

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 60**

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.

Index No. 657387/2017
(Friedman, J.)

**ANSWER OF RESPONDENT HBK
MASTER FUND L.P.**

Respondent HBK Master Fund L.P. (“HBK”), by its undersigned counsel, submits this Answer in response to the Petition for Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment (the “Petition”).

HBK respectfully alleges as follows:

PRELIMINARY STATEMENT

1. HBK is an investor in 59 securities issued by 20 NIM trusts; which NIM trusts hold certificates issued by 21 RMBS trusts that are among the trusts to which the Petition relates (the “HBK Trusts”).¹

2. The distribution of funds received by the trusts is governed by pooling and servicing agreements (the “HBK PSAs”). The HBK PSAs—both explicitly by their terms and

¹ A list of the HBK Trusts is attached to this Answer as Exhibit 1. Pursuant to the Court’s Clarifying Order, attached as Exhibit 2 is the Affidavit of Beaugard A. Fournet, which sets forth HBK’s interest in the HBK Trusts and which has been sent to the trustees of the HBK Trusts.

implicitly by their structure—require that the settlement payment at issue here be distributed to certificate holders as provided by Section 5.04(a) of the HBK PSAs before writing up certificate balances as provided by Section 5.04(b) of the HBK PSAs (the “Pay First, Write-Up Second Method”).

3. The HBK PSAs further require that no distributions be paid to Class A or Class M certificates whose principal balance has been written down to zero because those certificates have been retired (the “Retired Class Provision”).²

4. Finally, the HBK PSAs provide that Subsequent Recoveries are included in Principal Funds, which are used to pay down principal owed on Class A and M certificates and to constitute the Overcollateralization Release Amount, which is used to pay down Applied Realized Loss Amounts on nonretired certificates, make other distributions and then pay Class C (or economically equivalent) certificates.

5. The Petition does not raise issues of contract construction or contract law. Instead, it asks the Court to rewrite complex agreements negotiated by sophisticated parties and their counsel, because funds paid pursuant to the settlement agreement at issue in this proceeding (the “Settlement Agreement”)—another document negotiated by sophisticated parties and their counsel—will flow in a way to which Petitioners object (or at any rate, to which they know certain classes of certificateholders will object). That a certificateholder might now wish that the Settlement Agreement and the pooling and servicing agreements governing the distribution of

² See, e.g., BSABS 2006-HE5 PSA § 5.04 (a) (“[N]otwithstanding the foregoing, on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A Certificates or Class M Certificates has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions, including distributions in respect of Prepayment Interest Shortfalls or Basis Risk Shortfall Carry Forward Amounts.”); Ex. 6.)

funds provided for a different result is no grounds for declaring any of these agreements to be ambiguous, ignoring certain of their terms or rewriting them as Petitioners ask.

6. Indeed, the same appeal to vague notions of fairness or expectations not embodied in the agreements was rejected in litigation over the Pay First, Write-Up Second Method in *In re Bank of New York Mellon*, 56 Misc. 3d 210, 225, 51 N.Y.S.3d 356, 368 (N.Y. Sup. 2017), (the “BoNYM Article 77 Proceeding”). This Court (Scarpulla, J.) rejected all such appeals, holding, “[u]pon careful examination of the plain language of the Settlement Agreement and Governing Agreements, I find that their objective meaning is to direct the Trustee to distribute the Allocable Shares for the Fourteen Trusts using the pay first, write up second method” *Id.* The Court should do the same here—apply the plain terms of the HBK PSAs to the distribution of each trust’s Allocable Share.

FACTUAL BACKGROUND

A. HBK’s Interest In This Proceeding.

7. The NIM trusts of which HBK is a beneficiary own the Class C and P certificates issued by the HBK Trusts. HBK owns substantial positions—in many cases, 100%—of the certificates of the NIM trusts corresponding to those certificates. HBK thus has a substantial economic interest in the Court’s decision regarding how the HBK Trusts’ share of the Settlement Payment is distributed.

B. The Settlement Agreement.

8. The Settlement Agreement requires the distribution of each HBK Trust’s share of the Settlement Payment (the “Allocable Share”) for distribution by Petitioners “as though such Allocable Share was a ‘**subsequent recovery**’ relating to principal proceeds available for distribution on the immediately following distribution date.” (Settlement Agreement § 3.06(a) (Ex. 3) (emphasis added).) “After the distribution of the Allocable Share to a Settlement Trust

pursuant to Subsection 3.06(a),” the Allocable Share is to be applied “to increase the balance of each class of securities . . . to which . . . losses have been previously allocated” “in the reverse order of previously allocated losses” (the “Write-Up”). (*Id.* § 3.06(b).) However, the Settlement Agreement “is not intended to, and **shall not be argued or deemed to constitute**, an amendment of any term of” the HBK PSAs, which govern the distribution of subsequent recoveries. (*Id.* § 7.05 (emphasis added).)

C. The Petition and the HBK Trusts.

9. Petitioners seek instructions from the Court regarding how the Allocable Share of the Settlement Payment is to be distributed to the HBK Trusts and other similarly-structured trusts. While HBK reserves its right to be heard on other issues raised by the Petition, the issues it addresses here are “The Order of the Distribution of the Settlement Payment and the Write-Up of Certificate Principal Balance” (“Pay First, Write-up Second”) (Pet. ¶¶ 21 – 52), and “The Treatment of Certain Classes of Certificates or Loan Groups with Current Aggregate Certificate Principal Balances of Zero” (the “Zero Balance Provisions”) (Pet. ¶¶ 53 – 62).

1. Pay First, Write-Up Second.

a) The Petition.

10. The Petition argues that the HBK PSAs leave “unaddressed” the question of whether a trustee should follow the Pay First, Write-Up Second Method or whether it should instead first write-up the certificates and only then distribute the Allocable Share to certificateholders based on the written-up certificate balances (the “Write-Up First, Pay Second Method”). (Pet. ¶¶ 21 – 23.) Petitioners raise four concerns in particular: (1) the potential that the Settlement Payment will be distributed as Excess Cashflow rather than as principal (Pet. ¶¶ 24 – 34); (2) the potential for differing distributions of principal amount (Pet. ¶¶ 35 – 37); (3) the potential for portions of the Settlement Payment to be without any clear method of

distribution (Pet. ¶¶ 38 – 40); and (4) that certain trusts might contain write-up instructions that vary from those in the Settlement Agreement (Pet. ¶¶ 41 – 52).

b) The HBK Trusts.

11. The HBK PSAs all use the defined term “Subsequent Recoveries,” (Ex. 4) and provide that Subsequent Recoveries are part of “Principal Funds.” (Ex. 5.) The “Distributions” provision of the HBK PSAs, which is present in all HBK PSAs at either Section 5.04 or 6.04, governs both the distribution of Principal Funds (which include Subsequent Recoveries), as well as the write-up of classes of certificates to reflect Subsequent Recoveries. (Ex. 6.) Subsection (a) of Section 5.04 contains the rules for the distribution of such funds. (*Id.* at Section 5.04(a).) **Only after the distribution of such funds are accounted for** can the accounting for those funds be addressed in subsection (b) of Section 5.04. (*Id.* at Section 5.04(b).)

(1) Section 5.04(a): The Distribution of Funds.

12. Section 5.04(a) of the HBK PSAs requires that “on each Distribution Date, an amount equal to the Interest Funds and **Principal Funds** for each Loan Group for such Distribution Date shall be withdrawn by the Trustee from the Distribution Account and **distributed** in the following order of priority. . . .” (*Id.* (Emphasis added).) In other words, the Principal Funds flow into the payment waterfall of Section 5.04(a) and are distributed.

13. The first step of the waterfall does not involve the Principal Funds; rather, under Section 5.04(a)(1), first the Interest Funds are used to pay various payments relating to interest. Next, Section 5.04(a)(1) of the PSAs provides that “Excess Spread to the extent necessary to meet a level of overcollateralization equal to the Overcollateralization Target Amount shall be the Extra Principal Distribution Amount and shall be included as part of the Principal Distribution Amount.” (*Id.* at Section 5.04(a)(1).) In other words, the Excess Spread (Ex.7), up

to the Overcollateralization Target Amount, is used to constitute the Extra Principal Distribution Amount, which flows back into the waterfall at Section 5.04(a)(2). (*Id.* at Section 5.04(a)(2).)

14. Next, Section 5.04(a)(1) provides that “[a]ny Remaining Excess Spread, **together with the Overcollateralization Release Amount** shall be applied as Excess Cashflow and distributed pursuant to clauses 5.04(a)(4)(A) through (H).” (*Id.* at Section 5.04(a)(1) (emphasis added).) In other words, the Remaining Excess Spread—the Excess Spread over the Extra Principal Distribution Amount (Ex. 8)—and the Overcollateralization Release Amount—which is **paid from Principal Funds** (Ex. 9)—**skip** the parts of the waterfall in 5.04(a)(2) and 5.04(a)(3) and are distributed lower down, in 5.04(a)(4), in the provisions regarding the distribution of Excess Cashflow.

15. After possibly making payments for Relief Act Interest Shortfalls and Prepayment Interest Shortfalls, the waterfall moves to 5.04(a)(2), which is the distribution of principal. At Section 5.04(a)(2), the trustee pays the Principal Distribution Amount. The Principal Distribution Amount has three components: the Principal Funds and any Extra Principal Distribution Amount **minus** the Overcollateralization Release Amount created in Section 5.04(a)(1). (Ex. 10 (emphasis added).) This definition reinforces that the Overcollateralization Release Amount is not paid under Section 5.04(a)(2) with other principal payments, but rather is distributed lower down the waterfall, in Section 5.04(a)(4).

16. In Section 5.04(a)(2), the Principal Distribution Amount is used to pay down certificates, until the certificate balance is paid to zero, in payment priority. (Ex. 6 at Section 5.04(a)(2).) Section 5.04(a)(3) is the Class A Redirection Provision discussed below.

17. Finally, in Section 5.04(a)(4), Excess Cashflow (including the Remaining Excess Spread and the Overcollateralization Release Amount discussed above) is used to pay various

distributions, including paying down any Applied Realized Loss Amounts on non-retired certificates in order of seniority. (*Id.* at Section 5.04(a)(4).) At the end of the waterfall, at Section 5.04(a)(4)(G), is where distributions are made to Class C certificates.

(2) **Section 5.04(b): The Write-Up of Certificates.**

18. Section 5.04(b) of the HBK PSAs provides: “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 Certificate Principal balance of the Class of Certificates with the highest payment priority to which Realized Losses have been allocated, but not by more than the amount of Realized Losses previously allocated to that Class of Certificates” (*Id.* at Section 5.04(b).)

2. **The Zero Balance Provisions.**

19. The Petition raises two concerns regarding Zero Balance Provisions that are relevant to the HBK Trusts.

20. **First**, the Retired Class Provision in Section 5.04 (a) of each HBK Trust provides that when the principal balance of a Class A or Class M certificate is written down to zero, that certificate “will be retired and will no longer be entitled to distributions.”³ Petitioners argue that nothing in the relevant PSAs, including the Retired Class Provision itself, “expressly” precludes retired certificates to be “written up in connection with subsequent recoveries” and, thus, paid distributions from the trust’s Allocable Share. (Pet. ¶¶ 53 – 57.)

21. **Second**, 11 HBK Trusts contain a Class A Redirection Provision that provides:

³ See, e.g., BSABS 2006-HE5 PSA § 5.04 (a) (“[N]otwithstanding the foregoing, on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A Certificates or Class M Certificates has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions, including distributions in respect of Prepayment Interest Shortfalls or Basis Risk Shortfall Carry Forward Amounts.”); Ex. 6.)

Notwithstanding the provisions of clauses (2)(A) and (B) above, if on any Distribution Date the Class A Certificates related to a Loan Group **are no longer outstanding**, the pro rata portion of the Principal Distribution Amount or the applicable Class A Principal Distribution Amount, as applicable, otherwise allocable to such Class A Certificates **will be allocated to the remaining group** of Class A Certificates pro rata

(*See, e.g.*, BSABS 2006-HE5 PSA § 5.04 (a) (3) (emphasis added); Ex. 6.) Petitioners argue that those provisions would cause a payment “designated for a particular loan group to be distributed to an entirely different loan group,” and so might not apply to distribution of an Allocable Share. (Pet. ¶ 60.)

ARGUMENT

I. THE HBK PSA’S REQUIRE THE TRUSTEE TO PAY FIRST, WRITE-UP SECOND

22. The Petition’s concerns regarding using the Pay First, Write-Up Second Method are based on a faulty premise. Because the order of payment and write-up is not—as the Petition puts it—“unaddressed” in those PSAs, the Court need not (and should not) create its own rule for those tasks. Rather, the Court should direct Petitioners to make distributions (including distributions of Principal Funds, of which the Allocable Share is a part) as provided by Section 5.04(a) of the HBK PSAs before writing up certificate balances as provided by Section 5.04(b) of the HBK PSAs.

A. The Structure of the HBK PSAs Require Payment First, Write-Up Second.

23. Both the overall structure of the HBK PSAs and the waterfall embody the Pay First, Write-Up Second Method.

24. **First**, the structure of Section 5.04 of the HBK PSAs, which governs the distribution of funds (including Subsequent Recoveries) and the write-up of certificates, shows why the distribution of the Settlement Payment must be made using the Pay First, Write-Up

Second Method. The order of operations is clear: Subsequent Recoveries, including the Settlement Payment, must first be distributed in accordance with the waterfall (5.04(a)). Only after those distributions are complete are any certificates written up (5.04(b)).

25. Indeed, if a trustee wrote up under Section 5.04(b) before distributing Principal Funds under Section 5.04(a), the trustee would have to ignore the introductory clause of Section 5.04(b), which requires certificates to be written up only if, “after taking” Subsequent Recoveries “into account,” “the amount of a Realized Loss is reduced.” Realized Losses are reduced through the payment of distributions under Section 5.04(a)(4). A trustee cannot determine whether the condition precedent represented by the introductory clause of Section 5.04(b) is met except by paying distributions first, under Section 5.04(a).

26. **Second**, the HBK PSAs include Subsequent Recoveries in Principal Funds and those funds are used in Section 5.04(a)(1) to constitute the Overcollateralization Release Amount, in Section 5.04(a)(2) to pay down principal and finally, if there are any Principal Funds left, in Section 5.04(a)(4) (along with the Overcollateralization Release Amount) to pay down Applied Realized Loss Amounts on nonretired certificates, make other distributions, and then pay Class C certificates.

B. The Petition’s Concern is Not Ambiguity, it is About Whether the Class C Certificates Get Paid.

27. The Petition addresses neither the structure nor the payment waterfall of the HBK PSAs. Rather, it raises concerns about the consequences of the payment flow (Pet. ¶¶ 24 – 51), particularly payments being made to Class C certificates before higher certificates are paid in full. This is not an issue of contractual ambiguity, it is a complaint that it is unfair for payments to happen in the way the HBK PSAs unambiguously require them to happen. The Court should

reject this invitation to ignore the unambiguous terms of the HBK PSAs and rewrite the PSAs to make the payments flow to certificateholders who Petitioners deem more deserving.

28. **First**, the Settlement Agreement and the HBK PSAs are unambiguous and, in such a circumstance, the Court should enforce their unambiguous terms. *See, e.g., R/S Assoc. v. New York Job Dev. Auth.*, 98 N.Y.2d 29, 32, 744 N.Y.S.2d 358, 360 (2002) (“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.”); *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 – 570 (2002) (“[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity”); *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 162, 65 N.Y.S.2d 440, 443 (1990) (“A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.”).

29. **Second**, Petitioners’ appeal to “fairness” is exactly what Justice Scarpulla rejected in the BoNYM Article 77 Proceeding. When Petitioners there made the same appeal to supposed fairness to justify rewriting the waterfall, Justice Scarpulla recognized that she could “not look beyond the four corners of the relevant agreement to determine the parties’ intent, when the contract language is clear.” 56 Misc. 3d at 224.⁴

⁴ Petitioners mistakenly identify Justice Scarpulla’s pay-first, write-up second decision in the BoNYM Article 77 Proceeding as being on appeal. (Pet. ¶ 68 n.22.) The appeals of the BoNYM Article 77 Proceeding pay-first, write-up second decision were withdrawn. The Notice of Appeal filed October 25, 2017, related to a different aspect of Justice Scarpulla’s decision (relating to the application of *res judicata* regarding one specific trust), which is inapposite to this action.

30. **Third**, the decisions of Minnesota courts cited by Petitioners (Pet. ¶ 68 n.22), are inapposite. The question for the Court here is what the unambiguous text of the Settlement Agreement and the PSAs at issue here require. What a different court, interpreting a different settlement agreement and different PSAs, found those documents to require is inapplicable here, particularly where Petitioners have failed to provide the Court with the underlying documents at issue in the Minnesota actions.

31. **Fourth**, that there may be uncertainty regarding what to do if every active certificate is paid off before the Principal Distribution Amount is exhausted (Pet. ¶¶ 38 – 40), is a theoretical concern that should have no impact on the Court’s decision absent evidence that there is a danger of it happening. “When examining [a] contract for ambiguity, a court must look to the situation before it, and not to other possible or hypothetical scenarios.” *Bishop v. Nat’l Health Ins. Co.*, 344 F.3d 305, 308 (2d Cir. 2003) (applying Connecticut law); *see also In re Fontainebleau Las Vegas Contract Litig.*, 716 F. Supp. 2d 1237, 1252 (S.D. Fla. 2010) (applying New York law) (“Contract law is clear insofar as a court must look to the situation before it, and not to other possible or hypothetical scenarios when considering a contract in order to determine whether an ambiguity exists.”) (internal quotations omitted). And if this issue is real rather than hypothetical, the answer is to determine what to do, for example, with the excess Principal Distribution Amount, not to ignore the unambiguous distribution rules of Section 5.04(a).

32. **Fifth**, to the extent the Court chooses to look beyond the unambiguous text of the Settlement Agreement and the HBK PSA’s—and it should not—there is nothing unfair about the order of distribution required by the Settlement Agreement and the HBK PSAs. The purpose of the Settlement Agreement is to benefit a trust as a whole—not holders of specific classes of certificates—and the Court’s decision should thus reflect the Settlement Agreement’s

agnosticism toward specific classes of holders. Distribution of the Overcollateralization Release Amount in accordance with the waterfall of Section 5.04(a)(4) respects the senior certificateholders' position in the payment waterfall: to the extent holders of non-retired senior certificateholders' have suffered realized losses, Section 5.04(a)(4) compensates them for those losses before the holders of more junior non-retired certificateholders. And, of course, the Principal Funds—other than the Overcollateralization Release Amount—will still flow into Section 5.04(a)(2) and be used to pay the existing Certificate Principal Balance of each non-retired certificate down to zero by order of seniority.

II. ZERO BALANCE CERTIFICATES ARE NOT ENTITLED TO PAYMENT

A. The Retired Class Provision.

33. The HBK PSAs are unambiguous in providing that when the principal balance of a Class A or Class M certificate is written down to zero, that certificate “**will be retired and will no longer be entitled to distributions.**” (Emphasis added.) As required by the Settlement Agreement, the unambiguous Retired Class Provisions in the HBK Trusts should be enforced in distributing the Settlement Payment (Ex. 3 § 7.05), and for that reason, retired certificates may not receive a share of the Settlement Payment. The issues raised by the Petition do not provide a basis for writing Retired Class Provisions out of the HBK Trusts.

34. **First**, the Petition is wrong in asserting that “[n]othing on the face of the Retired Class Provision or in the” HBK PSAs “expressly preclude[s]” certificates that have been retired “from being written up in connection with subsequent recoveries.” (Pet. ¶ 57.) The HBK PSAs mandate that those certificates “**will no longer be entitled to distributions.**” (Emphasis added.) The HBK PSAs could not be clearer: certificates that are written down to zero are “retired” and are not entitled to receive **any** distributions of **any** kind. This necessarily includes Subsequent

Recoveries, which are included in the definition of Principal Funds, and thereby further incorporated into the definition of Principal Distribution Amount. (Exs. 5 and 10.)

35. As Justice Scarpulla noted last year in the BoNYM Article 77 proceeding, “Courts should not strain to find contractual ambiguities where they do not exist.” 56 Misc. 3d at 223 (quoting *Diaz v. Lexington Exclusive Corp.*, 59 A.D.3d 341, 342, 874 N.Y.S.2d 77 (1st Dep’t 2009)). The Retired Class Provision unambiguously provides that fully-written-down certificates are retired and not entitled to distributions. Any attempt to strain that unambiguous language to mean anything other than that should be rejected.

36. **Second**, the Petition suggests that Retired Class Provisions could be nullified if the retired certificates were written up such that they no longer had a zero balance. (Pet. ¶ 57.) This is incorrect; to do so would ignore both the Settlement Agreement and the requirements of the HBK PSAs. The Petition overlooks that retired trusts are “no longer . . . entitled to distributions.” (Ex. 6.) The HBK PSAs include no provision that allows retired trusts somehow to be “unretired,” or ever again to receive distributions once retired. Any attempt to write up the retired trusts to make them somehow “unretired” and thus allowed to receive distributions, would violate the express language of the Retired Class Provision that retired trusts are “no longer be entitled to distributions.”

37. If a retired trust could be unretired merely by writing it up, the provision that a retired trust “will no longer be entitled to distribution” would be rendered meaningless. This would violate the bedrock principle that, “[i]n construing a contract, one of a court’s goals is to avoid an interpretation that would leave contractual clauses meaningless.” *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403, 472 N.E.2d 315, 318 (1984).

38. The Court should reject the Petition’s suggestion that the Court could create an entirely new PSA provision—one allowing for the *nunc pro tunc* reinstatement of retired certificates, making it so that they had never been written down to zero and retired—to allow their participation in the distributions of a Settlement Payment in which they are “no longer entitled” to participate. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 – 570 (2002) (“if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity”). Further, to do so would violate the Settlement Agreement’s prohibition on using it to amend “any term of” the HBK PSAs. (Ex. 3 § 7.05.)

B. The Class A Redirection Provision.

39. To the extent there are Class A Redirection Provisions (Pet. ¶ 58) in the HBK Trusts, Petitioners’ concern that those provisions would cause a payment “designated for a particular loan group to be distributed to an entirely different loan group” (Pet. ¶ 60), does not justify writing the Retired Class Provisions out of the HBK PSAs, nor does a Class A Redirection Provision otherwise impact the proper distribution of a HBK Trust’s Allocable Share to its certificateholders. The Class A Redirection Provisions do nothing more than provide a rule for the payment of principal distributions when “the Class A Certificates related to a Loan Group are no longer outstanding.” In that situation, the distribution that would have gone to those certificates will instead “be allocated to the remaining group of Class A Certificates”

40. The Petition expresses a concern that obeying the requirements of the Class A Redirection Provisions would “require principal amounts that would otherwise have been distributed to Class A certificates in one loan group . . . to be distributed to the Class A certificates in a different loan group.” (Pet. ¶ 59.) What the Petition does not explain is why this is a problem or even if it were, why this allows the Court to rewrite the HBK PSAs.

41. The Class A Redirection Provisions provide a rule for making distributions when the certificates for a Class A loan group no longer are outstanding. This is not inconsistent with the other provisions of the payment waterfall, nor is it inconsistent with the application of the Pay First, Write-Up Second Method. The write-up of Realized Losses is done by order of certificates “with the highest payment priority,” which is set by the payment waterfall in the HBK PSAs. The Class A Redirection Provisions are part of that payment waterfall, and so apply to the write-up of Realized Losses just as they apply to any other distribution.

42. Finally, just as the Class A Redirection Provisions should be enforced as written, so, too, should the existing waterfall provisions be observed even for other certificates that “currently have an aggregate certificate principal balance of zero as a result of realized losses.” (Pet. ¶ 61.) Moreover, all the HBK Trusts contain an express Retired Class Provision (discussed above), which unambiguously provides that such certificates are retired and cannot receive any distributions. So, any attempt to rewrite the Class A Redirection Provisions would also require the Retired Class Provisions improperly to be written out of the HBK PSAs. *See Two Guys from Harrison-N.Y.*, 63 N.Y.2d at 403, 472 N.E.2d at 318 (1984).

CONCLUSION

43. For the foregoing reasons, the Court should direct the trustees of the HBK Trusts to (1) make distributions as provided by Section 5.04(a) of the HBK PSAs before writing up certificate balances as provided by Section 5.04(b) of the HBK PSAs (*i.e.*, Pay First, Write-Up Second) (2) and enforce the Retired Class Provisions in the HBK Trusts as written to provide no distributions to such retired classes.

Dated: New York, New York
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