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 Div. No. 2020-02716 New York County Clerk's Index No. 657387/2017

TILDEN PARK'S REPLY IN SUPPORT OF MOTION FOR REARGUMENT OR FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

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Respondents-Appellants Tilden Park Investment Master Fund LP, Tilden Park Management I LLC, and Tilden Park Capital Management LP (collectively, "Tilden Park") respectfully submit this reply in further support of their motion for reargument and for permission to appeal to the New York Court of Appeals.

PRELIMINARY STATEMENT

Further review by this Court or the Court of Appeals is necessary to ensure that the massive Settlement Payment is distributed to investors in accordance with fundamental norms of contract interpretation. The Court incorrectly held that Section 3.06(b) of the parties' Settlement Agreement applies only as a "gap-filler" when, in fact, the Settlement Agreement requires that section's rules for writing up certificates to apply regardless of any contrary instructions in the Governing Agreements. That error should be fixed. The Court's oversights regarding crucial facts about the Settlement Agreement's text and structure warrants rearguing this case. And the decision's impact on contract parties' ability to settle their contracts, the need for uniformity and clarity in New York contract law, and the decision's wide-ranging public implications all support granting permission to appeal to the Court of Appeals.

The Institutional Investors, AIG, and Olifant oppose reargument and permission to appeal. But they offer no coherent defense of the Court's decision on the merits. They make no attempt to explain how the Court's interpretation of the

Settlement Agreement can be squared with the multiple provisions of that agreement that impose uniform write-up or distribution rules regardless of any conflicting directions in the Governing Agreements. Nor do they show any good reason to cut off further review. The Court should grant reargument or permission to appeal.

ARGUMENT

I. REARGUMENT IS WARRANTED ON WHETHER THE SETTLEMENT AGREEMENT'S WRITE-UP PROVISIONS CONTROL

The Court should grant reargument to address crucial oversights that, when corrected, show that the Settlement Agreement's write-up rules in Section 3.06(b) control over contrary instructions in the Governing Agreements. Dkt. 116, Tilden Park Mot. for Reargument or Permission To Appeal ("Mot.") 9-13. Most notably, the Court's holding that the Settlement Agreement cannot vary from the Governing Agreements without making an "express" exception to Section 7.05's prohibition on "amend[ing]" the Governing Agreements cannot be reconciled with several Settlement Agreement terms that do precisely that. *Id.* at 9-11; *see, e.g.*, SA §§ 1.16, 3.05, 3.06(a), 3.07.

No respondent attempts to explain how the Court's interpretation of the Settlement Agreement could be compatible with those terms (because it cannot). Instead, the Institutional Investors' and AIG's only argument for why Section 3.06(b) is a mere "gap-filler" (other than simply reciting the Court's holding) is that

the Institutional Investors and the Trustees were "the parties who negotiated" the Settlement Agreement. Dkt. 119, Opp. Br. of AIG and Institutional Investors ("II-AIG Br.") 2. What those parties bargained for, however, is the specific text of the Settlement Agreement – including many clauses, such as Section 3.06(b), which overrule otherwise-applicable Governing Agreement terms. New York law holds them to that bargain. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356 (2019) ("[A]greements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language."). That the Institutional Investors now want something other than what they bargained for is no reason to depart from the Settlement Agreement's plain text.

Nor do the Institutional Investors, AIG, or Olifant defend the Court's other oversight – that the Court incorrectly believed that Section 7.13, which provides that the Settlement Agreement "supersedes" the parties' prior agreements, did not apply to the Governing Agreements because those contracts were purportedly "negotiated among parties other than those defined as 'parties' to the settlement agreement." Op. 6; *see* SA § 7.13. None of the parties opposing reargument claims that the Court's statement was factually correct. In fact, the parties to every Governing Agreement for every trust at issue in this appeal were parties to the Settlement Agreement as well. Mot. 12; *see* SA at 1. Together with the Court's incorrect reading of Section 7.05, this oversight caused the Court to erroneously conclude that Section 3.06(b)

could merely act as a "gap-filler" when it in fact displaces contrary terms in the Governing Agreements. Mot. 12-13. The Court should correct that oversight and grant reargument.

II. PERMISSION TO APPEAL IS WARRANTED ON WHETHER THE SETTLEMENT AGREEMENT'S WRITE-UP TERMS CONTROL

If the Court does not grant reargument, it should grant permission to appeal to the Court of Appeals for at least three reasons. Mot. 13-23. First, by deciding that the Settlement Agreement parties could not vary from the Governing Agreements without "amending" those contracts, the Court put itself in conflict with the holdings of the Court of Appeals, other courts, and even its own precedent that contract parties need not "amend" their contracts to settle their disputes. *Id.* at 13-17; *see Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 66 N.Y.2d 321, 325 (1985); *In re Residential Capital, LLC*, 497 B.R. 720, 748 (Bankr. S.D.N.Y. 2013); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1281-82 (9th Cir. 1992); *In re Bank of New York Mellon*, 42 Misc.3d 1237(A), 2014 WL 1057187, at *11 n.16 (Sup. Ct. N.Y. Cnty. Jan. 31, 2014), *aff'd*, 127 A.D.3d 120, 126 (1st Dep't 2015). Resolving that conflict is vital to protect New York's public policy favoring settlements and to give parties to complex, multi-party agreements clarity about how they can settle their disputes. Mot. 16-18.

No respondent disputes that New York law does not force settling parties to "amend" their contracts. And no respondent disputes that this principle is important to encourage settlements – especially in complex, multi-party contracts. Instead, the Institutional Investors and AIG claim that the issue is irrelevant because the Court merely construed the Settlement Agreement instead of ruling on what the parties could or could not do. *See* II-AIG Br. 5 (protesting that the Settlement Agreement "is not intended to amend any provision of the Governing Agreements"). That argument misses the point. The Court improperly relegated Section 3.06(b), which varies from the Governing Agreements, to a "gap-filling" role to avoid having to treat Section 3.06(b) as an "amendment" that might implicate Section 7.05. Op. 6. But because settlements may vary from contracts without "amending" them, classifying Section 3.06(b) as an "amendment" was unnecessary. Misinterpreting provisions of settlement agreements to avoid illusory concerns about "amendments" could limit contract parties' ability to settle their disputes just as effectively – and thus threaten these types of settlements just as effectively – as a ruling about what those parties could or could not do legally. The Court of Appeals' review is needed to avoid that outcome.

Second, Court of Appeals review is needed to address the conflict between the Court's reading of Section 3.06(b) and several fundamental principles of contract interpretation. Mot. 18-22. Once again, no respondent tries to defend the Court's

decision as consistent with those principles. Olifant argues that review is unwarranted because, at worst, the Court "misapplied these rules to the contracts at issue in this case." Dkt. 120, Opp. Br. of Olifant Funds ("Olifant Br.") 4-5. As Tilden Park already explained, however, the need for uniformity and predictability that is the "foundation of New York contract law" make review here more than a matter of mere error correction. Mot. 21 (quoting *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 357 (2020)). That these principles are well-settled, as Olifant observes (at 4), makes it all the more important to apply them consistently. For that reason, the Court of Appeals has repeatedly reviewed cases involving these principles, especially in the RMBS context. *See* Mot. 18 n.7 (collecting cases).[1]

Third, review is warranted because of the importance of this case. Mot. 22-23. As Olifant, AIG, and the Institutional Investors concede, over $1 billion remains to be distributed, making the stakes of this appeal massive. Olifant Br. 2; II-AIG Br. 6. Moreover, as one of the first precedential decisions in any appellate court on RMBS global settlement agreements, the Court's decision is bound to impact how

[1] Likewise, outside the RMBS context, leave to appeal has been repeatedly granted to enforce these principles. *See, e.g.*, *159 MP Corp.*, 33 N.Y.3d at 356 (review granted by this Court of case raising norm that contracts are enforced according to their plain language); *S. Rd. Assocs., LLC v. Int'l Bus. Machines Corp.*, 4 N.Y.3d 272, 277 (2005) (leave granted by Court of Appeals to review case involving principles that contracts must be read as a whole and enforced according to their plain meaning).

such settlements are structured and interpreted going forward. The Institutional Investors are thus wrong to call the issues involved "sui generis." *See* II-AIG Br. 5. In fact, each of the major RMBS global settlements struck so far has had identical or near-identical bars on "amending" governing agreements like Section 7.05.[2] Likewise, agreements settling individual RMBS putback claims routinely contain similar language.[3] And other settlements outside the RMBS context often contain language limiting "amendments" as well.[4] The Court's misreading of Section 7.05

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[2] *See* RMBS Trust Settlement Agreement, http://bit.ly/lehman_settlement, at § 6.04 (global settlement agreement for trusts sponsored by Lehman Brothers, providing, like Section 7.05, that the agreement "shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement"); Settlement Agreement, http://bit.ly/countrywide_settlement, § 21 (global settlement agreement for trusts sponsored by Countrywide, providing that "[n]othing in this Settlement Agreement is intended to, or does, amend any of the Governing Agreements"); RMBS Trust Settlement Agreement, https://bit.ly/citi_settlement, § 6.05 (global settlement agreement for trusts sponsored by Citibank, providing that the agreement "is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement").

[3] *See, e.g.*, *In the Matter of the Application of Hudson ES LLC*, No. 159687/2018, Dkt. 26, at § 15 (Sup. Ct. N.Y. Cnty. Jan. 11, 2019) (similar language in settlement agreement for the FFML 2006-FF11 trust); *In the Matter of the Application of Deutsche Bank Nat'l Trust Co.*, No. 654208/2018, Dkt. 15, at § 15 (Sup. Ct. N.Y. Cnty. Aug. 23, 2018) (settlement agreement for the HVMLT 2006-9 trust providing that the agreement "shall not be argued or deemed to constitute, an amendment of any term of any Transaction Document").

[4] *See, e.g.*, Evolus, Inc., Quarterly Report (Form 10-Q), ex. 10-5, § 6.1 (May 12, 2021) (settlement agreement of ITC dispute providing that "nothing contained herein shall be deemed to constitute a waiver of any right under, or modification or amendment of any term of, any prior executed agreement between the Parties,

could impact all those settlements, and others going forward, by limiting how settling parties can vary from their underlying contracts. Together with the enormous financial stakes, that impact provides a powerful reason for the Court of Appeals' review.

Finally, Olifant, AIG, and the Institutional Investors all argue that interests in finality outweigh any reason for further review. Olifant Br. 5-6; *see also* II-AIG Br. 6. But there is no public interest in cutting off review on direct appeal just because one party or another thinks that the case should end. The societal interest in the finality of judgments is far less powerful on direct appeal, where the judicial system can and should correct errors, than on collateral review. *See People v. Machado*, 90 N.Y.2d 187, 193 (1997). Nor is there a public interest in paying out over a billion dollars based on a contract interpretation at odds with fundamental principles of New York law.[5] That is especially so where, as here, certificateholders not represented

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including without limitation the[ir] License Agreement"); Ultrapetrol (Bahamas) Ltd., Disclosure Statement (Form 6-K), ex. 99-1, § 7.1 (Dec. 1, 2016) (standstill of loan agreement providing that the standstill shall not "be construed or deemed to constitute an amendment, modification or waiver of, or otherwise serve to impair, the rights, remedies, defenses, or claims" of the parties under a loan agreement); Eastman Kodak Co., Current Report (Form 8-K), ex. 99.1, § 15(i) (Nov. 9, 2012) (settlement of employee-benefit claims shall not "constitute or deemed to constitute an amendment to any plan" providing employee benefits).

[5] Similarly, the Institutional Investors are incorrect to argue (at 6) that an interest in resolving Article 77 cases efficiently weighs against review. The public also has an interest in the courts correctly resolving such cases according to basic contract-law

here could lose money as a result. *See* 11 Carmody-Wait (2d) N.Y. Prac. § 71:69 (the effect of the decision on "others than the parties litigant" supports permission to appeal). And the decision's widespread effect on other settlements also weighs towards further review. *See* pp. 5-8, *supra*. Olifant, the Institutional Investors, and AIG have a greater interest in this case ending quickly than in the Court reading the Settlement Agreement correctly. The public's interest is in getting this case right. The Court should grant permission to review.

CONCLUSION

This Court should grant reargument, or, in the alternative, permission to appeal to the Court of Appeals.

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principles. If anything, efficiency is best served by the Court of Appeals addressing these issues now so that Article 77 parties disputing a settlement agreement going forward better understand the law governing their disputes.

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Respectfully submitted,

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