome of this case but also to the many sophisticated parties that rely on the New York courts to interpret complex financial contracts by their plain terms.


**CONCLUSION**

For the foregoing reasons as well as the reasons set forth in the opening brief in support of the Motion, the HBK Parties respectfully request that the Court grant permission to appeal to the Court of Appeals the Order's construction of the Zero-Balance Class Provision.


Dated: October 22, 2021

Respectfully submitted,

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U.S. Bank N.A., solely in its capacity as  
NIM Trustee for the HBK Trusts*