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

REPLY 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 did not enforce Section 3.06(b) of the Settlement Agreement as written. That section's text, the Settlement Agreement's structure, and basic contract-interpretation principles all require the Trustees to apply Section 3.06(b)'s write-up rules to all trusts whether or not any Governing Agreement provides otherwise. The trial court erred by instead relegating Section 3.06(b) to a "gap-filling" role it was never meant to play.

Respondents Nover,[1] HBK,[2] and GMO[3] defend the trial court's reasoning. None of their defenses withstand scrutiny. Their arguments about Section 3.06(b)'s text rest principally on evidence-free speculation about the drafters' intent. They offer no coherent account of the Settlement Agreement's structure either: They cannot square their theory that the Settlement Agreement bars deviating from the Governing Agreements with the many Settlement Agreement terms that do exactly that. They fare no better than the trial court did in claiming that Section 3.06(b) improperly "amends" the Governing Agreements. And they

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[1] For purposes of this brief, "Nover" refers to Respondent Nover Ventures, LLC.

[2] For purposes of this brief, "HBK" refers to Appellant-Respondent U.S. Bank, N.A., solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in certain RMBS trusts (the "HBK Trusts") and solely at the direction of HBK Master Fund L.P. ("HBK"). *See* HBK Br. 1.

[3] For purposes of this brief, "GMO" refers to Respondents GMO Opportunistic Fund and GMO Global Real Return. The institutional investors and AIG parties incorporate GMO's arguments into their brief. Institutional Investors Br. 5-7.

largely abandon the trial court's other two rationales. This Court should reverse the trial court's decision in part and hold that Section 3.06(b) controls the write-up method for all trusts.

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)'s Plain Text Requires the Trustees To Apply a Uniform Write-Up Method*

The simplest reason why the Settlement Agreement's write-up instructions control over the Governing Agreements is that the Settlement Agreement's plain text makes clear they control. Section 3.06(b) directs each Trustee to write up each class of certificates' certificate balances (other than residual certificates) in reverse order of losses. A418-419, SA §3.06(b). That instruction does not refer to, depend on, or make any exception for what any Governing Agreement says. *Id.* The trial court erred by writing into Section 3.06(b) a caveat that it only applies if the Governing Agreements lack write-up provisions themselves. Tilden Br. 16-17.

Rather than address the text head-on, Nover, GMO, and HBK speculate about what the parties to the Settlement Agreement must have meant. Nover calls it "axiomatic" that "had the drafters intended for the Settlement Agreement to prevail over the Governing Agreements," they "would have expressly said so." Nover Br. 20. In fact, the Settlement Agreement expressly provides a mandatory,

uniform rule for write-ups that does not depend on what the Governing Agreements say. Had the drafters intended that unqualified instruction to yield to the Governing Agreements, they would have said so, as they did elsewhere. *See* pp. 5-6, *infra*. In any event, Nover's "axiom" is a fiction. Contract parties are free to specify contract terms by implication or cross-reference. *See* 12 Williston on Contracts § 31:7 (4th ed.); *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927). Nover offers no authority showing that, to the contrary, a contract term must explicitly name every other contract or event over which it prevails. There is none.[4]

GMO similarly conjectures (at 21) that, had the Trustees meant Section 3.06(b) to be enforced as written, they would have used different language to put investors on notice that Section 3.06(b) controls over the Governing Agreements. But GMO fails to explain why the Settlement Agreement's unequivocal instruction that all trusts be written up in a uniform manner was not notice enough.[5]

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[4] Nover also suggests (at 20) that the Settlement Agreement's drafters would have amended each of the Governing Agreements in order to implement Section 3.06(b)'s write-up instructions. That suggestion makes little sense: One evident benefit of Section 3.06(b) was avoiding the need to follow the elaborate amendment procedures for each of the hundreds of settling trusts. Tilden Br. 27-31; p. 17, *infra*.

[5] For the same reason, GMO's unsupported speculation (at 21 n.8) about the Settlement Agreement's "overarching goal" and "certificateholder expectations" also fails. GMO has no evidence either that the Settlement Agreement drafters' "overarching goal" was to relegate Section 3.06(b) to a gap-filling role or that

Finally, Nover and GMO point to the institutional investors' current contention that the Governing Agreements control write-ups. Nover Br. 19; GMO Br. 20-21. That, too, is irrelevant. Because the Settlement Agreement is unambiguous, parol evidence about what the parties intended by that contract is

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certificateholders expected that result. Speculation of this sort would not be admissible to vary Section 3.06(b)'s plain terms even if GMO had evidence to support it, which it does not. And as GMO admits, its citation to *U.S. Bank Nat. Ass'n v. Fed. Home Loan Bank of Bos.*, No. 652382/2014, 2016 WL 9110399 (Sup. Ct. N.Y. Cnty. Aug. 12, 2016) ("*JPMorgan I*") "is not determinative" of this point, because that proceeding did not interpret the Settlement Agreements' write-up terms. GMO Br. 21 n.8.

Moreover, GMO is wrong to claim that *JPMorgan I* approved "applying the Governing Agreements' provisions for 'subsequent recoveries' to the Settlement Payment." What that case approved was the Settlement Agreement as written. *JPMorgan I*, 2016 WL 9110399, at *3 (overruling "[a]ll objections . . . in connection with the Settlement Agreement"). The Settlement Agreement does not define the Settlement funds as "subsequent recoveries" or say that they should be treated as such for all purposes. Instead, one provision—Section 3.06(a)—treats funds "as though" they were "subsequent recoveries" for only one purpose: distribution. A418, SA §3.06(a). Other sections, such as Sections 3.06(b) and 3.07, deviate from the Governing Agreements by not using those agreements' treatment of "subsequent recoveries" to govern issues such as write-ups and deal triggers. *See* pp. 11-13, *infra.* Finally, the reference to "certificateholder expectations" GMO cites comes in a part of *JPMorgan I* where the trial court held merely that treating Settlement funds for distribution purposes as "subsequent recoveries" was not an abuse of discretion, especially given that their classification would not affect the distribution waterfall under which they were paid. *JPMorgan I*, 2016 WL 9110399, at *15. The court never held either that the funds were in fact "subsequent recoveries" or that they should be treated as such for purposes of writing up certificate balances. Thus, contrary to GMO's argument, *JPMorgan I* in no way holds that the Settlement Agreement was meant to strictly adhere to the Governing Agreements in all respects or employ their definitions for all purposes.

inadmissible. *See Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001).[6] But even if the Settlement Agreement were ambiguous, a "'unilateral expression of one party's postcontractual subjective understanding of the terms of [an] agreement'" is "'not probative as an aid to the interpretation of the contract.'" *LaSalle Bank Nat'l Ass'n v. Nomura Asset Cap. Corp.*, 424 F.3d 195, 207 n.10 (2d Cir. 2005) (quoting *Murray Walter, Inc. v. Sarkisian Bros.*, 183 A.D.2d 140, 146 (3d Dep't 1992)). The institutional investors' litigating position sheds no light on what they or other Settlement Agreement parties meant when the agreement was drafted.

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

The Settlement Agreement's other terms and overall structure confirm that Section 3.06(b)'s write-up rules control over the Governing Agreements. Tilden Br. 17-25. Where, unlike Section 3.06(b), the Settlement Agreement defers to the Governing Agreements, it does so by explicitly instructing the Trustees to act "pursuant to," "in accordance with," or as "given . . . in" those contracts. Tilden

[6] GMO claims courts may consider a contract's "circumstances" even if the contract is unambiguous. GMO Br. 20. But the cases GMO cites for this proposition say only that circumstances may be relevant "in deciding whether an agreement is ambiguous." *Kass v. Kass*, 91 N.Y.2d 554, 556-67 (1998) (quoting *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519 (1927); *Williams Press v. State of N.Y.*, 37 N.Y.2d 434, 440 (1975)). Moreover, the ambiguity for which "circumstances" may be relevant "is determined by looking within the four corners of the document, not to outside sources." *Kass*, 91 N.Y.2d at 566. GMO does not, and could not, claim that Section 3.06(b) is ambiguous.

Br. 21-23; *see* A417-25, SA §§2.09, 3.03, 3.05, 3.06, 4.05, 4.07, 4.08, 7.02, 7.10. And where, unlike Section 3.06(b), the Settlement Agreement provides a gap-filling rule that applies only if the Governing Agreements are silent, it does so explicitly as well. Tilden Br. 23-24; *see* A418, SA §3.06(a). But where, as in Section 3.06(b), the Settlement Agreement supersedes the Governing Agreements, it does so by providing a uniform procedure that does not refer to the Governing Agreements. Tilden Br. 18-21; *see* SA §§1.15, 3.05, 3.06(a), 3.07. Under *expressio unius* principles, the drafters' choice to use such uniform language in Section 3.06(b), and to omit language deferring to the Governing Agreements, "must be assumed to have been intentional." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986); *see* Tilden Br. 24.

None of HBK, Nover, or GMO offers any coherent theory of when the Settlement Agreement defers to the Governing Agreements and when it does not.[7] Moreover, none of them explains how Section 3.06(b) should be read to implicitly defer to the Governing Agreements when several other Settlement Agreement terms explicitly defer to the Governing Agreements. And none of them disputes

[7] GMO contends in a footnote that Sections 7.05 and 7.13 "establish the default" rule that "the Settlement Agreement does not disturb the Governing Agreements." GMO Br. 18 n.6. But Sections 7.05 and 7.13, which allow "superseding" the Governing Agreements but not "amending" them, establish nothing of the sort. Tilden Br. 25-32; pp. 21-23, *infra*. Moreover, GMO's proposed default rule would make superfluous the many clauses in the Settlement Agreement that explicitly defer to the Governing Agreements. *See* pp. 5-6, *supra*.

that *expressio unius* applies to Section 3.06(b)'s lack of reference to the "Governing Agreements." Because they cannot reconcile their reading of Section 3.06(b) with the rest of the Settlement Agreement, the Court should reject it. *See Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969) ("All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.").

Nover and GMO each largely concede that some Settlement Agreement terms supersede the Governing Agreements. While they try to explain away other Settlement Agreement terms that similarly supersede the Governing Agreements, none of those explanations holds water.

a. *Section 3.06(a)'s Ban on Distributions to Residual Certificates*

Section 3.06(a) explicitly overrides the Governing Agreements by preventing distributions that, under those agreements, would become payable to residual certificates. Tilden Br. 18-19; *see* A418, SA § 3.06(a). That rule was critical to avoid giving JPMorgan its own settlement payment. Tilden Br. 19. Together with other provisions in the Settlement Agreements, Section 3.06(a) refutes the trial court's claim that "the Settlement Agreement does not supersede or override the Governing Agreements." A53.

Unlike the trial court, GMO and Nover acknowledge that Section 3.06(a) alters conflicting terms in the Governing Agreements. GMO Br. 14-15; Nover Br.

23-24. That admission, by itself, defeats their argument that the Settlement Agreement can never override the Governing Agreements. Nonetheless, they try to distinguish Section 3.06(a) on the ground that it overrides the Governing Agreements more explicitly than Section 3.06(b) does. GMO Br. 14-15; Nover Br. 14. But that argument is as unfounded as it is irrelevant.

Neither Section 3.06(a), Section 3.06(b), nor any other part of the Settlement Agreement says that it applies "notwithstanding any Governing Agreement" or uses similar overriding language. Both Section 3.06(a) and Section 3.06(b) supersede the Governing Agreements simply by providing uniform, exception-free rules. And while GMO seizes (at 14) on the fact that Section 3.06(a)'s residual-certificates rule applies only if distribution to such certificates would happen "under the Governing Agreement[s]," that reference is only necessary because the residual-certificate rule's application depends on what the Governing Agreements say. Only if the Governing Agreements will cause funds to go to residual certificates will the residual-certificate rule be triggered. No such reference is needed in Section 3.06(b)'s write-up rules because those rules apply irrespective of the Governing Agreements' terms.

Nover and GMO claim that Section 3.06(a)'s departure from the Governing Agreements somehow does not count because it reflects JPMorgan's "waiver" of its rights to take back some of its own settlement payment. Nover Br. 24; GMO

Br. 15 & n.5. That argument, too, effectively concedes that the Settlement Agreements can override the Governing Agreements. It also rests on baseless speculation. Nover and GMO present no evidence that JPMorgan intended to, or even could have, waived that conflict. In particular, there is no evidence in the record that JPMorgan owned, and thus could waive payment rights for, every residual certificate in every trust.[8]

GMO and HBK contend that, unlike Section 3.06(a), Section 3.06(b) would "reorder the relative economic rights" of certificateholders that were not parties to the Settlement Agreement. GMO Br. 15; HBK Br. 9. But Section 3.06(a) also reorders the economic rights of all parties other than JPMorgan that hold residual certificates. In fact, the entire Settlement Agreement—most obviously, the Trustees' decision to settle each Trust's repurchase claims against JPMorgan in exchange for the Settlement Payment—impacts the economic rights of non-party certificateholders.[9] That was a proper exercise of the Trustees' power to compro-

[8] There is good reason to think that JPMorgan does not in fact hold residual certificates in all Trusts. SEC risk-retention rules do not require sponsors like JPMorgan to hold a trust's residual certificates in all circumstances. As an alternative, sponsors may hold a portion of each class of the ABS interests issued in the transaction or a single vertical security representing interests in each class. Credit Risk Retention, Exchange Act Release 34-73407, SEC File No. S7-14-11 (Oct. 22, 2014), https://www.sec.gov/rules/final/2014/34-73407.pdf (last visited December 17, 2020).

[9] As another example, the Settlement Agreement's "servicing protocol" makes a number of economically significant changes to the ways servicers handle the

mise certificateholder rights by entering into settlement agreements. *See In re Delta Air Lines, Inc.*, 370 B.R. 537, 548-49 (Bankr. S.D.N.Y. 2007). Moreover, the Trustees gave certificateholders a chance to object to the Settlement Agreement by bringing the first Article 77 proceeding on notice to all certificateholders. The court approved the Settlement Agreement over all objections—a ruling that is *res judicata.* *See In re Hunter*, 4 N.Y.3d 260, 269 (2005) (trust-accounting proceedings have *res judicata* effect).[10] Any objection that a Settlement Agreement provision improperly modifies certificateholders' "economic rights" is far too late to bring now.[11]

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trusts' collateral. *See* A479-490 (SA ex. B); *see also* A416, SA §3.02 (releasing servicing claims as well as repurchase claims); A419, SA §3.07 (modification of Governing Agreement trigger events); A4109, A417, SA §§1.16, 3.05 (allocation of settlement proceeds).

[10] GMO argues in a footnote (at 15 n.5) that Section 3.06(a) "only delays" payments that might go to residual certificates, while 3.06(b) is a "wholesale replacement" of the Governing Agreements' write-up rules. That argument is misleading at best: The delay in payment effected by Section 3.06(a) has direct economic consequences for residual certificateholders. *See* Tilden Br. 19 n.6 (explaining how delay of residual payments in effect changes payment priorities between certificates).

[11] The court below correctly held that the *JPMorgan I* judgment did not preclude subsequent disputes as to the proper interpretation of the Settlement Agreement. A31-32. However, the court did not address Tilden Park's argument that the prior judgment precludes any subsequent objection to the Settlement Agreement on the ground that that the Trustees lacked the power to impact certificateholder rights through the settlement. *See* A3500-3502.

By contrast, HBK argues that Section 3.06(a) "is consistent with the [G]overning [A]greements," specifically, those agreements' direction to the Trustees to maintain the Trust's REMIC status. HBK Br. 9 (citing A13159, BSABS 2005-HE3 PSA §9.12). While HBK is correct that Section 3.06(a) is consistent with the Trustees' obligation to maintain REMIC tax status, it does not follow that Section 3.06(a) is consistent with every provision of the Governing Agreements. HBK also ignores the other sections of the Settlement Agreement that override the Governing Agreements in ways having nothing to do with REMIC status. *See* pp. 11-14, *infra*. HBK thus cannot explain away how those provisions, like Section 3.06(b), supersede the Governing Agreements in contradiction of the trial court's reading.

b. *Section 3.07's Rule Against Reversing Transaction Triggers*

Another Settlement Agreement provision that expressly overrides the Governing Agreements is Section 3.07, which states that the Settlement Payment will not "be deemed to reverse the occurrence of any transaction-related trigger" in any Governing Agreement. A419, SA §3.07; Tilden Br. 20. Because the Governing Agreements specify different distribution waterfalls—and thus pay different certificates in different priorities—depending on whether a "trigger" event is in effect, Section 3.07 directly changes certificateholders' economic rights under the Governing Agreements. Tilden Br. 20.

HBK and Nover ignore this provision entirely. GMO argues that Section 3.07 "functions primarily to preserve th[e] Governing Agreements' terms, rather than to override them." GMO Br. 17 (emphasis omitted). That makes no sense: Preventing the reversal of deal triggers by definition changes the way the Governing Agreements operate. For example, one common type of trigger event, a "cumulative loss trigger," depends on how much realized losses a Trust has incurred.[12] Because subsequent recoveries typically reduce the Trust's realized losses, receiving funds paid as if they were a subsequent recovery (such as the Settlement Payment) could mean that a trigger event no longer exists under the Governing Agreements.[13] In many Trusts, the removal of a trigger event will change the priority that different certificates have to receive payments because a different waterfall will be in effect.[14] But Section 3.07 compels the Trustees to act as if that trigger event still exists. That section plainly supersedes the Governing Agreements rather

[12] *See, e.g.*, A7131, BALTA 2006-3 PSA (defining "Trigger Event" as triggered by, among other things, the "aggregate amount of Realized Losses").

[13] *See* A7116, BALTA 2006-3 PSA (definition of "Realized Loss" stating that the "Realized Loss with respect to [a] Mortgage Loan will be reduced" in some cases by a Subsequent Recovery).

[14] For example, the BSABS 2005-AQ2 PSA sets out a separate distribution "waterfall" for "Principal Funds" that applies "[f]or each Distribution Date . . . on which a Trigger Event is in effect." A3532, BSABS 2005-AQ2 PSA § 5.04(a)(2)(A)(ii); *compare id.* at A3534, BSABS 2005-AQ2 PSA § 5.04(a)(2)(B) (distribution of "Principal Funds" on "each Distribution Date on or after the Stepdown Date, so long as a Trigger Event is not in effect").

than "preserving" them. GMO concedes as much by recognizing that "Section 3.07 arguably modifies those Governing Agreement triggers." GMO Br. 17.

GMO's argument also creates needless tension with Sections 3.06(a) and 3.06(b). Read together, those terms in no way "preserve" how subsequent recoveries are treated under the Governing Agreements. Even though Section 3.06(a) directs the Trustees to pay the Settlement Payment to certificates "as though [it] was a 'subsequent recovery,'" A418, SA §3.06(a), Section 3.07 prevents that payment from reversing cumulative-loss trigger events as an actual subsequent recovery would. Similarly, while the Governing Agreements provide rules to write up certificates when subsequent recoveries are received, Section 3.06(b) imposes write-up rules that do not depend on whether the Settlement funds are subsequent recoveries. The only reading that reconciles Sections 3.06(a), 3.06(b), and 3.07 is that the Settlement Agreement uses the "subsequent recovery" concept in the Governing Agreements for some purposes but not for others.[15]

c. *Sections 1.16 and 3.05's Loss-Allocation Procedure*

A third way the Settlement Agreement overrides the Governing Agreements is set forth in Sections 1.16 and 3.05's allocation of Settlement funds across trusts. Tilden Br. 20-21; A4109, A417, SA §§1.16, 3.05. While the Governing Agree-

[15] That reading also reconciles these Settlement Agreement provisions with the Governing Agreements.

ments specify their own "Repurchase Prices" to measure JPMorgan's repurchase liability for each trust, the Settlement Agreement instead uses its own formula for allocating Settlement funds by using a measure of loss different from the measure the Governing Agreements use. *Id.*

GMO and Nover argue that Sections 1.16 and 3.05 do not conflict with the Governing Agreements because those contracts do not cover how to allocate JPMorgan's settlement payment across trusts. GMO Br. 18; Nover Br. 22. But the Governing Agreements do specify what JPMorgan must pay each trust for breaching loans—each trust's contractually-defined "Repurchase Price." Tilden Br. 20; *see, e.g.*, A7128, BALTA 2006-3 PSA (definition of "Repurchase Price"). When the Trustees accepted the Settlement Payment in lieu of those aggregate Repurchase Prices—and agreed to allocate the payment across trusts based on a new loss calculation in Sections 1.16 and 3.05—they necessarily accepted different performance from JPMorgan than what it originally promised. Sections 1.16 and 3.05 cannot be reconciled with each trust's right to the "Repurchase Price" for breaching loans under the Governing Agreements.

d. *Section 3.06(a)'s Gap-Filling Rule for Subsequent Recoveries*

Further proof that Section 3.06(b) is not merely a "gap-filler" is that another part of the Settlement Agreement, Section 3.06(a), does explicitly play a gap-

filling role for those Governing Agreements that lack the concept of a "subsequent recovery." Tilden Br. 23-24; SA § 3.06(a).

Nover and HBK ignore that section. GMO tries to paint Section 3.06(a)'s gap-filler language as "part of a broader, surgical effort to integrate and align" the Settlement Agreement with the Governing Agreements. GMO Br. 18 n.6. But that just obscures the critical point: Section 3.06(a) has explicit gap-filling language that applies only if a trust's Governing Agreement does "not include the concept of [a] 'subsequent recovery,'" while Section 3.06(b) does not. It would have been easy for the Settlement Agreement's drafters to use similar language in Section 3.06(b)—for example, to say its write-up rules apply only if a given Governing Agreement "does not include the concept of increasing principal balances in respect of subsequent recoveries." They chose not to. As GMO does not deny, their decision further confirms that Section 3.06(b) is not limited to the gap-filling role that the trial court thought it had.

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

The trial court erred in relying on Section 7.05's rules about "amendments" to hold that Section 3.06(b) cannot deviate from the Governing Agreements. Tilden Br. 25-32. As explained above, that ruling conflicts with multiple, economically consequential sections of the Settlement Agreement that, like Section 3.06(b), supersede the Governing Agreements. *Id.* at 26-27; pp. 7-14, *supra*. The

ruling also ignores authority holding that RMBS settlement agreements like this one can modify underlying contracts without being deemed to "amend" them. *Id.* at 27-31. And it disregards the fact that, if there were any conflict between Section 3.06(b) and Section 7.05, Section 3.06(b) should control. Tilden Br. 31-32.

HBK, GMO, and Nover offer a grab bag of arguments that Section 7.05 bars Section 3.06(b) from overriding the Settlement Agreements. Each lacks merit and should be rejected.

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

GMO and HBK defend the trial court's argument that Section 7.05 bars "superseding" the Governing Agreements in any way. GMO argues that the word "amendment" "refer[s] to altering particular terms of the Governing Agreements rather than the formal process for amending those overall agreements," GMO Br. 7, while HBK asserts that any term in "conflict with the terms of earlier-executed governing agreements" is a "paradigmatic contractual amendment." HBK Br. 7. But neither GMO nor HBK offers any authority supporting those interpretations—and, as discussed in Point 1.B.2 below, their say-so cannot displace the actual case law that has found RMBS settlements like this one not to be "amendments."

GMO's and HBK's readings also create insoluble conflicts between Section 7.05 and the many Settlement Agreement terms that explicitly override the Governing Agreements. *See* pp. 7-14, *supra*. It cannot be that Section 7.05 forbids

any term in "conflict with" the Governing Agreements when Section 3.06(a) and several other terms create just that conflict. GMO's and HBK's argument thus violates the rule that courts must construe contracts to "avoid inconsistency," *Nat'l Conversion Corp.*, 23 N.Y.2d at 625, and "reasonably harmonize[]" their terms, *James v. Jamie Towers Hous. Co.*, 294 A.D.2d 268, 269 (1st Dep't 2002), *aff'd*, 99 N.Y.2d 639 (2003).

HBK, Nover, and GMO all repeat the trial court's conclusion that Section 7.05 is "meaningless" unless it bars any deviation from the Governing Agreements. *See* HBK Br. 6-7; Nover Br. 21; GMO Br. 7-8. As Tilden Park explained, however, Section 7.05 serves two key functions. It clarifies that the Settlement Agreement does not formally amend the Governing Agreements, but merely addresses the Settlement Payment (not future distributions); and it protects the Trustees from any accusation that they "amended" the Governing Agreements without following the necessary processes. Tilden Br. 27-28 n.8. Contract drafters commonly employ such clarifying clauses to avoid doubt. *Levine v. Golub Corp.*, 21 A.D.2d 38, 42 (3d Dep't 1964), *aff'd*, 15 N.Y.2d 615 (1964).

Only GMO wrestles with this explanation, calling it "farfetched" that the Trustees would want protection of this sort. GMO Br. 8. Because the Trustees were also protected by court approval of the Settlement Agreement and by case law holding that settlements like this one are not "amendments," GMO asserts that

they should not have also sought protection in Section 7.05. GMO Br. 8 (citing Tilden Br. 28-30). But it was hardly "farfetched" for the Trustees to shield themselves in multiple ways. The fact that GMO now questions the case law only proves the soundness of the Trustees' decision not to rely on that authority alone. And the Trustees' insistence on obtaining "Final Court Approval" for the Settlement Agreement, A411-413, SA §2.03, simply underscores the importance they gave to ensuring that their conduct would be shielded from any challenge.

GMO also argues that Section 7.05 has such "strong framing" that the Governing Agreements must control. GMO Br. 9. But Section 7.05's language is anything but "strong" for the reading GMO wants. If the Settlement Agreement's framers shared GMO's goal, they could have said that in the event of conflict between the Settlement Agreement and the Governing Agreements, the Governing Agreements control. They did not. Instead, the drafters chose to use the word "amendment"—a word with specific meaning in the Governing Agreements—and stated merely that the Settlement Agreement would not be "deemed" or "argued" to be an "amendment." A424. The most natural reading of that framing is that the drafters sought to avoid certificateholders "arguing," or courts "deeming," the Trustees to have amended the Governing Agreements without following those agreements' formal amendment rules. GMO's appeal to Section 7.05's "framing" is thus no more than a request to ignore that section's text.

2. *Case Law Confirms That the Settlement Agreement Does Not "Amend" the Governing Agreements*

The trial court's finding that any term in "conflict with" the Governing Agreements is an "amendment" fails for another reason: Courts have repeatedly recognized that a settlement agreement may vary from the terms of underlying contracts without "amending" those contracts. Tilden Br. 27-31; *In re Residential Capital, Inc.*, 497 B.R. 720, 748 (Bankr. S.D.N.Y. 2013) (*"ResCap*"); *In re Bank of N.Y. Mellon*, No. 651786/2011, 2014 WL 1057187, at *11 n.16 (Sup. Ct. N.Y. Cty. Jan. 31, 2014); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1281 (9th Cir. 1992).

HBK and Nover completely ignore these cases. GMO argues, without authority, that "modifying intra-certificateholder terms of a trust agreement, especially those that have no direct relationship to the third-party settlement, is a different legal issue." GMO Br. 21 n.7. That argument is a red herring. Tilden Park has not suggested that the Trustees could "modify[]" Governing Agreement terms that have no "direct relationship" to the Settlement Agreement. GMO also gives no reason why changing "intra-certificateholder terms" (whatever those are) is an "amendment" when other types of changes are not. Nothing in *ResCap* or other cases turns on that distinction. To the contrary, the Trustees' authority to make settlements without "amending" trust contracts comes from their inherent power to compromise disputed claims. *See ResCap*, 497 B.R. at 748; *Class*

Plaintiffs, 955 F.2d at 1281. Whether that compromise involves "intra-certificateholder terms" makes no difference.

HBK, meanwhile, asserts that "there is no 'just-one-time' exception to a binding agreement." HBK Br. 8. That assertion, too, fails to distinguish *ResCap* and other cases. The settlement agreements in each of those cases involved one-time deviations from the underlying contracts. *ResCap*, 497 B.R. at 748; *Bank of N.Y. Mellon*, 2014 WL 1057187, at *11 n.16; *Class Plaintiffs*, 955 F.2d at 1281. Conversely, while HBK also insists (without authority) that Section 3.06(b) is an "amendment" because it would have "lasting consequences," HBK Br. 8, that, too, misses the mark. Nothing in those cases limited trustees' powers to settle disputed claims based on whether the settlements involved "one-time" changes or changes with "consequences." Regardless of how GMO tries to characterize the Settlement Agreement, it was an exercise of the Trustees' powers to settle repurchase claims and not an "amendment" of the Governing Agreements.[16]

[16] Moreover, the only "consequence" HBK identifies is that write-ups under Section 3.06(b) could increase certificates' "Certificate Principal Balances," thus affecting later distributions. *Id.* But changing the amount of a particular class's Certificate Principal Balance does not modify, let alone "amend," any terms of the Governing Agreements. Furthermore, those "lasting consequences" will happen under any possible write-up regime because any possible write-up will affect the certificates' Certificate Principal Balances.

3. *The Trial Court's Reading of Section 7.05 Cannot Be Squared with Section 7.13*

Section 7.13 of the Settlement Agreement removes any doubt that, if necessary, the Settlement Agreement supersedes contrary terms in the Governing Agreements. Tilden Br. 29 n.9. Section 7.13 dictates that, "[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 Governing Agreements are "prior agreements . . . between the Parties." Thus, together with Section 7.05, Section 7.13 makes clear that, while the Settlement Agreement does not amend the Governing Agreements, it supersedes those agreements to the extent they concern the Settlement Agreement's subject matter.

GMO acknowledges that "the Governing Agreements are one type of prior agreement covered"—and thus "superseded"—"by Section 7.13." GMO Br. 9. It also does not dispute that the contractual phrase "subject to" has long been understood as "the equivalent of 'conditional upon or depending on.'" *F.W. Berk & Co. v. Derecktor*, 301 N.Y.110, 113 (1950). And GMO does not even dispute that at least one term of the Settlement Agreement—Section 3.07—can only be read to override the Governing Agreements. GMO Br. 17.

GMO does argue that the phrase "subject to Section 7.05" means that Section 7.05 "takes priority over and limits" Section 7.13, and that to read "subject

to" as "'conditional on or depending on,'" as the Court of Appeals has, "makes no sense." GMO Br. 9-11. Unless Section 7.05 "takes priority over" Section 7.13, GMO claims, Section 7.13 is "redundant." GMO Br. 13. But the distinction GMO draws makes no difference. Whether Section 7.05 is read to "take priority over" or "condition" Section 7.13, the result is the same: The Settlement Agreement may "supersede" the Governing Agreements as long as it is not deemed or argued to "amend" them.[17] GMO offers no serious reason why Sections 7.05 and 7.13 cannot be read together in that way.[18]

By contrast, Nover asserts that the Governing Agreements are not "prior agreements . . . between the Parties" to the Settlement Agreement. Nover Br. 21-22. Nover is wrong. For each of the trusts at issue in this appeal, the same parties to the Governing Agreements—the Trustees and JPMorgan-affiliated entities—were also the parties to the Settlement Agreements. *See* SA at 1 (listing

[17] The meaninglessness of GMO's distinction is made clear by the example it uses. GMO points to the fact that the distribution in Section 3.06(a) is "subject to" JPMorgan's waiver in Section 3.04 of any rights to its own settlement payment. GMO Br. 11. There is no practical difference between reading Section 3.06(a) to say that "the Trustees should make certain distributions on the condition that JPMorgan not receive settlement funds" and "JPMorgan's waiver of its right to the settlement payment takes priority over the distribution rules in Section 3.06(a)." Either way, Sections 3.04 and 3.06(a) tell the Trustees to distribute funds according to Section 3.06(a) as long as they do not distribute funds to JPMorgan.

[18] The cases GMO cites (at 11 n.4) do not provide any such reason. None of those cases elucidate what "subject to" means, let alone find any meaningful difference between whether "subject to" means "conditional upon" or "has less priority than."

"JPMorgan Chase & Co. and its direct and indirect subsidiaries" as parties to the Settlement Agreement).[19] As a result, Nover is incorrect to argue that Section 7.13 does not apply to, and supersede, the Governing Agreements.

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

Even if Section 3.06(b) and Section 7.05 conflict, Section 3.06(b) controls under the longstanding canon that specific contract terms control over general ones. *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956); *see* Tilden Br. 31-32. The trial court's disregard of that canon is another reason why its decision to have Section 7.05 control was error.

GMO argues that the trial court's reading of Sections 3.06(b) and 7.05 "harmonized" those provisions by reading Section 3.06(b) as a gap-filler. GMO Br. 19. But that argument assumes the conclusion. The trial court found it necessary to "harmonize" the two provisions because the court recognized that applying Section 3.06(b) as written would create a conflict with its reading of Section 7.05. *See* A53-53. The trial court, having recognized the purported conflict, should have

[19] In particular, entities affiliated with Bear, Stearns & Co. served as depositors, sponsors, and servicers for certain trusts. *See, e.g.*, A3528, BSABS 2005-AQ2 PSA (title page listing Bear Stearns Asset Backed Securities I LLC as depositor and EMC Mortgage Corporation as servicer). Those entities became affiliates of JPMorgan after it bought Bear, Stearns in 2008. *See* Reuters, *JPMorgan Completes Takeover of Bear Stearns* (May 31, 2008), https://reut.rs/3mqvEoP (last visited Dec. 17, 2020); A4606.

followed the more specific provision—Section 3.06(b)—over the more general provision.

GMO next argues that Section 7.05 is not a "'catchall' provision" because it "emphatically provides that amending terms of the Governing Agreements was not the intent of the drafters." GMO Br. 19. GMO places special weight on the fact that, under Section 7.05, the Settlement Agreement "[shall] not be argued" to be an amendment. *Id*. Tilden Park is not arguing that any part of the Settlement Agreement amends any Governing Agreement. And there is no reason why the supposedly "emphatic[]" nature of a general contract either makes it any more specific or negates the rule that the more specific provision controls. In any event, GMO ignores that courts have found that similarly "emphatic" anti-amendment clauses are not implicated by settlement agreements like this one. *See ResCap*, 497 B.R. at 748; *In Re Residential Capital*, No. 12-12020 (Bankr. S.D.N.Y. June 7, 2013), Dkt. 3929-2 (settlement agreement); Tilden Br. 29.[20]

HBK, meanwhile, insists that the specific-general canon does not apply because "[t]his is not a matter of construing a single agreement . . . but of applying a later agreement that expressly preserves and relies on earlier agreements." HBK

[20] GMO also argues that the canon that the specific controls the general should be read in light of the anti-superfluity canon, and Tilden Park's reading would leave 7.05 superfluous. GMO Br. 19-20. As explained above, that is not the case. *See* pp. 17-18, *supra*. It is GMO's reading that would render many provisions of the contract meaningless.

Br. 8. Both Section 3.06(b) and Section 7.05, however, are part of a "single agreement"—the Settlement Agreement. HBK does not explain how the fact that the Settlement Agreement "preserves and relies on earlier agreements" makes any difference for purposes of the general-specific canon.

C. The Trial Court's Other Rationales Fail

The trial court's two other rationales for limiting Section 3.06(b) to a "gap-filler" role were also wrong. Tilden Br. 32-38. HBK and Nover do not defend these rationales on appeal. GMO does, but its defenses miss the mark.

1. *Section 3.06(a) Does Not Require Deference to the Governing Agreements*

The trial court erred in claiming that Section 3.06(a) requires following the Governing Agreements on any subject that might be "integral" to the distribution process. Tilden Br. 33-34. Distributions and write-ups are different processes handled in different sections of the Governing Agreements by different rules. And write-ups change only the inputs used in the distribution rules, not the distribution rules themselves. *See, e.g.*, A3532-3537 & 3530, BSABS 2005-AQ2 PSA art. I & §§ 5.04(a), 5.04(b) (laying out write-up rules and "Certificate Principal Balance" in different section from distribution rules). There is therefore no conflict between applying the Governing Agreements' distribution rules under Section 3.06(a) and applying the Settlement Agreements' write-up rules under Section 3.06(b).

GMO accuses Tilden Park of "ignor[ing] the practical reality that write-ups and distributions are two parts of the same payment process." GMO Br. 16.[21] But GMO misses the point. While the write-up process and distributions process both apportion trust capital to various certificateholders over the Trusts' lifetime, that does not imply that the write-up process is part of the distribution process, as the trial court wrongly assumed. GMO does not deny that write-ups and distributions are separate processes controlled by separate parts of the Governing Agreements. Nor does GMO offer any serious practical reason why the Trustees cannot follow both the Governing Agreements' distribution rules and Section 3.06(b)'s write-up rules at the same time. There is thus no reason to think that language in Section 3.06(a) requiring the Trustees to apply the "distribution provisions of the Governing Agreements," A418, SA § 3.06(a), requires the Trustees to apply those agreements' write-up terms as well.

GMO also argues that Tilden Park "fail[ed] to explain why Subsection 3.06(b) needed a sentence to clarify that its write-up cannot 'affect' distributions under Subsection 3.06(a) if those 'distinct processes' are unrelated." GMO Br. 16. But Tilden Park explained exactly that. It described how the real purpose of Section 3.06(b)'s clarifying clause is to make clear that providing a write-up in

[21] Confusingly, GMO also argues elsewhere in its brief that "Tilden Park does not . . . dispute" that write-up provisions are "integral" to distribution provisions. GMO Br. 12.

reverse order of previous losses—often to more junior certificates—does not affect the Governing Agreement rules providing for distributions to more senior certificates. Tilden Br. 37. GMO ignores that explanation.

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

The trial court was also wrong to rely on a clarifying clause at the end of Section 3.06(b) stating that, "[f]or the avoidance of doubt," that section "shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)." Tilden Br. 34-38 (discussing A419, SA §3.06(b)). Because the distribution "provided for in Subsection 3.06(a)" is Section 3.06(a)'s distribution rules, and because distributions and write-ups are separate processes with separate rules, any changes to the Governing Agreements' write-up rules do not affect the distribution provided for in Section 3.06(a). Tilden Br. 35-36. The trial court also disregarded the fact that Section 3.06(a) is merely "for the avoidance of doubt." *Id.* at 36. It reached a ruling inconsistent with the clarifying clause's real purpose. *Id.* at 37. And if there is any conflict between Section 3.06(b)'s specific write-up rules and its general clarifying clauses, the more specific write-up rules should apply. *Id.* at 37-38.

GMO notes that Section 3.06(b)'s write-up rules might change the amount of distributions in some trusts and argues that changing the amount of a "distribution" necessarily "affects" that distribution. GMO Br. 12. That argument

ignores the rest of the sentence. The "distribution" that should not be "affected" is the "distribution . . . provided for in Subsection 3.06(a)." A419, SA §3.06(a). What Section 3.06(a) "provide[s]" for distribution are rules—for example, the rule to distribute funds pursuant to the Governing Agreements unless doing so would send funds to residual certificates. Section 3.06(a) does not provide for any given certificate to receive any given amount. It therefore does not make sense for GMO (or the trial court) to say that changing write-up rules "affects" the distribution rules provided for in Section 3.06(a), even if the write-up rules change the amount of distributions that a given certificate might receive.

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.

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