To be Argued by:
JONATHAN L. HOCHMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK, 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

(For Continuation of Caption See Inside Cover)

Appellate Case No.: 2020-02716

OPENING BRIEF FOR TILDEN PARK

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

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")

– 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 trial court failed to enforce a contract between sophisticated parties as written. The proceedings below, brought under CPLR Article 77, concerned the interpretation of a multibillion-dollar Settlement Agreement between JPMorgan Chase and trustees of numerous RMBS trusts. One key question was to what extent each class of certificates in each trust would benefit from the settlement payment by having its certificate balances increased, or "written up," on the date of distribution. Section 3.06(b) of the Settlement Agreement answers that question with a straightforward and uniform write-up rule: Each class's balance should be written up in the reverse order of previously allocated losses. That rule applies to all classes of certificates, contains no exceptions, and supersedes the trusts' "Governing Agreements." Under basic contract-interpretation principles, Section 3.06(b) applies regardless of any contrary instructions in any Governing Agreement.

The trial court, however, held that Section 3.06(b) functions as a "gap filler" which applies only where a trust's Governing Agreement lacks write-up instructions. That interpretation defies Section 3.06(b)'s text, which specifies a uniform rule without reference to the Governing Agreements. It also cannot be squared with the Settlement Agreement's structure and other provisions making

clear when the Settlement Agreement intends to impose a uniform rule, adopt terms of the Governing Agreements, or provide a gap-filler.

The trial court based its atextual reading of Section 3.06(b) primarily on Section 7.05 of the Settlement Agreement. The trial court read Section 7.05—which states that the Settlement Agreement "shall not be argued or deemed to constitute[] an amendment of any term of any Governing Agreement"—to mean that the Settlement Agreement may not override or supersede the Governing Agreements. But that interpretation cannot be correct. It ignores the multiple important provisions of the Settlement Agreement that expressly supersede the Governing Agreements. It flouts basic contract-interpretation principles. And it cannot be reconciled with case law construing similar settlement contracts. The Court should reverse the trial court's decision interpretaing Section 3.06(b) and apply that section's write-up rules to all trusts.

QUESTION PRESENTED

Do the write-up rules in Section 3.06(b) of the Settlement Agreement apply only as "gap-fillers," even though Section 3.06(b) provides a uniform write-up rule without reference to the Governing Agreements, several other terms of the Settlement Agreement also override the Governing Agreements, and the Settlement Agreement's text does not limit Section 3.06(b) to a "gap-filling" role?

The trial court answered in the affirmative.

STATEMENT OF FACTS

I. THE SETTLEMENT AGREEMENT AND ITS APPROVAL

In 2013, JPMorgan Chase & Co. negotiated a global settlement agreement regarding its role in creating and servicing hundreds of residential mortgage-backed securitization trusts. *See 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. Cty. Aug. 12, 2016) ("*JPMorgan I*"). The multibillion-dollar Settlement Agreement was initially entered into between JPMorgan and investors holding a plurality of the certificates issued by the trusts. *Id.* Those parties then presented the Agreement to the Trustees of the trusts. *Id.* In 2014, the Trustees accepted a modified version of the agreement on behalf of hundreds of trusts and loan groups. *Id.*

In the Settlement Agreement, JPMorgan agreed to pay the Trustees up to $4.5 billion (the "Settlement Payment") for distribution to the trusts' investors. A415-416, Settlement Agreement ("SA") § 3.01. The Agreement provided for the Trustees to allocate the Settlement Payment among the trusts based on those trusts' relative losses as determined by an expert. A417, SA § 3.05. In exchange, the trusts released JPMorgan from "repurchase" claims and other contract claims relating to JPMorgan's role in the securitizations. A416-17, SA § 3.02.[1]

[1] Among other things, the trusts released demands to cure or repurchase breaching mortgage loans; claims arising under the Governing Agreements "that relate to the

To distribute the Settlement Payment to investors, the Settlement Agreement borrowed in part from the "Governing Agreements" governing each trust (for example, a trust's "Pooling and Servicing Agreement"). *See* A406, SA at 1 (defining "Governing Agreement"). RMBS Governing Agreements typically contain two sets of terms that affect how trustees make payments and apportion entitlements to trust capital among different classes of investors:

- Governing Agreements contain detailed "distribution" provisions, often known colloquially as "waterfalls," that set out the priority and amount of distributions to various classes of certificateholders. *See* Am. Bar Ass'n, 7 Bus. & Com. Litig. Fed. Cts. §77:19 (4th ed.); A361 ¶3.
- Governing Agreements also typically contain provisions for determining the "certificate principal balance[s]" of the trust's certificates, which affect the payments each class of certificates may be eligible to receive. A361, A364-365 ¶¶3, 6-7. One common provision increases, or "writes up," the balances of the trust's certificates to account for certain recoveries received by the trust,

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origination, sale, delivery and/or servicing of Mortgage Loans"; and claims for alleged breach of notice obligations. A416-417, SA §3.02.

often known as "subsequent recoveries." A364 ¶7.[2] Writing up certificates may make the certificates eligible for additional distributions in the future. A376 ¶36.[3]

The Settlement Agreement took different approaches—set forth in sections 3.06(a) and 3.06(b), respectively—to distribution and write-up terms. For distributions, the Settlement Agreement provided that each trust's share of the Settlement Payment would generally be distributed "in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a 'subsequent recovery[.]'" A418, SA §3.06(a). In the event a Governing Agreement "d[id] not include the concept of 'subsequent recovery,'" the payment would be "distributed as though it was unscheduled principal[.]" *Id.*

The Settlement Agreement did not fully adopt the Governing Agreements' distribution provisions, however. For example, in the event that the Settlement Payment distribution would "become payable to a class of REMIC residual interests" under the Governing Agreements' distribution instructions, the

[2] "Subsequent recoveries" are "typically unexpected recoveries from mortgage loans that have been previously liquidated." *In re Bank of N.Y. Mellon*, 56 Misc. 3d 210, 218 (Sup. Ct. N.Y. Cnty. 2017).

[3] In the Governing Agreements for all trusts at issue in this appeal, the distribution rules, the write-up terms, and the definitions of "certificate balances" are each contained in separate provisions. See, e.g., A3532-3537 & 3530, BSABS 2005-AQ2 PSA §§5.04(a) (distribution instructions); 5.04(b) (instructions for write-up of subsequent recoveries); art I. (definition of "Certificate Principal Balance").

Settlement Agreement directed the Trustees not to follow those instructions. A418, SA §3.06(a). Instead, "such payment" was to be "maintained in the collection or distribution account for distribution on the next distribution date according to the provisions of Subsection 3.06(a)." *Id.*

The Settlement Agreement took a different approach to write-ups than it did to distributions. Instead of specifying that certificate balances should be written up "in accordance with . . . the Governing Agreements," Section 3.06(b) of the Settlement Agreement imposes a single write-up protocol for all trusts without reference to the Governing Agreements. "After the distribution of the Allocable Share" to the trust, Section 3.06(b) directs, the trustee is to "apply . . . the amount of the Allocable Share for that Settlement Trust in the reverse order of previously allocated losses, to increase the balance of each class of securities (other than REMIC residual interests) to which such losses have previously been allocated[.]" A418-419, SA §3.06(b). Section 3.06(b) also contains a clarifying clause stating that "[f]or the avoidance of doubt, this Subsection 3.06(b) is intended only to increase the balances of the related classes of securities, as provided for herein, and shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)." A419, SA §3.06(b).

Although the Settlement Agreement incorporated terms of the Governing Agreements into its distribution rules (as well as into several other provisions, *see,*

e.g., A407-410 & A417-419, SA Art. 1, §§3.03, 3.05, 3.06(d)), the parties to the Settlement Agreement made clear that it was a distinct agreement which did not purport to amend the Governing Agreements. In Section 7.05 of the Settlement Agreement, the parties agreed that "this Settlement Agreement reflects a compromise of disputed claims" and "was not intended to, and shall not be argued or deemed to constitute, an amendment to any term of any Governing Agreement." A424, SA §7.05.[4]

In 2014, the Trustees of the settling trusts brought a proceeding pursuant to CPLR Article 77 to seek judicial approval of the Settlement Agreement. *JPMorgan I*, 2016 WL 9110399, at *1. Before the court approved the settlement, it directed an international notice program to provide notice of the proposed settlement to investors in the affected trusts. *Id.* at *5. After briefing, discovery, and a four-day evidentiary hearing, the court approved the Settlement Agreement in an August 2016 order. *Id.* at *5, *16.

[4] At the same time, the Settlement Agreement stated that it superseded any and all prior agreements, including the Governing Agreements: "Subject to Section 7.05, all prior agreements and understandings between the Parties concerning the subject matter hereof are superseded by the terms of this Settlement Agreement." A425, SA §7.13.

II. PROCEEDINGS BELOW

A. The Trustees' Second Article 77 Petition

Under the Settlement Agreement, the process for calculating and paying out the trusts' settlement payments was to begin on the agreement's "Effective Date," when the Settlement Agreement had obtained final judicial approval and certain tax rulings from the IRS. *See* A408, SA § 1.08 (defining "Effective Date"). The "Effective Date" occurred in September 2017. A366-367 ¶14. Rather than begin the distribution process, however, the Trustees filed this action as a second Article 77 petition to seek judicial instruction about how the Settlement Payment should be paid. A359.

Although the Trustees raised various questions, only their questions about the meaning and applicability of the Settlement Agreement's write-up instructions are at issue in this appeal. *See* A378-380 ¶¶41-48. Specifically, the Trustees asked the trial court whether to apply the write-up rules specified in Section 3.06(b) of the Settlement Agreement if those rules differ from the write-up instructions in a Governing Agreement. A378 ¶41. For example, the write-up instructions for certain trusts require that subsequent recoveries be written up in order of "payment priority," rather than in the reverse order of previously allocated losses as Section 3.06(b) directs. A381 ¶50. The settlement trusts with this issue were listed in Exhibit F to the Trustees' petition. *See* A503-508.

The Trustees also noted that certain settlement trusts contain write-up instructions that apply only to "subordinate" (or Class M/B) certificates. A379-380 ¶45. For those trusts, the Trustees explained, implementing Section 3.06(b) and writing up certificates in reverse order of losses would generally require the settlement write-up to be applied first to senior (or Class A) certificates. A380 ¶¶46-47. Because the write-up would be applied to Class A certificates first, it is possible that Class M/B certificates would not be written up at all. *Id.* By contrast, applying the write-up instructions in the Governing Agreements for those trusts would result in only the subordinate (Class M/B) certificates being written up. A380 ¶47. The trusts with this issue were identified in Exhibit E to the Trustees' petition. A501-502.

B. The Trial Court's Decision

Numerous investors in the Trusts answered the Trustees' petition, including Appellant-Respondents Tilden Park Investment Master Fund LP, Tilden Park Management I LLC, and Tilden Park Capital Management LP (together, "Tilden Park"). *See* A2271. Tilden Park took the position in its answer that Section 3.06(b) "provides a clear method for writing up certificate balances" which "expressly overrides conflicting provisions of the Governing Agreements with respect to implementation of the Settlement and treatment of the one-time Settlement Payment." A2282 (emphasis omitted). As a result, Tilden Park argued,

"the Trustees must follow the Settlement Agreement Write-up Instruction" in Section 3.06(b), "rather than any conflicting write-up instructions in the Governing Agreements, such as provisions limiting subsequent recovery write-ups to subordinate classes." A2284.

After pleadings were complete, the parties and the court proceeded to briefing and argument. The court first addressed standing: In 2018, it issued an order that "only investors with a direct interest in a Settlement Trust (i.e., certificateholders)" could "appear with respect to the Trust." A27-28 n.2; *In re Wells Fargo Bank*, No. 657387/2017, 2018 WL 3743897, at *8 (Sup. Ct. N.Y. Cty. Aug. 7, 2018). This Court affirmed that order in 2019. *Wells Fargo v. Nover Ventures, LLC*, 173 A.D.3d 626 (1st Dep't 2019).

In February 2020, the trial court issued an order resolving the Trustees' questions on how to pay out settlement funds. A26. Among other holdings, the trial court ruled that Section 3.06(b)'s instruction to write up certificates in reverse order of losses was merely a "gap filler" which "applies only where [a] Governing Agreement is silent as to the write-up mechanics." A53-56. The Settlement Agreement, the court asserted, did not "evidence an intent to vary the terms of the Governing Agreements regarding the order of operations or the write-up method." A55. In reaching that conclusion, the trial court rejected the arguments of Tilden

Park and other respondents that Section 3.06(b)'s write-up rules control over any contrary terms in a Governing Agreement. A52.

The trial court offered three reasons for its decision. First, the court held that applying Section 3.06(b) as written would violate Section 7.05 by "'amend[ing]'" Governing Agreements with different write-up terms. A53 (quoting A424, SA §7.05). The court acknowledged that "Section 3.06(a) expressly defers to the Governing Agreements whereas section 3.06(b) does not." A54. But the court asserted that "the Settlement Agreement does not supersede or override the Governing Agreements." A53. If the Settlement Agreement were allowed to "modif[y]" the Governing Agreements, the court concluded, Section 7.05 would be "rendered meaningless." *Id.* And the court asserted that the Governing Agreements must control over the Settlement Agreement because the Settlement Agreement "does not contain a term which provides that it is to be followed in the event of a conflict with the Governing Agreements." A55. The court did not address the fact that, as Tilden Park observed, other important sections of the Settlement Agreement, such as Section 3.06(a)'s ban on distributing funds to residual certificates, expressly override the Governing Agreements and would thus also violate Section 7.05 under its reading. *See* A10892-10893.[5]

[5] Nor did the court address Section 7.13, which states that, "[s]ubject to Section 7.05, all prior agreements and understandings between the Parties concerning the

Second, the court asserted that, even though Section 3.06(b) does not refer to the Governing Agreements, the Trustees must still apply those agreements' write-up rules because they are "integral" to the Governing Agreements' distribution rules. A54. In the court's view, the Governing Agreements' write-up provisions were "integral" to distribution because "the distribution provisions of the Governing Agreements . . . refer to the write-up provisions in those agreements." *Id.* As with its holding that Section 3.06(b) could not "amend" the Governing Agreements, the court did not address the fact that other provisions of the Settlement Agreement, such as the ban on paying funds to residual certificates, would also affect key aspects of the Governing Agreements' distribution rules.

Third, the trial court observed that the last sentence of Section 3.06(b) states that the write-up instruction "'is intended only to increase the balances of the related classes of securities . . . and shall not affect the distribution of the Settlement Payment.'" A55 (quoting A419, SA §3.06(b)). The court asserted, citing the Trustees' petition, that, for certain trusts where the Governing Agreements state that write-ups for a given payment period should take place before distribution (the "Write-Up First Trusts"), applying Section 3.06(b) "could affect the classes entitled to the distribution of the Settlement Payment." A55.

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subject matter thereof are superseded by the terms of the Settlement Agreement." A425, SA §7.13.

The court did not address the fact that the last sentence of Section 3.06(b) states that it is "[f]or the avoidance of doubt" and merely repeats the provisions of Section 3.06(a). *See* A419, SA §3.06(a).

Based on its conclusion that the Governing Agreements control over Section 3.06(b)'s write-up instructions, the trial court held that Governing Agreements providing for write-up of subordinate certificates "must be applied to permit write-up only of those subordinate certificates." A60. Although the court recognized that the Settlement Agreement expressly contradicted these provisions by "clearly provid[ing] for the write-up of senior certificates," the court concluded that it must follow the Governing Agreements' instructions with respect to the write-up of senior certificates. A56-58.

On February 14, 2020, another respondent, Nover Ventures LLC, served notice of entry of the trial court's February 13 decision and order. A25. On March 13, 2020, Tilden Park filed a timely notice of appeal to this Court. A11.

STANDARD OF REVIEW

"When engaging in contract interpretation, 'the standard of review is for this Court to examine the contract's language de novo.'" *MPEG LA, LLC v. Samsung Elecs. Co*, 166 A.D.3d 13, 17 (1st Dep't 2018), *leave to appeal denied*, 32 N.Y.3d 912 (2018) (quoting *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (1st Dep't 2018)). Because "the procedure in special proceedings" like this one

"shall be the same as in actions," CPLR § 103, this Court reviews contract-interpretation issues *de novo* in Article 77 appeals. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. SMBC Holdings, LLC*, 177 A.D.3d 443 (1st Dep't 2019) (interpreting RMBS contract in Article 77 proceeding without deference to trial court).

SUMMARY OF ARGUMENT

The trial court erred by reading Section 3.06(b) as a mere "gap filler" which applies only if the Governing Agreements are silent. A53. By its terms, Section 3.06(b) provides a uniform rule for writing up certificate balances that applies regardless of any write-up instructions in the Governing Agreements. By limiting Section 3.06(b)'s scope, the trial court defied that section's text. Its reasoning is also incompatible with the Settlement Agreement's structure and other provisions clearly indicating when the Trustees should follow the Governing Agreements and when they should not. And the trial court's reasons for limiting Section 3.06(b)—based on the Settlement Agreement's clause about "amendments," the "integral" role of write-ups to distribution, and a clarifying clause in Section 3.06(b)—all fail. This Court should reverse the trial court's decision and hold that Section 3.06(b)'s write-up instructions should be applied to all trusts as written.

ARGUMENT

POINT I: THE SETTLEMENT AGREEMENT'S WRITE-UP PROVISIONS CONTROL

A. The Settlement Agreement Supplies a Uniform Method To Govern Write-Ups for All Trusts

1. *Section 3.06(b) Unambiguously Requires a Uniform Write-Up Method*

Under familiar principles, where a contract like the Settlement Agreement is "complete, clear and unambiguous, it must be enforced according to its plain meaning." *Littleton Constr. Ltd. v. Huber Constr. Inc.*, 27 N.Y.3d 1081, 1082 (2016). That "rule applies 'with even greater force in commercial contracts,'" like the Settlement Agreement, that were "'negotiated at arm's length by sophisticated, counseled businesspeople.'" *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 3 (1st Dep't 2016), *aff'd*, 28 N.Y.3d 1039 (2016) (quoting *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 7 (1st Dep't 2012)); *see* A27 (noting that the Settlement Agreement was negotiated by JPMorgan Chase and a group of large institutional investors). And for all contracts, courts are "extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *ACE Sec. Corp. v. DB Structured Prods.*, 25 N.Y.3d 581, 597 (2015) (quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004)). "'[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new

contract for the parties under the guise of interpreting the writing.'" *Id.* (quoting *Vermont Teddy Bear*, 1 N.Y.3d at 475).

Under those principles, the plain meaning of Section 3.06(b) is dispositive. Section 3.06(b) provides the following instructions for how to write up certificate balances:

> After the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a), the Accepting Trustee for such Settlement Trust will apply (or if another party is responsible for such function under the applicable Governing Agreement will use reasonable commercial best efforts to cause such party to apply) the amount of the Allocable Share for that Settlement Trust in the reverse order of previously allocated losses, to increase the balance of each class of securities (other than any class of REMIC residual interests) to which such losses have been previously allocated, but in each case by not more than the amount of such losses previously allocated to that class of securities pursuant to the Governing Agreements. . . . For avoidance of doubt, this Subsection 3.06(b) is intended only to increase the balances of the related classes of securities, as provided for herein, and shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a).

A418-419, SA §3.06(b).

Section 3.06(b) states unequivocally that each Trustee should write up "the balance of each class of securities (other than any class of REMIC residual interests)" for each trust in the reverse order of losses. A418-419, SA §3.06(b). Those instructions do not refer to the write-up rules in the trusts' Governing Agreements. The plain meaning of Section 3.06(b), therefore, is that the Trustees should write up certificate balances by reverse order of losses, whether or not any

Governing Agreement says otherwise. The trial court's reading of Section 3.06(b) to implicitly defer to the Governing Agreements, by contrast, does just what the Court of Appeals has forbidden—to "interpret" the Settlement Agreement "as impliedly stating something which the parties have neglected to specifically include." *ACE Sec. Corp.*, 25 N.Y.3d at 597 (quoting *Vermont Teddy Bear*, 1 N.Y.3d at 475).

2. *The Settlement Agreement's Structure and Other Provisions Require a Uniform Write-Up Method*

The trial court also disregarded other basic principles of contract interpretation which show that Section 3.06(b) applies regardless of the Governing Agreements. In addition to the text of a given contract term, courts also examine the contract's other provisions and overall structure to discern its meaning. It is "important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases." *S. Rd. Assocs. LLC v. Int'l Bus. Machs. Corp*, 4 N.Y.3d 272, 277 (2005) (citing *Matter of Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003)). "All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." *Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969); *see also James v. Jamie Towers Hous. Co.*, 294 A.D.2d 268, 269 (1st Dep't 2002), *aff'd*, 99 N.Y.2d 639 (courts should "adopt the construction of [a] contract that reasonably harmonizes [its] provisions"). For example, under the *expressio unius* canon of construction, when

specific contract language is used in one clause, its omission elsewhere "must be assumed to have been intentional." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986) (citation omitted); *see also Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014); *Salerno v. Coach, Inc.*, 144 A.D.3d 449, 450 (1st Dep't 2016) ("To the extent [an] agreement expressly provide[s]" one term, *expressio unius* implies "the exclusion of other" terms).

Reading the Settlement Agreement as a whole confirms Section 3.06(b)'s plain meaning. Multiple sections of the Agreement supply a uniform rule, like that in Section 3.06(b), that applies regardless of any Governing Agreement's terms. Other sections instruct the Trustees to follow the Governing Agreements' provisions or provide a "gap-filler" rule to use only when a particular Governing Agreement is silent. In each case, the Settlement Agreement makes clear what sort of rule (uniform, agreement-by-agreement, or gap-filler) is intended—just as Section 3.06(b) does. Those clear instructions should be followed.

a. *Multiple Provisions of the Settlement Agreement Clearly Override the Terms of the Governing Agreements*

Section 3.06(b) is just one of several instances where the Settlement Agreement's parties opted to override the Governing Agreements instead of following those agreements' terms. Most notably, Section 3.06(a) explicitly overrides the Governing Agreements' distribution instructions in one key respect. Although Section 3.06(a) tells the Trustees to generally distribute funds "pursuant

to the terms of the Governing Agreements," it provides an exception where, under those Governing Agreements, a "distribution . . . would become payable to a class of REMIC residual interests." A418, SA §3.06(a). In that situation, "such payment shall be maintained in the collection or distribution account for distribution on the next distribution date," *id.*, thereby avoiding paying funds to residual certificates when the Governing Agreement's distribution rules would mandate that result.[6]

Section 3.06(a)'s ban on distributing settlement payments to residual certificates serves an essential purpose. Under SEC regulations, residual certificates in RMBS deals are often held by the deal's sponsor or depositor—here, JPMorgan Chase and its corporate affiliates. *See* Credit Risk Retention, Exchange Act Release 34-73407; SEC File No. S7-14-11 (Oct. 22, 2014) (residual-retention requirement); A406, SA at 1 (referring to JPMorgan's role as sponsor or depositor of the relevant trusts). Deviating from the Governing Agreements' distribution rules that would otherwise send funds to residual certificates was critical to ensure that JPMorgan Chase would not receive portions of its own settlement payment.

[6] Deferring distribution will typically avoid payments to residual bonds because, by the time of the next distribution, other, more senior certificates will have become entitled to principal payments. For example, in "Pay First" trusts, where certificate balances are written up after distributions are made, certificates with written-up balances will then be entitled in the next distribution to payments ahead of any possible payment to a residual certificate.

Section 3.07 of the Settlement Agreement also specifically overrides the Governing Agreements. Structured-finance contracts like the Governing Agreements often specify "trigger" events (such as the amount of losses incurred) that can modify the parties' rights and obligations, including different certificates' relative priority to payment. *See Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, No. 12 Civ. 7372, 2020 WL 5518146, at *12 (S.D.N.Y. Sept. 14, 2020) (describing "triggers"). Section 3.07 expressly alters the effect of such trigger provisions by stating that payment of the settlement funds shall not "be deemed to reverse the occurrence of any transaction-related trigger in any Settlement Trust." A419, SA §3.07. Section 3.07 makes no reference to the trusts' Governing Agreements, even though it overrides their terms.

Likewise, Sections 1.16 and 3.05 provide a method for allocating settlement funds across trusts that is doubly removed from the Governing Agreements' terms. RMBS Governing Agreements often define a "Repurchase Price" for repurchase claims like the ones the Settlement Agreement resolves. *See, e.g.*, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Cap., Inc.*, 133 A.D.3d 96, 101 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017) (providing example "Repurchase Price" definition). Instead of using those contractual definitions, the Settlement Agreement lays out a detailed formula for allocating the Settlement Payment across various trusts. A417-418, SA §3.05. And that formula, in turn, draws on a

uniform definition of "Net Losses" provided by the Settlement Agreement, even though RMBS Governing Agreements often contain their own definitions and methods for calculating a trust's losses. *See* A409, SA §1.16 (defining "Net Losses"); A417-418, SA §3.05 (defining each trust's "Allocable Share" of the Settlement Payment based on calculated "Net Losses"); *cf., e.g.*, *U.S. Bank Nat'l Ass'n v. SBMC Holdings, LLC*, 177 A.D.3d 443, 444 (1st Dep't 2019) (describing definition of "Realized Losses" in RMBS PSA).

In each of these examples, the Settlement Agreement overrides the Governing Agreements simply by providing a uniform procedure that does not refer to the Governing Agreements. The pattern is clear: Where the drafters of the Settlement Agreement intended to impose a uniform rule, they did so without referring to the Governing Agreements.

b. *When the Settlement Agreement Means to Adopt Terms from the Governing Agreements, It Says So Explicitly*

In contrast to the provisions of the Settlement Agreement that impose uniform rules, other provisions of the Settlement Agreement direct the Trustees to apply the specific—and varying—rules provided by each trust's Governing Agreement. For example:

- Section 3.06(a) expressly instructs the Trustees to deposit each trust's settlement payment "into the related Trust's collection or distribution account pursuant to the terms of the Governing Agreements, for

further distribution to Investors in accordance with the distribution provisions of the Governing Agreements . . . ." A418, SA § 3.06(a).

- Section 3.05 requires that, if the mortgage loans in any given trust "are divided by the Governing Agreements into loan groups," then "those loan groups shall be deemed to be separate Trusts" for purposes of distributing settlement funds. A417, SA § 3.05.
- The Settlement Agreement also dictates that any capitalized terms not defined in that Agreement itself shall "have the definition given to them in the Governing Agreements for that Trust." A407, SA art. I.
- Section 3.03 states that modifications of the trusts' mortgage loans "pursuant to the relevant terms of the applicable Governing Agreements . . . shall be deemed permissible loan modifications under the Governing Agreements and this Settlement Agreement." A417, SA § 3.03.
- Even Section 3.06(b)'s write-up instruction caps the write-up for each class at "the amount of such losses previously allocated to that class of certificates pursuant to the Governing Agreements." A419, SA § 3.06(b).

Additional examples abound.[7] In each instance, the Settlement Agreement makes clear that the Trustees should follow the Governing Agreements by stating that the Trustees should act "pursuant to," "in accordance with" or as "given . . . in" those contracts. *See, e.g.*, A417-418 & A407, SA §§3.03, 3.06(a), 3.05; art. 1. The Settlement Agreement's structure thus shows that its drafters well knew how to dictate where the Governing Agreements were to control instead of the Settlement Agreement itself. When they intended that result, they said so explicitly by referring to the Governing Agreements.

c. *When a Settlement Agreement Provision Is Meant to Serve as a Mere Gap-Filler, It Says So Explicitly*

The Settlement Agreement's drafters also said explicitly when they intended to fill gaps in the Governing Agreements. Section 3.06(a)'s distribution rules

[7] *See* A415, SA §2.09 (IRS private-letter rulings required for the Settlement Agreement must decide taxable status of trusts "for which a REMIC election . . . has been made in accordance with the applicable Governing Agreement"); A421, SA §4.05 (servicers for the trusts must make "prudent advances of principal and interest under the terms of the Governing Agreements" but retain their "right[s] to recoup servicing advances under the Governing Agreements"); A421, SA §4.07 (to the extent JPMorgan pursues claims against third parties for certain trusts, the Trustees must use commercially reasonable efforts to assist JPMorgan "to the extent they are required to do so under the Governing Agreements"); A421, SA §4.08 (parties retain their "obligation[s] under the Governing Agreements" to cure document defects); A423, SA §7.02 (Trustees retain their right to require "the indemnity or bond, if any, required by the Governing Agreements"); A425, SA §7.10 (Trustees retain their "rights and obligations . . . under the applicable Governing Agreements"); A489, SA Ex. B (under the subservicing protocol, "Approved Subservicers shall service the Mortgage Loans pursuant to the Governing Agreements").

generally instruct the Trustees to pay settlement funds as if they were a "subsequent recovery." A418, SA §3.06(a). But that section also acknowledges that the Governing Agreements for some trusts may "not include the concept of 'subsequent recovery.'" *Id.* In that circumstance, the Settlement Agreement provides a gap-filling rule: The Settlement Payment should instead be paid "as though it was unscheduled principal available for distribution on such immediately following distribution date." *Id.*

* * *

The Settlement Agreement's drafters took care to distinguish among three types of substantive rules: those that apply uniformly to all trusts; those that vary from trust to trust, according to each trust's Governing Agreement; and those that serve only as gap-fillers. By its plain terms, Section 3.06(b) provides that write-ups are to be governed by the first of these sorts of rules—a uniform rule applicable to all Trusts. The drafters' choice to use such uniform language—and to omit language saying that write-ups would occur "pursuant to" or "according to" the Governing Agreements—"must be assumed to have been intentional." *Annunziata*, 67 N.Y.2d at 233; *see Vertin*, 23 N.Y.3d at 560; *In re N.Y.C. Asbestos Litig.*, 41 A.D.3d 299, 302 (1st Dep't 2007). Only that interpretation—that Section 3.06(b) applies a uniform rule to the write-up of certificates—reads the Settlement Agreement as whole and harmonizes its various provisions that either follow, or

diverge from, the Governing Agreements' text. *See S. Rd. Assocs. LLC*, 4 N.Y.3d at 277; *Nat'l Conversion Corp.*, 23 N.Y.2d at 625; *Salerno*, 144 A.D.3d at 450. Because the trial court rejected that reading, this Court should reverse.

B. Section 3.06(b) Does Not "Amend" the Governing Agreements

The trial court primarily based its erroneous reading of Section 3.06(b) on Section 7.05 of the Settlement Agreement. That section provides that the contract "reflects a compromise of disputed claims and is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." A424, SA § 7.05. The trial court read Section 7.05 to mean that "the Settlement Agreement does not supersede or override the Governing Agreements." A53. It reasoned that Section 7.05 controls over Section 3.06(b) because "section 3.06(b) does not state that it is an exception to the section 7.05 mandate." A54; *see also* A55 (similar). The trial court further stated that if the Settlement Agreement were to govern write-up procedures in the event of a conflict with the Governing Agreements, Section 7.05 "would be rendered meaningless." A53.

That reading was wrong for at least three reasons. It cannot be reconciled with the contract as a whole, which clearly supersedes the Governing Agreements in several ways; it defies Section 7.05's clear meaning and ignores directly relevant case law recognizing that RMBS settlement agreements can modify the underlying contracts without being deemed to "amend" them; and it ignores that, in the event

of any conflict, Section 3.06(b)'s specific mandate would control over Section 7.05's general terms.

1. *The Trial Court's Reading of Section 7.05 Cannot Be Squared with the Rest of the Settlement Agreement*

The trial court's claim that Section 7.05 bars "supersed[ing] or overrid[ing]" the Governing Agreements in any circumstance, A53, is inconsistent with the Settlement Agreement as a whole. As explained above, several important provisions of the Settlement Agreement, including Section 3.06(a)'s ban on distributions to residual certificates and Section 3.07's mandate that the Settlement Payment shall not be "deemed to reverse the occurrence of any transaction-related trigger," unambiguously apply regardless of any contrary Governing Agreement provisions. *See* pp. 18-21, *supra*. The trial court's interpretation of Section 7.05 cannot be squared with those terms.

The trial court nevertheless concluded that the Settlement Agreement's terms must give way to the Governing Agreements unless they "contain a term which provides that [they are] to be followed in the event of a conflict with the Governing Agreements." A55. But if the Governing Agreements were meant to apply by default, it would make no sense to specify numerous situations that are to be handled "pursuant to the Governing Agreements." *See* pp. 21-23, *supra*. Nor would it make sense to include terms such as Section 3.06(a)'s residual-certificate rules which override the Governing Agreements but do not state that they should

be "followed in the event of a conflict with the Governing Agreements." To avoid these inconsistencies, the Settlement Agreement's mandatory terms must be understood to apply except where the contract instructs the Trustees to follow the Governing Agreements.

2. *The One-Time Settlement Distribution Is Not an "Amendment"*

The trial court's conclusion that Section 7.05 bars "supersed[ing] or overrid[ing]" the Governing Agreements, A53, also misreads Section 7.05 itself. Section 7.05 says nothing about the parties' ability or intent to "supersede" or "override" the Governing Agreements. A424, SA § 7.05. If the Settlement Agreement's drafters had intended Section 7.05 to also dictate that the Settlement Agreement could not "supersede" or "override" the Governing Agreements, they could have said so explicitly. That they chose not to is dispositive.

Rather than barring any modifications of Governing Agreements' terms, Section 7.05 merely clarifies that the Settlement Agreement "shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." A424, SA § 7.05. The term "amendment" has a specific meaning in the Governing Agreements with which the Settlement Agreements' drafters would have been familiar. Specifically, "amendment" refers to the formal process set forth in each Governing Agreement by which the parties could alter those agreements' terms—for example, by securing a majority vote of the trust's certificateholders or by

obtaining an opinion of counsel. *See, e.g.*, A3544-3545, BSABS 2005-AQ2 PSA § 11.01. That formal process could not readily have been invoked with respect to each of the hundreds of trusts subject to the global Settlement Agreement. To ensure that the Settlement Agreement would not trigger that formal process—and that the Trustees would not be faulted for failing to follow that process's requirements—the Settlement Agreement's drafters provided that the Settlement Agreement "shall not be argued or deemed" to constitute "an amendment." A424, SA § 7.05.[8]

Moreover, there was no need for the Settlement Agreement to amend the Governing Agreements. The Settlement Agreement governed a specific, non-recurring situation not contemplated by those prior agreements: the distribution of JP Morgan's multibillion-dollar global Settlement Payment. As the trial court recognized, that Settlement Payment was "unquestionably an exceptional event that differs from ordinary course distributions and was unanticipated by the Governing Agreements." A55. As a result, there was no need to "amend" anything in those

[8] The trial court's assertion that this interpretation would render Section 7.05 "meaningless," *see* A53, ignores this section's clarifying function—and the benefit the Trustees presumably believed this clarification provided in helping protect them from any accusation that they had "amended" the Governing Agreements without following those contracts' amendment procedures.

contracts in order to carry out the Settlement Agreement's one-time distribution and write-up rules.[9]

Courts have repeatedly recognized that trustees may settle claims without complying with the formal requirements for amending their trusts' governing agreements. *In re Residential Capital, LLC*, 497 B.R. 720 (Bankr. S.D.N.Y. 2013) ("*ResCap*"), is closely on point. There, several RMBS trustees reached an agreement to settle their trusts' repurchase claims with Residential Capital, an originator that had sought bankruptcy protection. *Id.* at 726. As part of the settlement, insurance policies protecting the trusts' certificate payments were cancelled (or "[c]ommut[ed]") in exchange for a cash payment to the trusts. *Id.* at 729. The settlement agreement contained a clause stating that "[n]othing in this Settlement Agreement amends or modifies in any way provisions of any Governing Agreement." *In Re Residential Capital*, No. 12-12020 (Bankr. S.D.N.Y. June 7,

[9] The Settlement Agreement nevertheless provided that, to the extent necessary, it superseded any prior agreements, such as the Governing Agreements, which might affect the treatment of the one-time Settlement Payment. Section 7.13 states, "[s]ubject to Section 7.05, all prior agreements and understandings between the Parties concerning the subject matter hereof are superseded by the terms of this Settlement Agreement." A425, SA § 7.13. The contractual phrase "subject to" is "the equivalent of 'conditional upon or depending on.'" *F.W. Berk & Co. v. Derecktor*, 301 N.Y. 110, 113 (1950). Thus, Sections 7.05 and 7.13 draw a simple distinction: On the condition that the Settlement Agreement should not be deemed to "amend" the Governing Agreements, the Settlement Agreement supersedes the parties' other agreements—including, if necessary, the Governing Agreements—to the extent they concern the subject matter of the Settlement Agreement. A424-425, SA §§ 7.05, 7.13.

2013), Dkt. 3929-2. Certain objectors argued that the settlement agreement was improper because it deviated from the governing agreements and the trustees did not follow the trusts' amendment rules. They claimed that the trustees "cannot amend the terms of the Governing Agreements to provide for a commutation because the Governing Agreements strictly proscribe alterations by means of amendment or entry into a supplemental indenture." *Res Cap.*, 497 B.R. at 731. But the bankruptcy court rejected that argument, holding that "the Settlement Agreement is not an amendment to the Governing Agreements; it is a resolution of a claim against an insurer in an insolvency proceeding." *Id.* at 748.

ResCap is not alone. *See also, e.g.*, *In re Bank of N.Y. Mellon*, No. 651786/2011, 2014 WL 1057187, at *11 n.16 (Sup. Ct. N.Y. Cnty. Jan. 31, 2014), *aff'd*, 127 A.D.3d 120 (1st Dep't 2015) (approving global RMBS settlement agreement over objection that it would "alter the terms of the Governing Agreements without following the amendment procedures set forth therein"); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1281 (9th Cir. 1992) (indenture's limitation on altering certificateholders' rights to payment without their consent did not restrict trustee's "power to settle or compromise Bondholders' claims" in a settlement agreement). These cases further show that, contrary to the trial court's reasoning, Section 3.06(b) could—and did—vary from the Governing Agreements'

write-up rules without being deemed to amend the Governing Agreements. A424, SA § 7.05.[10]

3. *Even If Section 3.06(b) and Section 7.05 Were in Conflict, Section 3.06(b) Must Control*

For all those reasons, the trial court erred in reading 3.06(b) to conflict with Section 7.05. Even if there were a conflict, however, the trial court's resolution of that conflict would still be error. If there is "an inconsistency between a specific provision and a general provision of a contract . . . the specific provision controls." *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956); *see also Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 583 (2018) (quoting *William Higgins & Sons v. State,* 20 N.Y.2d 425, 428 (1967)) (a "'specific provision will not be set aside in favor of a catchall clause'").

Section 3.06(b)'s detailed instructions for writing up certificate balances are obviously more specific than Section 7.05's catchall statement that the Settlement

[10] These cases' holdings are also consistent with public policy. This State "favors the settlement of disputes." *Wimbledon Fund, SPC v. Weston Cap. Partners Master Fund II, Ltd.*, 184 A.D.3d 448, 450 (1st Dep't 2020); *see also Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 383 (1993) (similar). If settlement agreements that differ from an underlying contract could be deemed as "amendments," RMBS trustees would need to either adhere meticulously to the governing agreements to reach a settlement or else follow the governing agreements' formal amendment process. That outcome would needlessly discourage settlements in RMBS cases by limiting the settling parties' flexibility. *See Bank of N.Y. Mellon*, 2014 WL 1057817, at *11 n.16 (argument that accepting performance other than what the PSAs provide was an "amendment" would imply that "no trustee would ever be able to settle trust claims").

Agreement shall not be "deemed" to amend the Governing Agreements. The trial court got this basic principle backward when it insisted that Section 7.05's more general terms would control unless Section 3.06(b)'s more specific term explicitly stated that it was an exception. A54. If there were any conflict between those two clauses, the correct approach was to construe Section 3.06(b)'s more specific term as an exception to Section 7.05. *Ambac*, 106 N.Y.3d at 583; *Muzak Corp.*, 1 N.Y.2d at 46.

C. The Trial Court's Other Rationales Fail

The trial court offered two other reasons for limiting Section 3.06(b) to a "gap-filling" role. It held that writing up certificate balances was "integral to the distribution" of the Settlement Payment, which Section 3.06(a) states should be governed by the Governing Agreements. A54. And it concluded that a clarifying clause at the end of Section 3.06(b), stating that the write-up process "'shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a),'" meant that Section 3.06(b)'s write-up rules cannot apply if they would conflict with the write-up rules in a Governing Agreement. A55 (quoting A419, SA §3.06(b)). As with the court's reasoning about Section 7.05, these grounds are irreconcilable with the text and structure of the Settlement Agreement.

1. *Section 3.06(a) Does Not Require Deference to the Governing Agreement Rules on Matters "Integral" to Distribution*

Contrary to the trial court's reading, Section 3.06(a) does not tell the Trustees to defer to the Governing Agreements on any issue that might be considered "integral" to the distribution process. Instead, it says that the Trustees must follow the "distribution provisions of the Governing Agreements." A418, SA §3.06(a). Distributions and write-ups are distinct processes handled by distinct provisions. The distribution provisions in each Governing Agreement are laid out separately from those agreements' write-up terms and definitions of principal balances. *See, e.g.*, A3532-3537 & 3530, BSABS 2005-AQ2 PSA §5.04(a) (dictating distributions); *id.* §5.04(b) (dictating write-ups), art. I (defining "Certificate Principal Balance"). When write-up provisions change the inputs used in the distribution provisions, they alter only the amounts that are distributed to each class of certificates, not the manner of the distribution itself. Thus, the Trustees can faithfully apply the Governing Agreements' distribution provisions under Section 3.06(a) even where Section 3.06(b)'s write-up terms change the inputs used in those distributions.

The court's own example shows the flaws in its reasoning. The court observed that distribution provisions in some Governing Agreements refer to the those agreements' definition of "Certificate Principal Balance." A54. But applying a uniform rule under Section 3.06(b) to write up the "Certificate Principal

Balances" does not prevent the Trustees from distributing funds based on the "Certificate Principal Balances"; it merely changes how the "Certificate Principal Balances" are calculated. The court thus erred by supposing that Section 3.06(b)'s write-up rules would prevent the Trustees from following Governing Agreement distribution rules that rely on a definition of "Certificate Principal Balance."

The trial court's theory is also at odds with the Settlement Agreement's structure. As described above, the Settlement Agreement overrides or supersedes the Governing Agreements on some topics. *See* pp. 18-21, *supra*. Those superseding provisions apply regardless of how "integral" they might be to the distribution provisions. For example, Section 3.06(a)'s ban on distributing funds to residual certificates by definition involves terms "integral" to the Governing Agreements' distribution terms, because it overrides those distribution terms directly. *See* pp. 18-19, *supra*. As with its reading of Section 7.05, however, the trial court failed to consider whether those clauses can be reconciled with its theory that anything "integral" to distribution is controlled by the Governing Agreements. They cannot.

2. *Section 3.06(b)'s Clarifying Clause Confirms Its Independence from Section 3.06(a)*

The trial court's final basis for reducing Section 3.06(b) to a "gap filler" was Section 3.06(b)'s clarifying clause. A55. That clause provides that "[f]or the avoidance of doubt, this Subsection 3.06(b) is intended only to increase the

balances of the related classes of securities, as provided for herein, and shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)." A419, SA §3.06(b). The trial court reasoned that, "if section 3.06(b) superseded the write-up instructions in the Write Up First Trust Governing Agreements," it would violate the clarifying clause because "it could affect the classes entitled to the distribution of the Settlement Payment and the amounts of distributions to those classes." A55.

The trial court thus read this clarifying clause as if it provided that the Section 3.06(b) write-up instruction could not affect the "amount[]" of the Settlement Payment distributed to each class. But that reading fails for the same reason the court's theory about matters "integral" to distribution fails. Section 3.06(b) says that write-ups should not affect the "distribution provided for" in Section 3.06(a). That word choice is the "'best evidence of what [the] parties'" intended. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) (quoting *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992)). And the "distribution of the Settlement Payment provided for in Subsection 3.06(a)" is the "distribution to Investors in accordance with the distribution provisions of the Governing Agreements" and the special carve-out for residual bonds. A418, SA §3.06(a). Because 3.06(a) merely tells the Trustees to follow the Governing Agreements' distribution provisions, the distribution provided for in Section 3.06(a) is not

"affected" simply because the amount of that distribution may change as a result of Section 3.06(b)'s write-up instructions.

Moreover, the court erred by interpreting a clarifying clause as imposing additional substantive terms. By its very nature, an "avoidance of doubt" clause only clarifies potential ambiguity created by other terms of the agreement. Such a clause does not introduce new operative terms or nullify existing ones. Thus, this Court has held that a statement "repetitive of the previous substance of a contract is not to be given a contrary interpretation merely because it is repetitive and hence unnecessary." *Levine v. Golub Corp.*, 21 A.D.2d 38, 42 (3d Dep't 1964), *aff'd*, 15 N.Y.2d 615 (1964). "It is well recognized," this Court pointed out, "that draftsmen resort to otiose statements in the exercise of caution in emphasizing a prior provision or in avoiding any doubt as to the meaning of a prior provision." *Id.*; *see also Geist v. Hisp. Info. & Telecomm. Network, Inc.*, No. 16 Civ. 3630, 2018 WL 1169084, at *4 (D. Md. Mar. 6, 2018) (applying New York law) ("Generally, the plain meaning of the phrase 'for the avoidance of doubt' is to clarify earlier language."). Because Section 3.06(b)'s clarifying sentence merely repeats the fact that Section 3.06(a) governs distribution methods, it cannot be read to supersede the unequivocal language earlier in Section 3.06(b) specifying a uniform write-up method.

Nor is the trial court's approach consistent with the clarifying clause's real purpose. That clause serves to avoid any misperception that the classes entitled to write-up under the Settlement Agreement—those classes that have taken losses most recently—are necessarily the same classes that receive payment of the Settlement Payment under Section 3.06(a)'s distribution rules. Many Governing Agreements provide in the normal course that, while subsequent recoveries may be paid to one class of certificates, an entirely different class of certificates may have their balances written up because of those recoveries.[11] The clarifying clause thus simply confirms that the write-up alone is controlled by the reverse-loss sequence of Section 3.06(b), while the mechanisms for distributing the payment remain controlled by Section 3.06(a).

Finally, if there were any conflict—and there is not—then Section 3.06(b)'s write-up instructions would control because they are more specific than its catchall

[11] For example, in the BSABS 2005-AQ2 PSA, "Subsequent Recoveries" are treated as "Principal Funds." A3530, BSABS 2005-AQ2 PSA art. I. On each distribution date, "Principal Funds" are distributed first to more senior certificates. A3532-3534, BSABS 2005-AQ2 PSA § 5.04(a)(4) (distributing "Principal Funds" first to Class A-1, A-2, and A-3 certificates, and so on in order of priority). By contrast, subsequent recoveries are used to write up "the Certificate Principal Balance of the Class of Certificates with the highest payment priority to which Realized Losses have been allocated." A3537, BSABS 2005-AQ2 PSA § 5.04(b). Because Realized Losses are allocated in reverse order of priority, more junior certificates take losses before more senior certificates. A3539-3540, BSABS 2005-AQ2 PSA § 5.05. Accordingly, more junior certificates may be entitled to receive write-ups as a result of a subsequent recovery even if more senior certificates are entitled to have those recoveries distributed as "Principal Funds."

clause. *See Muzak Corp.*, 1 N.Y.2d at 46; *Ambac*, 106 N.Y.3d at 583; pp. 31-32, *supra*. Under New York law, "'[d]efinitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary.'" *Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp.*, 945 F.2d 1226, 1248-49 (2d Cir. 1991) (quoting *John Hancock Mut. Life Ins. Co. v. Caroline Power & Light Co.*, 717 F.2d 664, 669 n.8 (2d Cir. 1983)). The clause at the beginning of Section 3.06(b) sets out definitive and particular instructions for writing up certificates, while the clarifying clause merely expresses the drafters' intent "for the avoidance of doubt" not to implicitly overrule Section 3.06(a)'s distribution terms. As a result, even if the trial court were correct that the two clauses were in conflict, Section 3.06(b)'s write-up instructions would still control.

D. All Certificates Must Be Written Up Pursuant to Section 3.06(b)

Applying Section 3.06(b) as written leads to a straightforward result: "[E]ach class of securities" (other than residual securities) must be written up "in the reverse order of previously allocated losses." A418-419, SA §3.06(b). This language dictates the result for two distinct groups of trusts.

The first group, which were listed in Exhibit E to the Trustees' Article 77 petition, are trusts whose Governing Agreements contain write-up instructions that apply only to "subordinate" (or Class M/B) certificates. A379-380 ¶45. For those trusts, writing up all certificates in reverse order of losses, as required by Section

3.06(b), would generally require the settlement write-up to be applied first to senior (or Class A) certificates—potentially resulting in the subordinate certificates not being written up at all. A380 ¶¶46-47. The second set of trusts, identified in Exhibit F to the Trustees' petition, contain write-up methods that differ from the method specified in Section 3.06(b). A381-382 ¶¶49-52. For example, some trusts require the recovery to be written up in order of "payment priority" rather than in the reverse order of previously allocated losses. A381 ¶50.

The trial court refused to apply Section 3.06(b)'s write-up methodology to those two groups of trusts based on its conclusion that Section 3.06(b) could not override contrary write-up terms in the Governing Agreements. *See* A51-60. As explained above, that conclusion was error. Section 3.06(b) unambiguously requires the Trustees to write up "each class of securities" "to which [the trust's] losses have been previously allocated" in the "reverse order of previously allocated losses." A418-419, SA §3.06(b). "Each" means "every one." *See In re Turner's Will*, 208 N.Y. 261, 265 (1913) ("each" means "[e]very one of the two or more composing the whole" or "every one of any number separately considered"); *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008) (similar); "Each," American Heritage Dictionary (5th ed. 2020) ("Each" means "Every one of a group considered individually."). Section 3.06(b) therefore requires write-up of each certificate in the Exhibit E and Exhibit F trusts "in the reverse order of

previously allocated losses," notwithstanding contrary provisions in the Governing Agreements for those trusts.

* * *

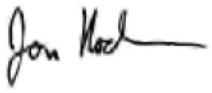
The only reading of Section 3.06(b) compatible with its text, the Settlement Agreement's structure, and basic norms of contract interpretation is that it imposes a uniform rule for writing up certificate balances that applies regardless of any contrary instructions in the Governing Agreements. Because the trial court did not apply Section 3.06(b) as written, its decision should be reversed.

CONCLUSION

The Court should reverse the trial court's order in part, and should hold that (1) the Trustees should apply Section 3.06(b)'s write-up instructions as written, and (2) as a result, all classes of certificates, including "senior" certificates, should be written up in the reverse order of previously allocated losses.

November 2, 2020
New York, New York

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

Tilden Park hereby specifies pursuant to Rule 1250.8(j) of the Rules of Procedure for the Appellate Division of the Supreme Court, First Judicial Department, that this brief was prepared in Microsoft Word using fourteen-point Times New Roman font. Tilden Park further specifies that, as calculated by Microsoft Word, this brief contains 9,054 words, excluding the table of contents, the tables of citations, and all addenda.

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., 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.

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1. The index number of the case in the court below is 657387/17.

2. The full names of the original Petitioners are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on December 15, 2017 by filing of a Petition. Respondents D.E. Shaw Refraction Portfolios, L.L.C, HBK Master Fund L.P., Olifant Fund, Ltd., FFI Fund Ltd., FYI Ltd., Ellington Management Group L.L.C., Prophet Mortgage Opportunities LP, Poetic Holdings VI LLC and Poetic Holdings VII LLC, FT SOF IV Holdings, LLC, Fir Tree Capital Opportunity Master Fund, L.P., Fir Tree Capital Opportunity Master Find III, L.P., Tilden Park, AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Teachers Insurance and Annuity Association of America, the TCW Group, Inc., Thrivent Financial for Lutherans, Western Asset Management Company, 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, The Variable Annuity Life Insurance Company, GMO Opportunistic Income Fund, GMO Global Real Return (UCITS) Fund, Axonic Capital LLC, Nover Ventures, LLC, Strategos Capital Management, LLC filed their Responses to Petition on January 29, 2018.

5. This is an Article 77 Proceeding.

6. This appeal is from the Decision and Order of the Honorable Marcy S. Friedman, dated February 13, 2020, which held, as relevant to this appeal, that (1) the settlement payment write-up should be made using the subsequent recovery write-up instructions in the associated pooling and servicing agreements ("PSAs"), unless the relevant PSA is silent as to the write-up mechanics, in which case the Settlement Agreement write-up instruction should be applied as a "gap filler"; (2) the Petitioners should not write up the certificate principal balances of senior certificates in connection with the settlement payment in trusts where the PSA write-up instructions only indicate a write-up of subordinated certificates; and (3) with respect to calculating the overcollateralization amount as to certain "Pay First" trusts, Petitioners should take into account both a reduction of the certificate principal balance and an increase of the certificate principal balance prior to making any distribution.

7. This appeal is on the full reproduced record.