To be Argued by:
KEVIN REED
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of WELLS FARGO BANK,

(For Continuation of Caption See Inside Cover)

Appellate Case No.: 2020-02716

JOINT OPENING BRIEF FOR THE INSTITUTIONAL INVESTORS, AIG PARTIES, AND ELLINGTON AND DW PARTIES

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

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

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 Parties")

– 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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Pursuant to the Briefing Schedule Stipulation dated September 24, 2020, the below-signed Institutional Investors[1], AIG Investors[2], DW Partners LP ("DW"), and Ellington Management Group, L.L.C. ("Ellington") (collectively, the "Investors") submit this Opening Brief in support of their appeal from the Decision and Order of the Honorable Marcy S. Friedman, Supreme Court of New York, New York County, dated February 13, 2020, which was entered in the Office of the Clerk of New York County, and for which notice of entry was provided, on February 14, 2020 (the "Decision and Order").

PRELIMINARY STATEMENT

This appeal arises from an Article 77 proceeding in which Petitioners, the trustees or securities administrators of the 270 residential mortgage-backed securities ("RMBS") trusts named in the Petition (the "Settlement Trusts"), petitioned the Supreme Court of the State of New York, County of New York (Friedman, J.) (the "IAS Court") for judicial guidance concerning the manner in

[1] The sixteen Institutional Investors are: AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, Federal Home Loan Bank of Atlanta, Federal Home Loan Mortgage Corp., Federal National Mortgage Association, Goldman Sachs Asset Mgmt L.P., Voya Investment Mgmt LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Metropolitan Life Ins. Co., Pacific Investment Mgmt Company LLC, Teachers Ins. and Annuity Assoc. of America, TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Mgmt. Co.

[2] The AIG Investors are: American General Life Insurance Company, American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., The United States Life Insurance Company in the City of New York, and The Variable Annuity Life Insurance Company.

which a $4.5 billion settlement payment should be distributed among the certificateholders (i.e., investors) of those trusts. More specifically, the Petition asked the IAS Court to resolve a number of distinct issues with respect to the construction of the settlement agreement pursuant to which portions of the $4.5 billion payment allocated to each of the Settlement Trusts (the "Settlement Agreement") were to be distributed to those trusts, in light of the terms of the Trusts' governing documents.

The Court, in the Decision and Order, correctly resolved all but one of the issues presented by the Petition. Its error arose out of the question of whether the governing documents for certain of the Settlement Trusts allowed for the senior-most and least risky certificates issued by those Trusts to have their prior losses reversed—the precise losses that the settlement at issue was intended to remedy. In particular, the IAS Court ruled that the governing documents precluded these senior-most certificates from having their certificate balances "written up," which would have allowed them to receive settlement funds paid to compensate the Trusts for the losses that had caused those certificates to have been written down in the first place. In this limited but vital respect, the IAS Court erred by depriving the Trusts' safe, senior certificates of a key contractual entitlement—the entitlement to have their losses reversed by settlement recoveries—with the result that such recoveries would instead wrongfully accrue to the Trusts' riskier "subordinate" certificates.

On this issue, the IAS Court erred by misconstruing the relevant contracts, myopically focusing on (and misreading) a single provision, while failing properly to account for other provisions that compelled a different result because they decisively demonstrate the parties' intent to write up senior certificates that had suffered losses. Compounding this error, the IAS Court also erred by ignoring uncontroverted evidence showing that, since the Settlement Trusts were created over a decade ago, Petitioners have consistently written up the senior certificates' balances in substantively identical circumstances. To do otherwise now sharply changes how Petitioners administer certificate write-ups and upsets the settled expectations of the parties. Tellingly, out of the myriad investors that hold certificates issued by the impacted Settlement Trusts, just one investor, Nover Ventures, endorsed the IAS Court's holding that only the subordinate certificates issued by those Trusts are eligible for write-ups.

The IAS Court's erroneous decision on this issue turns the Trusts' seniority structure upside down, with the Trusts' senior certificates continuing to suffer from billions of dollars in realized losses, while the Trusts' far riskier, subordinate certificates have their past realized losses reversed through certificate write-ups. That result is impossible to reconcile with the text, intent, or structure of the contracts. Although the IAS Court should be commended for its careful analysis in resolving an admittedly complex dispute affecting billions of dollars of securities,

and for getting it right on nearly all of the issues, the Court's error in depriving the Trusts' most senior certificates of a key benefit of the settlement defeats the basic bargain struck in the contracts, and must be reversed.

QUESTIONS PRESENTED

1. Do the governing documents for the Settlement Trusts at issue on this appeal permit senior certificates issued by those Trusts to have their certificate balances "written-up" in a manner that reverses some or all of the reduction of those balances when the Trusts receive funds previously written off by the Trusts?

Answer: The IAS Court erred by answering this question no—it construed the governing documents to prohibit such write-ups because it misconstrued and failed to consider relevant provisions of the governing documents and failed to consider whether its reading of those documents was consistent with their purpose and structure.

2. In the event the at-issue Settlement Trusts' governing documents are deemed ambiguous on the matter of whether senior certificates issued by those Trusts may have their certificate balances "written up" in a manner that reverses some or all of their prior losses when the Trusts receive funds previously written off, does extrinsic evidence of the course of performance under those governing documents demonstrate that they were intended to permit such "write-ups"?

Answer: The IAS Court erred by failing to address this question—it failed to recognize that its reading of the governing documents rendered them ambiguous and thus further failed to consider uncontroverted course of performance evidence that the parties have consistently interpreted the at-issue Settlement Trusts' governing agreements to permit the "write-up" of senior certificates.

3. In the event the at-issue Settlement Trusts' governing documents are deemed ambiguous as to whether senior certificates issued by those Trusts may have their certificate balances "written up" in a manner that reverses some or all of the reduction of those balances when the Trusts receive funds previously written off by the Trusts, and this Court declines to make a finding as to the import of the uncontroverted evidence of the course of performance under those governing documents, should this case be remanded to the IAS Court?

Answer: The IAS Court erred by failing to recognize that its reading of the governing documents rendered them ambiguous, and thus did not reach this question. Accordingly, in the event the at-issue Settlement Trusts' governing documents are deemed ambiguous and this Court does not find the uncontroverted course of performance evidence dispositive, the case should be remanded to the IAS Court with instructions to resolve the factual question

concerning the proper interpretation of the governing documents by reference to extrinsic evidence.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. Factual Background

This appeal involves six central disputed issues in connection with the distribution methodology for a $4.5 billion settlement of representation and warranty claims for over three hundred RMBS trusts. The settlement at issue was negotiated between the below-signed sixteen Institutional Investors and JPMorgan in November 2013; and was accepted by the Settlement Trusts' trustees in July 2014, following a period during which the trustees reviewed the settlement offer and revised the Settlement Agreement. (R.26-27.) The settlement was approved by the New York Supreme Court (Friedman, J.) in August 2016.[3]

The Settlement Trusts were created in the lead-up to the financial crisis through the packaging of mortgage loans into trusts that issued securities in the form of certificates for sale to investors. The certificates represent interests in the income stream the Settlement Trusts were expected to receive on the mortgage loans they owned. The Settlement Trusts' assets are the obligations owed by the borrowers on the mortgages, and the Settlement Trusts' liabilities are their payment obligations to holders of their certificates. The terms and conditions of the Settlement Trusts are set forth in lengthy contracts, called "Indentures" or "Pooling and Servicing

[3] *See Matter of U.S. Bank N.A. v. Federal Home Loan Bank of Boston*, 2015 Slip Op. 32846 (U), 2016 WL 9110399, at *1 [Sup. Ct., NY Cty, Aug. 12, 2016] ("JPMorgan I").

Agreements" (collectively, "PSAs"), which spell out, among other things, the manner in which the Settlement Trusts' cash flows and losses are allocated and distributed to the Trusts' certificates. The Settlement Trusts offer their certificates to investors through documents known as prospectus supplements, or "ProSupps," which disclose the certificates' material terms and conditions, on which the investors based their investment decisions.

When individual mortgages owned by a Settlement Trust default, and proceed through a foreclosure sale or other "liquidation" event, the difference between the amount still owed on the mortgage, and the amount recovered through the foreclosure or other liquidation event, is deemed a "Realized Loss." (R.5905.[4]) That Realized Loss is passed on to the certificates held by investors by reducing, or "writing down" the amount owed on the certificates (referred to as such certificate's "principal balance"), thereby lowering investors' remaining claims against the Settlement Trust for payment. (*Id.*[5]) In this way, whenever the Settlement Trusts'

[4] A typical definition of "Realized Loss" is found in the PSA for GPMF 2005-AR4: "Realized Loss: Any (i) Bankruptcy Loss or (ii) as to any Liquidated Mortgage Loan, (x) the Outstanding Principal Balance of such Liquidated Mortgage Loan plus accrued and unpaid interest thereon at the Mortgage Interest Rate through the last day of the month of such liquidation, less (y) the related Net Liquidation Proceeds with respect to such Mortgage Loan and the related Mortgage Property. In addition, to the extent the Servicer receives Subsequent Recoveries with respect to any Mortgage Loan, the amount of the Realized Loss with respect to that Mortgage Loan will be reduced to the extent such recoveries are applied to reduce the Current Principal Amount of any Class of Certificates on any Distribution Date."

[5] Section 6.02(b) of PSA for GPMF 2005-AR4 provides for reduction of certificate balances of senior certificates by the amount of Realized Losses: "With respect to any Certificates [on] any

assets (the mortgage loans) are written down, the Trusts' liabilities (the obligations owed on their certificates) are written down by the same amount. This ensures that the Trusts' assets and liabilities stay in balance.

The Settlement Trusts issued certificates with varying levels of risk attached to them. The safest certificates are known as "Senior Certificates," and the riskiest certificates are known as "Subordinate Certificates." In exchange for taking less risk, the Senior Certificates generally paid out lower monthly coupon payments to investors, compared to the Subordinate Certificates. (R.10456.[6]) The PSAs contain detailed provisions allocating Realized Losses to the various certificates. To enhance the safety of the Senior Certificates, Realized Losses are first allocated to the Subordinate Certificates. (R.10445.[7]) Once the Subordinate Certificates are written down to zero, however, the Senior Certificates begin to suffer Realized Losses. (*Id.*) The Trusts also have a mechanism to reverse previous Realized Losses if cash is received by the Trusts with respect to one or more defaulted mortgages

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Distribution Date, the principal portion of each Realized Loss on a Mortgage Loan in a Loan Group shall be allocated as follows: […] fourteenth, to the Class of Senior Certificates in the related Certificate Group as described in Section 6.02(d) hereof."

[6] August 2018 monthly remittance report for SAMI 2006-AR5, showing interest rates ranging from 2.27% to the most senior certificate, the 1-A-1 certificate, up to 4.21%, to the most subordinate certificate, the B-11 certificate).

[7] Section 6.05 of the PSA for BSABS 2006-HE3 provides that Realized Losses are first to be allocated to eleven different Subordinate Certificates (Class M1 through M11) in order of increasing seniority, and only then, once the Subordinate Certificates have been written down to zero, to the Class A Senior Certificates.

after a Realized Loss has already been passed through to the certificates. Such cash receipts "subsequent" to a Realized Loss are called "Subsequent Recoveries." (R.28-29[8]; R.10395.[9]) A Subsequent Recovery could be small relative to the previous Realized Loss, such as a single, trailing payment received on a mortgage after a foreclosure has been completed. Or, a Subsequent Recovery could be large, such as a repurchase or settlement payment from the issuer of the Settlement Trust that could make the Trust whole for the entire amount of a prior Realized Loss.

Importantly, when a Subsequent Recovery payment is received by the Trusts, one or more of the Trusts' certificate balances must be "written up," in order to reverse the Realized Loss previously incurred by the certificates and to keep the Trusts' assets and liabilities in balance. (R.29; R.10395; R.364.) In this way, Subsequent Recoveries are accounted for as negative Realized Losses. (*See*, *e.g.*, R.10456-10458 [showing that upon a trust's receipt of a Subsequent Recovery in the

[8] The IAS Court explained at pages 3 to 4 of the Decision and Order that "[a] Trust may receive a monetary recovery related to a realized loss previously allocated to the certificates. Most Trusts refer to such a recovery as a 'subsequent recovery,' and provide that when a subsequent recovery is realized, certificate principal balances of previously written down certificates generally must be increased, or 'written up,' by the amount of the Subsequent Recovery." *See also* R.354 (Petition describing the general features of subsequent recoveries).

[9] PSA for SAMI 2007-AR4: "As of any Distribution Date, amounts received during the related Prepayment Period by the Servicer … or Surplus amounts held by the Servicer to cover estimated expenses (including, but not limited to, recoveries in respect of the representations and warranties made by the Sponsor Pursuant to the Mortgage Loan Purchase Agreement) specifically related to a Liquidated Mortgage Loan, a Mortgage Loan that has been modified which resulted in a Realized Loss or a final disposition of any REO Property prior to the related Prepayment Period that resulted in a Realized Loss."

ordinary course, the Senior Certificates are allocated negative Realized Losses to reduce their prior Realized Losses].) This mechanism is expressly set out in the definition of Realized Loss, which typically provide as follows:

> Realized Loss: Any (i) Bankruptcy Loss or (ii) as to any Liquidated Mortgage Loan, (x) the Outstanding Principal Balance of such Liquidated Mortgage Loan plus accrued and unpaid interest thereon at the Mortgage Interest Rate through the last day of the month of such liquidation, less (y) the related Net Liquidation Proceeds with respect to such Mortgage Loan and the related Mortgage Property. In addition, to the extent the Servicer receives Subsequent Recoveries with respect to any Mortgage Loan, the amount of the Realized Loss with respect to that Mortgage Loan will be reduced to the extent such recoveries are applied to reduce the Current Principal Amount of any Class of Certificates on any Distribution Date.

(R.5905 [PSA for GPMF 2005-AR4]; *see also* R.5902-5908 [collecting the definitions of Realized Loss for each of the Exhibit E Trusts].) Thus, as set forth in the final sentence of the foregoing definition, to the extent Subsequent Recoveries are received and distributed, they are accounted for as negative or reduced Realized Loss.

As has been well documented, investors in RMBS trusts like the Settlement Trusts suffered catastrophic losses during and after the financial crisis, when huge numbers of the mortgages held by these trusts defaulted and went through foreclosures and other liquidations. The Settlement Trusts suffered losses of more than $64.5 billion. R.5882. The magnitude of the losses was so high that, in many of the Settlement Trusts, the principal balances of all of the Subordinate Certificates

were written down to zero, with the Senior Certificates also suffering from billions of dollars in Realized Losses.

An example is illustrative. One of the Settlement Trusts, called "Structured Asset Mortgage Trust Investments Inc. Mortgage Pass-Through Certificates Series 2006-AR5, or "SAMI 2006-AR5" for shorthand, experienced $186 million in Realized Losses by August 2018. (R.10456.) As a result, all of the Trust's Subordinate Certificates—denominated the "Class B-1" through "Class B-11" certificates—had been written down to zero. (*Id.*) However, the Subordinate Certificates were only capable of absorbing $75 million in realized losses through write-downs, because their original certificate balances were only $75 million. (*Id.*) Accordingly, the Senior Certificates – termed the "Class A" certificates – suffered approximately $111 million of the $186 million in total losses experienced by the Trust. (*Id.*)

The $4.5 billion settlement paid by JPMorgan was meant to compensate the Settlement Trusts for the portion of their losses attributable to mortgages that violated representations and warranties made by JPMorgan in the relevant governing agreements, including that the mortgages were underwritten in accordance with JPMorgan's underwriting guidelines, and that the homes had proper appraisals, had sufficient value to support the amount of the loans, and were occupied by their

owners. (R.64 [Decision and Order].[10]) Pursuant to Section 3.05 of the Settlement Agreement, the settlement funds were divided among the Settlement Trusts in proportion to the overall losses they had suffered. (R.417-418.)

Consistent with the overall purpose of the global Settlement Agreement—compensating the Trusts for their past and future Realized Losses—the Settlement Agreement provides for two essential operations when distributing the settlement funds: (1) the distribution of the settlement payment as though it were a Subsequent Recovery; and (2) the reversal of previous Realized Losses through the "write up" of certificate balances by the amount of the settlement payment. (R.418-419 [Section 3.06(a) and 3.06(b) of Settlement Agreement].) In the second operation, the certificate write-up, Senior Certificates are the first certificates to have their prior Realized Losses reversed, because they are the last certificates that are supposed to suffer Realized Losses.

As to the first operation, the distribution of the settlement funds, Section 3.06(a) of the Settlement Agreement (R.418) provides:

> (a) Each Trust's Allocable Share shall be deposited 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 (taking into account the Expert's determination under Section 3.05) as though such Allocable Share was a "subsequent

[10] *See also JPMorgan I*, 2016 WL 9110399 at *4-*5 (describing trustees' engagement of experts to estimate losses incurred by the trusts due to breaches of representations and warranties).

> recovery" relating to principal proceeds available for distribution on the immediately following distribution date…

As to the second operation, the write-up of the certificates by the amount of the settlement payment, Section 3.06(b) of the Settlement Agreement (R.418-R.419) provides:

> 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 . . . 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.

The write-up procedure specified in the Settlement Agreement accords with the manner in which the Settlement Trusts' trustees have always performed certificate write-ups and Realized Loss reversals upon the Trusts' receipt of Subsequent Recoveries. Whenever Realized Losses were reversed, Petitioners wrote up certificates in the reverse order of previously allocated Losses, meaning they would first write up the senior-most certificate that had previously suffered Realized Losses, including any Senior Certificates that had previously suffered a Realized Loss. (*See* pp. 28-36, *infra*.) This is precisely what the Settlement Agreement provides.

B. The Proceedings Below

In December 2017, the Settlement Trusts received the settlement funds from JPMorgan, exceeding $4 billion, and Petitioners immediately filed the Petition, seeking judicial instructions on six issues relating to the settlement payment distribution methodology for 270 of the 300-plus trusts covered by the Settlement Agreement.[11] Petitioners are the Settlement Trusts' trustees and payment administrators, who had not only administered the very same Trusts pursuant to the terms of the PSAs for over a decade, but who had been involved with the drafting of the Settlement Agreement the Petition discusses at length.[12] More than a dozen sophisticated groups of investors—holding billions of dollars of investments impacted by the alternative distribution methodologies described in the Petition—appeared in the Article 77, often taking diametrically opposed positions on the central distribution disputes set forth in the Petition.

Notwithstanding their decade-long practice of writing up all certificates that incurred losses, one of the six central issues on which Petitioners sought judicial

[11] Since the filing of the Petition, the settlement funds for most of the 270 trusts originally included in the case have been distributed by agreement among the parties, leaving approximately 75 Settlement Trusts in dispute, for which approximately $1.3 billion in settlement funds remain in escrow pending the outcome of this appeal. *See* R.72-R.342 (collecting severance orders entered for many trusts, whose settlement funds have now been distributed) & R.5866-R.5901 (showing settlement amounts for each of the Settlement Trusts, in proportion to their losses).

[12] *JPMorgan I*, 2016 WL 9110399, at *1-*9 (Petitioners accepted modified agreement in July 2014, after receiving initial settlement offer in November 2013 and conducting extensive due diligence on that settlement offer).

instructions was whether senior certificates of certain Settlement Trusts that have suffered Realized Losses—listed in Exhibit E to the Petition (the "Exhibit E Trusts")—are eligible to be written up based on a Settlement Trust's receipt of its portion of the settlement payment. (R.379-380.) In the two pages of the Petition devoted to this issue, Petitioners cited a single, isolated provision of the PSAs for these Exhibit E Trusts that typically appears at Section 6.02(h) of the PSAs (the "Section 6.02(h) Provision") (R.379):

> If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such Subsequent Recoveries will be applied to increase the Current Principal Amount of the Class of Subordinate Certificates with the highest payment priority to which Applied Realized Loss Amounts have been allocated, but not by more than the amount of Realized Losses previously allocated to that class of Subordinate Certificates . . . .

Petitioners narrowly focused on the reference to "Subordinate Certificates" in this provision to suggest, contrary to their own, established practice of writing up all certificates, that perhaps only Subordinate Certificates are eligible for write-ups.

Following an extensive notice protocol to all of the Trusts' investors, (*see* R.688-701) (Court-ordered notice program), only a single investor appeared in this Article 77 proceeding and took the position that Subordinate Certificates, alone, were eligible for write-ups: Nover Ventures, LLC. (R.56.) Tellingly, despite their many differences, and their differing holdings in the Trusts' seniority structures, all other investors that responded to the Petition unanimously agreed that the Settlement

Trusts' trustees' practice of writing up Senior Certificates was appropriate and should be followed when distributing the settlement payment.

In the Decision and Order, the IAS Court correctly held that the Settlement Agreement "clearly provides for the write up of [S]enior Certificates" of the Settlement Trusts, including the Exhibit E Trusts. (R.56-57.) However, the IAS Court agreed with Nover that Settlement Trusts whose PSAs contain the Section 6.02(h) Provision or its equivalent restrict write-ups based on the receipt of Subsequent Recoveries (such as the settlement payment) to Subordinate Certificates. (R.60.) Having previously ruled that PSAs trump the Settlement Agreement in the case of a conflict, the IAS Court held that Exhibit E Trusts with PSAs containing the Section 6.02(h) Provision or its equivalent (the "Subject Exhibit E Trusts") restrict write-ups based on the receipt of Subsequent Recoveries (such as the settlement payment) to Subordinate Certificates. (*Id.*) In so holding, the IAS Court misconstrued the Section 6.02(h) Provision, and failed to: (i) harmonize that isolated provision with other key terms in the PSAs and ProSupps which permit write-ups of Senior Certificates; (ii) address Petitioners' undisputed practice of construing the exact same PSAs to permit Senior Certificates write-ups; (iii) harmonize the IAS Court's construction of the PSAs with the Subject Exhibit E Trusts' senior/subordinate structure; and (iv) consider the absurd consequences that would

result from the reversal of the senior/subordinate structure, including fundamental and irreconcilable breakdowns in the Trusts' accounting structure.

This appeal followed.

ARGUMENT

A. THE PSAs FOR THE SUBJECT EXHIBIT E TRUSTS UNAMBIGUOUSLY PERMIT SENIOR CERTIFICATE WRITE-UPS.

Read in context and properly construed,[13] the PSAs for the Subject Exhibit E trusts unambiguously provide that all certificates that suffer from Realized Losses are eligible to have those losses reversed through certificate write-ups whenever Subsequent Recoveries are received. The IAS Court erred by misconstruing a single, isolated provision of some of these PSAs—the Section 6.02(h) Provision—to prohibit Senior Certificate write-ups. (R.58.) This provision, however, is simply silent as to the eligibility of senior certificates for write-ups and the reversal of Realized Losses. Moreover, other key terms of the PSAs and the ProSupps for the Subject Exhibit E Trusts make clear that all certificates that suffer from losses are eligible for certificate write-ups and Realized Loss reversals upon the receipt of Subsequent Recoveries.[14]

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[13] When engaging in contract interpretation, "the standard of review is for [the First Department] to examine the contract's language de novo." *MPEG LA, LLC v Samsung Elecs. Co., Ltd.*, 166 A.D.3d 13, 17 [1st Dept 2018], *lv denied*, 32 N.Y.3d 912 [2018].

[14] Out of the twenty-six disputed Exhibit E trusts, there are five trusts for which the Senior Certificates are not allocated Realized Losses at all, and therefore would not receive a subsequent

1. Section 6.02(h) is silent as to Senior Certificate write-ups and contains no prohibition on the write-up of Senior Certificates.

As noted above, the Section 6.02(h) Provision (R.379-380) states:

> If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such Subsequent Recoveries will be applied to increase the Current Principal Amount of the Class of Subordinate Certificates with the highest payment priority to which Applied Realized Loss Amounts have been allocated, but not by more than the amount of Realized Losses previously allocated to that Class of Subordinate Certificates . . . .

Contrary to the IAS Court's conclusion (R.58), this provision does not prohibit Senior Certificate write-ups. While it expressly authorizes write-ups of Subordinate Certificates, it is silent on the issue of write-ups for Senior Certificates, and provides no justification for a blanket prohibition on Senior Certificate write-ups.

2. A Full Reading Of The PSAs And Their Related ProSupps Makes Clear That All Certificates Are Eligible For Realized Loss Reversals and Certificate Write-Ups.

Though the Section 6.02(h) Provision of the Subject Exhibit E Trusts' PSAs is silent on the question of write-ups for Senior Certificates, other provisions of those PSAs are not. In particular, the definition of "Realized Losses" in those PSAs provides that "any Class of Certificates"—including Senior Certificates—is eligible

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recovery write-up even if they were eligible for such a write-up. The Trustees conceded in Footnote 21 of the Petition, R.380, that for trusts such as these, in which Senior Certificates are not allocated realized losses at all, the issues identified for the Exhibit E trusts do not impact such trusts. These five Bear Stearns trusts are: BSABS 2005-AC3, BSABS 2005-AC5, BSABS 2005-AC6, BSABS 2006-AC1, and BSABS 2006-AC2. (*See* R.5902 & R.5907-5908 (showing relevant PSA language for each of these trusts)).

to have its previous Realized Losses reduced, a result that can only be achieved through writing back up its certificate balance after it has been written down. In this regard, the definition of Realized Loss generally provides:

> Realized Loss: Any (i) Bankruptcy Loss or (ii) as to any Liquidated Mortgage Loan, (x) the Outstanding Principal Balance of such Liquidated Mortgage Loan plus accrued and unpaid interest thereon at the Mortgage Interest Rate through the last day of the month of such liquidation, less (y) the related Net Liquidation Proceeds with respect to such Mortgage Loan and the related Mortgage Property. In addition, to the extent the Servicer receives Subsequent Recoveries with respect to any Mortgage Loan, the amount of the Realized Loss with respect to that Mortgage Loan will be reduced to the extent such recoveries are applied to reduce the Current Principal Amount of any Class of Certificates on any Distribution Date.

(R.5905, PSA for GPMF 2005-AR4.) As explained above (pp. 9-11, *supra)*, certificate write-ups reduce previously allocated Realized Losses whenever Subsequent Recoveries are received, so that the Trusts' assets and liabilities remain in balance. This Realized Loss definition thus encapsulates the logical and necessary symmetry between: (i) the allocation of Realized Losses, and (ii) the allocation of Realized Loss reductions, which are achieved through certificate write-ups. (*See, e.g.*, R.10456-10458 [showing that upon a trust's receipt of a Subsequent Recovery in the ordinary course, the senior certificates' prior Realized Losses are reversed as a result].)

The IAS Court erred when it held that "while the Realized Loss definition provides for the allocation of losses to reduce certificate balances of certificates

including senior certificates, the definition does not address the write-up of balances of certificates to account for subsequent recoveries." (R.58.) This is because the Subject Exhibit E Trusts' definition of Realized Loss plainly does address certificate write-ups, because certificate write-ups are part and parcel of realized loss reductions. Reversing previously allocated Realized Losses is the purpose of certificate write-ups; they are two sides of the same coin. And, the definition of Realized Loss unambiguously provides that Realized Loss reversals are possible for "any Class of Certificates" which had previously been allocated Realized Losses. Because Senior Certificates have indisputably been allocated Realized Losses—billions of them, in fact—they are eligible for Realized Loss reversals.

In addition to misconstruing the definition of Realized Loss in the Subject Exhibit E Trusts' PSAs, the IAS Court also failed to consider relevant language in the ProSupps for the Subject Exhibit E trusts, which often unquestionably permit Senior Certificate write-ups. (R.10412; R.10414.) To cite a representative example, the SAMI 2006-AR5 ProSupp states, "the Certificate Principal Balance of each class of Certificates that has been reduced by the allocation of a Realized Loss to such Certificate will be increased, in order of seniority, by the amount of such Subsequent Recovery." (R.10412.) This provision in the ProSupp provides for Realized Loss reversals through certificate write-ups for "each class of Certificates that has been reduced by the allocation of a Realized Loss." This plainly includes Senior

Certificates. Similarly, the ProSupp for SAMI 2007-AR4 provides that "to the extent the Servicer receives Subsequent Recoveries with respect to any mortgage loan, the amount of the Realized Loss with respect to that mortgage loan will be reduced to the extent such recoveries are applied to reduce the Current Principal Amount of any class of Certificates…" (R.10414.) There is no colorable argument that such language permits only Subordinate Certificate write-ups, as the IAS Court held.[15]

The IAS Court erred by failing to consider the relevant portions of the Subject Exhibit E Trusts' ProSupps in its analysis, even though all writings forming part of a single transaction must be read together. (*See, e.g.*, *This Is Me, Inc. v. Taylor*, 157 F3d 139, 143 [2d Cir 1998]; *PETRA CRE 2007-1 CDO, Ltd. v. Morgans Group LLC*, 84 A.D.3d 614, 615 [1st Dept 2011] ["Agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one."]; *see also Nau v. Vulcan Rail &*

[15] Other ProSupps that discuss only subordinate write-ups, such as GPMF 2006-AR1, do not explicitly preclude write-ups to senior classes, and in fact suggest that only subordinate write-ups are discussed because only subordinate write-downs were contemplated:

> Subordination provides the holders of Offered Certificates having a higher payment priority with protection against Realized Losses on the mortgage loans. In general, this loss protection is accomplished by allocating any Realized Losses among the Subordinate Certificates…the Current Principal Amount of each class of Subordinate Certificates that has been reduced by the allocation of a Realized Loss to such Certificate will be increased, in order of seniority, by the amount of such Subsequent Recovery…" R.10416-10417.

Construction Co., 286 NY 188, 197 [1941] [holding that instruments executed at substantially the same time and related to the same subject matter are contemporaneous writings that must be read together as one]; *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 20 NY3d 438, 445 [2013] [same]; *In re Trusteeship Created by Am. Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494, 2014 WL 3858506, at *20-21 [SDNY July 24, 2014] [holding all deal documents must be read together].) A prospectus supplement is one of the "instruments disclosing all material terms and conditions" of a security like those issued by the Trusts. (*In re Trusteeship Created by Am. Home Mortg. Inv. Trust 2005-2*, 14 CIV. 2494 AKH, 2014 WL 3858506, at *20 [SDNY July 24, 2014].) New York courts have therefore held that agreements like PSAs must be read in conjunction with prospectus supplements to ascertain the parties' actual intent. (*See Wells Fargo Bank, N.A. v. Fin. Sec. Assur. Inc.*, 504 Fed. Appx. 38, 40 [2d Cir 2012]; *Bank of New York Mellon v. WMC Mortg., LLC*, 12CV7096 DLC, 2015 WL 4597540, at *8 [SDNY July 30, 2015].) Critically, even Nover agreed that the prospectus supplements should be taken into account, describing them as "documents that investors rely on (and are told to rely on) when making investment decisions." (R.5961.)

3. The Court Ignored the Senior/Subordinate Structure and Failed to Recognize the Absurd Consequences That Would Result from Prohibiting Senior Certificate Write-Ups.

Not only did the IAS Court fail to harmonize the isolated provision on which it relied with other relevant terms of the PSAs and ProSupps, it also failed to reconcile its holding with the essential feature of the Trusts' senior/subordinate structure, which is to insulate the senior-most certificates from Realized Losses.

In this regard, the IAS Court did not explain how any party could have conceivably expected that, upon the receipt of Subsequent Recoveries, the Subject Exhibit E Trusts' senior-most certificates would continue to suffer from past Realized Losses, while the Subordinate Certificates' losses would be reversed. The allocation of losses between senior and subordinate certificates is central to the Trusts' mechanics, and the IAS Court's reasoning turns it upside down.

In this regard, the IAS Court again overlooked the Trusts' ProSupps, which set out this senior/subordinate structure in clear terms:

> Subordination provides the holders of Offered Certificates in a Loan Group having a higher payment priority with protection against Realized Losses on the related mortgage loans. In general, this loss protection is accomplished by allocating any Realized Losses in a Loan Group in excess of available Excess Spread and any current overcollateralization (if any) for such loan group among the related Subordinate Certificates, beginning with the Subordinate Certificates with the lowest payment priority until the Current Principal Amount of that subordinate class has been reduced to zero.

(R.10399 [ProSupp for BSMF 2006-AR1].) The essential feature of the senior/subordinate structure is that Subordinate Certificates absorb all Realized Losses before the Senior Certificates suffer any Realized Losses. Under the IAS Court's holding, however, the opposite would be true: the Subordinate Certificates' losses would be reduced by the settlement payment, even though the Senior Certificates will continue to suffer from billions of dollars in Realized Losses.

It is well settled that "a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." (*Luver Plumbing and Heating, Inc. v Mo's Plumbing and Heating*, 144 A.D.3d 587, 588 [1st Dept 2016].) Acknowledging this principle, the IAS Court reasoned that while the PSAs "generally provide for structures in which distributions are made and losses allocated based on seniority, [Appellants] fail[ed] to show that it is absurd for a Governing Agreement to give priority in limited respects, such as allocation of write-ups, to junior classes." (R.59.) The protection afforded by the allocation and reversal of Realized Losses, however, is not a "limited respect" of the priority structure in the contracts–it is the *sine qua non* of the priority structure. (R.10399.) For that reason, the Trustees have consistently permitted Senior Certificate write-ups, and there is nearly universal consensus among all investors—except Nover—that the Trustees should continue to do so here.

Taken to its logical conclusion, the IAS Court's holding that write-ups are limited to Subordinate Certificates would lead to an additional absurd result by capping the amount of Realizes Losses that could be reversed at the principal amount of a Subject Exhibit E Trust's Subordinate Certificates. To again take the SAMI 2006-AR5 trust as an example, the trust suffered $186 million in Realized Losses through August 2018, of which $111 million were allocated to the Senior Certificates and $75 million were allocated to the Subordinate Certificates. R.10456. If the Subsequent Recoveries received by this Trust were to exceed $75 million, then under the IAS Court's construction of the Section 6.02(h) Provision, the full amount of the $75 million in Realized Losses allocated to the Subordinate Certificates would be reversed through a write-up, but there would be no write up of the Senior Certificates to account for the Trust's receipt of the amount of the Subsequent Recoveries over and above $75 million.

Such a scenario would result in an impermissible imbalance between the Trust's assets and liabilities, as the Trusts' assets (the mortgages) would appear to be higher than the Trusts' liabilities (the certificates) by the amount the Subsequent Recoveries exceeded $75 million. In fact, even Petitioners have expressed concern that restricting write-ups would create an untenable result. Petitioner U.S. Bank has stated that, "it needs an appropriate mechanism by which to apply the entire amount of the applicable settlement payment write-up" and that write-up restrictions could

create a situation in which the only certificates that are purportedly eligible for write-up "do not have sufficient losses to absorb the entire settlement payment write-up." (R. 10420.[16])

The IAS Court erred by resolving the Exhibit E issue in such a way as to create an absurd and untenable result—directly at odds with the senior/subordinate structure and the parties' reasonable expectations. The Court should reverse the IAS Court's ruling, and hold that senior certificates in the Exhibit E Trusts are permitted to be written up upon the Settlement Trusts' receipt of the Settlement Payment.

B. IF THE SECTION 6.02(h) PROVISION IS DEEMED TO PROHIBIT SENIOR CERTIFICATE WRITE-UPS, THE PSAS FOR THE SUBJECT EXHIBIT E TRUSTS ARE RENDERED AMBIGUOUS AND THE UNCONTROVERTED EVIDENCE OF THE PARTIES' COURSE OF PERFORMANCE COMPELS THE CONCLUSION THAT SENIOR CERTIFICATE WRITE-UPS ARE REQUIRED.

As set forth in the prior Section, both the Settlement Agreement and the Subject Exhibit E Trusts' PSAs require senior certificate write-ups. However, if the Section 6.02(h) Provision is read to prohibit the write-up of senior Certificates, as the IAS Court did in the Decision and Order, it renders the PSAs internally inconsistent and, therefore, ambiguous. As such, the IAS Court was required to

[16] Kushner Aff. Ex. L, September 10, 2018 email from U.S. Bank Counsel to all counsel in the IAS Court proceeding.

consider extrinsic evidence of the parties' intent. Instead, the IAS Court ignored the best available evidence of their intent: the parties' own course of performance.

This Court, the Supreme Court and the Restatement [Second] of Contracts have all observed that there is no better indication of contractual parties' intent than their own course of performance. Here, the course of performance evidence could not be clearer in demonstrating that, up through the date that this issue was presented to the IAS Court, the Petitioner trustees and/or other deal parties to the Subject Exhibit E Trusts unequivocally wrote up senior certificates upon the receipt of Subsequent Recoveries. Further, such evidence of course of performance was entirely uncontroverted in the record before the IAS Court. Nover—the lone party contending that senior certificate write-ups were prohibited—produced no evidence demonstrating Subsequent Recoveries were treated in any other manner over the greater than twelve years since these trusts were created. The IAS Court simply ignored this unequivocal, unrebutted and critically important evidence, which constitutes clear error and warrants reversal.

1. Where Contract Terms Are Inconsistent or Ambiguous, Extrinsic Evidence of Course of Performance Is the Strongest Evidence of Their Meaning.

Where there are "internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties' intent." (*Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44 [1st Dept 1999] [citing *Bianculli v*

Bianculli, 242 AD2d 647 [2nd Dept 1997]; *Friedman v Smithfield, Inc.,* 146 AD2d 567 [2nd Dept 1989]].) Even where the terms of the contract are unambiguous, if the literal application of those terms would lead to an absurd result, "the courts can reject such a construction in favor of one which would better accord with the reasonable expectations of the parties." (*Reape v New York News*, 122 AD2d 29, 30, *lv denied* 68 NY2d 610 [citing *Sutton v. East Riv. Sav. Bank*, 55 NY2d 550, 555 [1982]; *Tougher Heating & Plumbing Co. v. State of New York*, 73 AD2d 732, 733 [3d Dept 1979]].) "Since the intent of the parties in entering an agreement is a paramount consideration when construing a contract, even the actual words provided therein may be transplanted, supplied or entirely rejected to clarify the meaning of the contract." *Id*.

Nothing better exhibits the parties' intent than their prior course of performance in connection with the agreement in question. Indeed, this Court has held that "the parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties.'" (*Federal Ins. Co.,* 258 A.D2d at 44 [quoting, *Webster's Red Seal Publs. v. Gilberton World–Wide Publs.,* 67 A.D2d 339 [1st Dep't 1999] *aff'd* 53 NY2d 643]].) The United States Supreme Court has likewise held that, "[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling,

influence." (*Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 [1913].) Indeed, "[t]he parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning." Restatement [Second] of Contracts § 202, comment g.

2. In Light of the IAS Court's Interpretation of the Section 6.02(h) Provision, Inconsistencies and Ambiguities Within the PSAs Existed, Requiring Review of Extrinsic Evidence of Course of Performance.

The IAS Court's Order holding that the Section 6.02(h) Provision prohibits write-ups of Senior Certificates rendered the PSA internally inconsistent—and, therefore, ambiguous—due to the presence of the above-discussed language in the PSAs and ProSupps specifying that all classes of certificates are eligible to be written up. (*See, e.g.*, *Chimart Assocs. v. Paul*, 66 NY2d 570, 573 [1986] [ambiguity in a contract exists where "the agreement on its face is reasonably susceptible of more than one interpretation."].) As the First Department has explained, "[w]here ... there are internal inconsistencies in a contract pointing to ambiguity, extrinsic evidence is admissible to determine the parties' intent." (*Collins v. Harrison-Bode*, 303 F.3d 429, 433, 34 [2d Cir 2002] [citing *Fed. Ins. Co. v. Americas Ins. Co.*, 258 AD2d 39, 691 NYS2d 508, 512 [1st Dept 1999]].)

Indeed, Petitioners themselves apparently perceived the ambiguity that resulted from reading the Section 6.02(h) Provision to prohibit write-ups of Senior Certificates, for they otherwise would not have sought guidance from the Court

about whether or not to apply write-ups to Senior Certificates in the Subject Exhibit E Trusts. In their Petition, they cited the above-discussed structural anomaly (*see* pp.15-16, *supra*) that results from allocating Realized Losses to Senior Certificates without permitting them to be written back up as the very reason Petitioners required guidance from the Court. (R.379-380.[17])

Given the ambiguity created by the IAS Court's reading of the Section 6.02(h) Provision, it was incumbent upon the IAS Court to consider the extrinsic evidence of the parties' course of performance that was included in the record. *Federal Ins. Co*., 258 AD2d 39, is instructive in this regard. There, this Court determined that the IAS Court had erred in declining to consider extrinsic evidence of the parties' intent as to whether a certain insurance policy covered the entity (Pyramid) whose employee had been injured in a truck accident. This Court further found that the IAS Court had "implicitly recognized," by noting internal inconsistencies in the policy in question, that such policy was "ambiguous insofar as it reflected the parties' intent with respect to providing automobile liability coverage for Pyramid's vehicles." (*Id*. at 43.) This Court went on to find that, in light of the internal inconsistencies in the contract indicating ambiguity, the best evidence of the parties' intent—other than sworn affidavits from both parties as to a mutually agreeable

[17] Petition ¶¶ 45-48.

intent—was their prior conduct. (*Id*. at 44.) This Court found that the insurance company denying coverage had submitted "unequivocal" and "unrebutted" evidence of the parties' course of performance consistent with the insurer's interpretation, and that the IAS Court erred in declining to consider such evidence and when it denied the insurance company's motion for summary judgment. (*Id*.) Here, too, the IAS Court erred in ignoring or declining to consider the best evidence available to it—the unambiguous and unrebutted evidence of the parties' course of performance in the Exhibit E Settlement Trusts, which is consistent with the interpretation that senior certificates were entitled to be written up when Subsequent Recoveries were received.

3. The Evidence of Course of Performance in the Record Establishes Conclusively that the Parties Intended that Senior Certificates Be Written Up Upon the Receipt of Subsequent Recoveries.

The unrebutted extrinsic evidence before the IAS Court, in the form of monthly remittance reports made available to all deal parties, demonstrates conclusively that the intent of the parties was to permit Senior Certificate write-ups. (*See* R.10349-10350; R.10454, 10456-10462.) Namely, these monthly reports show that Senior Certificates repeatedly and consistently had been written up when Subsequent Recoveries were received, and that all deal parties were regularly made aware of such write-ups. (*Id.*)

Remittance reports are periodic accountings of trust cash flows, balances and underlying loan performance that are required under the terms of the PSAs to be made available to all deal parties and investors (and, typically, to the public) on a monthly basis. Unlike most of the issues raised in the Petition—which arise from the unique nature of this one-time bulk settlement payment received by the Trusts—whether seniors should be written up upon the receipt of Subsequent Recoveries is not a novel issue; to the contrary, it is undisputed that the Trustees have repeatedly received, applied, and distributed Subsequent Recoveries to Certificateholders in the Subject Exhibit E Settlement Trusts over the greater than one dozen years since their inception. Remittance reports show that, when they did so, the Trustees consistently wrote-up senior certificates, to the extent of prior Realized Losses, without objection from the other deal parties. (*Id.*) As such, these reports constitute clear course of performance evidence that the parties intended for Senior Certificates to be written up in appropriate circumstances. Indeed, the New York Supreme Court has held, in an Article 77 proceeding similar to the instant case (involving interpretation of RMBS Trust governing agreements), that the Trust remittance reports provided critical evidence of the intent of the parties to the PSAs when those PSAs were arguably susceptible to multiple interpretations. (*See Matter of Bank of New York Mellon as Tr. for 278 Residential Mortg.-Backed Securitization Trusts*, 68 Misc 3d 1206(A), 129 NYS3d 628 [N.Y. Sup. Ct. 2020] [adopting RMBS trustee's position,

in Article 77 proceeding, that parties' course of performance concerning the trustee's decade-long practice of performing interest rate calculations in a particular manner, as reflected in the monthly remittance reports, was "powerful evidence that [the trustee's] reading accurately reflects the intent of the parties to the PSAs"].)

Appellants DW and Ellington presented one or more remittance reports to the IAS Court for each of five such Subject Exhibit E Settlement Trusts (some dated as recently as 2018—after this case was filed) showing write-ups having been applied to senior certificates. (*See* R.10349-10350[18]; R.10454, 10456-10462.[19]) For example, even as recently as August 2018, the Remittance Report for the SAMI 2006-AR5 Subject Exhibit E Trust reflects that the Trust received a Subsequent Recovery for Group 1 loans that was applied (as a credit under Current Realized Loss) to write up the 1-A-2 certificates for this trust, one of the senior classes. (R.10456-10458.[20]) In July 2018, the GPMF 2005-AR4 Subject Exhibit E Trust received a Subsequent Recovery, which was applied to write up the IV-A-2

[18] DW/Ellington 9/14/18 Merits Br. at 11-12.

[19] Margolis Aff . ¶¶ 3-7, Exs. A-E.

[20] Margolis Aff., Ex. A (SAMI 2006-AR5 August 2018 Remittance Report), pp. 1, 25, 64. Further detail on this example is provided for illustration. The relevant loan took a loss of $154,648 in May 2013. This loss was later recovered in August 2018, resulting in realized gains on the group level of $154,347.73 after deducting losses from four other loans. The resulting Subsequent Recovery was applied to, *inter alia*, the Class 1A2 (senior) Certificates.

certificates, one of the senior classes. (R.10459.[21]) In May 2018, the BALTA 2006-3 Subject Exhibit E Trust received a Subsequent Recovery, which was applied to write up the I-A-1 certificates—again, a senior class. (R.10460.[22]) Likewise, in May 2018, Subsequent Recoveries were applied to write up the principal balance of I-A-1, II-A-1, and II-A-2 certificates in the BSARM 2005-3 Subject Exhibit E Trust, which are all senior classes, while in December 2017 (the same month the Petition was filed), Subsequent Recoveries were applied to write up the principal balance of I-A-2 and II-A-2 certificates in the BSMF 2006-AR5 Subject Exhibit E Trust, which are both senior classes. (R.10461-10462.[23])

Critically, neither Nover nor any other party to these proceedings provided any contrary evidence to the IAS Court to refute the course of performance evidence presented by DW and Ellington. Rather than ignoring this evidence, which provided the best available extrinsic evidence of the parties' intent in light of the ambiguity in the Governing Agreements resulting from its interpretation of the Section 6.02(h) Provision, the Court was required to consider it. Had the Court done so, the evidence would have provided unequivocal and powerful support for Appellants'

[21] Margolis Aff., Ex. B (GPMF 2005-AR4 July 2018 Remittance Report), p. 1.

[22] Margolis Aff., Ex. C (BALTA 2006-3 May 2018 Remittance Report), p. 1.

[23] Margolis Aff., Ex. D (BSARM 2005-3 Trust May 2018 Remittance Report), p. 1; Ex. E (BSMF 2006-AR5 Trust December 2017 Remittance Report), p. 1.

interpretation of the PSAs for the Subject Exhibit E Trusts. (*See Matter of Bank of New York Mellon*, 68 Misc 3d at *5.) The IAS Court's failure to consider such evidence constituted clear error and the holding must be reversed.

C. TO THE EXTENT THIS COURT DOES NOT AGREE THAT THE EVIDENCE OF COURSE OF PERFORMANCE IN THE RECORD IS UNEQUIVOCAL AND DISPOSITIVE, IT SHOULD REMAND FOR FURTHER CONSIDERATION OF SAME.

A CPLR Article 77 proceeding is governed by CPLR Article 4, which requires the court to make a summary determination upon the pleadings, papers, and admissions, to the extent no triable issues of fact are raised. (CPLR 409(b); *In re U.S. Bank National Association*, 51 Misc.3d 273, 276 [NY Sup 2015].) In a circumstance "where the interpretation of contract terms or provisions are susceptible to at least two reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, it becomes an issue of fact that must be resolved by [extrinsic evidence or] trial." (*Yanuck v. Simon Paston & Sons Agency, Inc.*, 209 AD2d 207, 208 [1st Dept. 1994] [citing *Amusement Bus. Underwriters v. American Intl. Group,* 66 NY2d 878, 880–881 [Ct. App. 1985]; *see also Rachel Bridge Corp. v. Dishi*, 819 NYS2d 212 [1st Dept. 2006] [in light of lease ambiguity, "the dispute may not be resolved without the aid of extrinsic evidence"].)

As detailed above, Appellants maintain that: (a) the PSAs for the Subject Exhibit E Trusts clearly and unambiguously provide that Senior Certificates are

eligible for write-ups, and (b) should the PSAs be deemed ambiguous, the extrinsic evidence conclusively proves that the parties intended for the Senior Certificates issued by the Subject E Trusts to be eligible for write-ups. That said, if this Court disagrees with those positions, the Court should remand this matter for further proceedings in light of the ambiguity created by the IAS Court's interpretation of the Section 6.02(h) Provision. Such further proceedings would allow Appellants to provide even further evidence—through, *inter alia*, additional remittance reports for the Subject Exhibit E Settlement Trusts—that the parties to the Subject Exhibit E Trusts' PSAs intended to, and consistently did, permit senior certificate write-ups. (*See Ender v. National Fire Ins. Co. of Hartford*, 169 AD2d 420, 421 [1st Dept 1991] [remanded to the IAS Court to afford the parties an opportunity to submit additional evidence to enable the trier of fact to resolve ambiguities in a contract and to discern the parties' true intent]; *Walrich v. Security Mut. Ins. Co.*, 96 A.D.2d 658, 658-59 [3rd Dept 1983] [reversing and remanding grant of summary judgment due to ambiguity on the face of written agreement at issue]; *LoFrisco v. Winston & Strawn LLP*, 42 A.D.3d 304, 307-308 [1st Dept 2007] [holding neither party was entitled to summary judgment where ambiguity could not be resolved by reading the agreement as a whole and remanded for trial to determine the correct interpretation of the agreement].)

In addition, such proceedings would allow Appellants to present: (a) additional extrinsic evidence concerning the intent of the parties to the governing agreements; (b) expert testimony regarding the expectations of investors and/or the commercial impact of disallowing write ups to senior certificates; and (c) evidence that any omission of express provisions providing for Subsequent Recovery write-ups of senior certificates constituted a scrivener's error.

In particular, DW and Ellington had raised in the lower court the likelihood that any omission of express provisions providing for Subsequent Recovery write-ups of senior certificates was the result of the drafters erroneously applying language from disparate trusts where senior certificates were never written down. (R.10353.[24]) As Petitioners had recognized, such trusts did not logically require senior write-ups. (*See id.*; R.380.[25]) Yet, the IAS Court determined that DW/Ellington's argument that the "Governing Agreement write-up provisions limiting write-ups to subordinate classes reflect a 'scrivener's error'" was "based on speculation" alone. R.59.[26] While Appellants dispute that such argument was based on "speculation," as it was supported by numerous examples of inconsistencies within the PSAs, to the extent this Court finds that the record is insufficient to evaluate the parties' true

[24] DW/Ellington 9/14/18 Merits Br. at 15.

[25] Petition ¶ 48 n. 21.

[26] Decision & Order at 34.

intent, Appellants request the opportunity to present additional evidence regarding same.

CONCLUSION

For these reasons, Appellants ask that the Court reverse the IAS Court's holding that only Subordinate Certificates are eligible for write-ups and instead hold that the governing contracts unambiguously require that all certificates that had suffered a Realized Loss are eligible for such write-ups in the Exhibit E Trusts. In the alternative, should the Court find the governing documents are ambiguous in this regard, Appellants submit that the uncontroverted course of performance evidence presented below, which the IAS Court ignored, is dispositive of any such ambiguity. Finally, should the Court find that the course of conduct evidence presented below is not dispositive of any ambiguity, Appellants request that the Court remand to the IAS Court with instructions to resolve the factual question concerning the proper interpretation of the governing documents by reference to extrinsic evidence; and grant them whatever other relief the Court finds just and appropriate.

Dated: New York, New York
November 2, 2020

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I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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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.