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2020-02716
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To be Argued by:
GAYLE R. KLEIN
(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

BRIEF FOR RESPONDENT NOVER VENTURES, LLC

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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 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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PRELIMINARY STATEMENT

Seven trustees,[1] overseeing more than 300 Residential Mortgage Backed Security ("RMBS") settlement trusts (the "Settlement Trusts"), initiated the underlying Article 77 proceeding to obtain judicial instruction regarding the proper methods for administering and distributing a $4.5 billion global settlement payment to investors. As all but one of the Appellants[2] agree, the answer to each of Trustees' Petition questions (the "Petition Issues") lies in the agreements governing the administration of each Settlement Trust (the "Governing Agreements"). Although the Governing Agreements may seem substantively complex, the interpretative questions before this Court on appeal are not. As the IAS Court's February 13 Order ("Order") makes clear, each of the Petition Issues are straight-forward questions of contract interpretation governed by the plain and unambiguous language set forth in the Governing Agreements.

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[1] 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 (collectively, the "Trustees").

[2] The "Appellants" are the 16 "Institutional Investors" (defined at R.27 (Order at 2, n.2)); the 6 AIG Parties (defined at R.27 (Order at 2, n.2)); Tilden Park Investment Master Fund L.P, Tilden Park Management I LLC, and Tilden Park Capital Management LP (collectively, "Tilden Park"); 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 (collectively, the "Prophet and Poetic Parties"); U.S. Bank National Association, as NIM Trustee, solely in its capacity as Indenture Trustee for the HBK Trusts ("HBK"); Ellington Management Group, L.L.C ("Ellington"), DW Partners LP ("DW"), and Ambac Assurance Corporation ("Ambac").

Following three rounds of exhaustive briefing by 12 groups of investors and a marathon hearing, the IAS Court issued a detailed and well-reasoned 46-page decision holding that that the Trustees should distribute each Settlement Trust's portion of the settlement payment (its "Allocable Share") to its investors pursuant to the plain and unambiguous language of the Governing Agreement. Central to the IAS Court's ruling was its determination that the Governing Agreements—and not the Settlement Agreement—would govern the distribution of the Allocable Share to the certificate holders unless the Governing Agreements were silent on the distribution methodology. On this, there can be no real dispute. Not only does the plain and unambiguous language of the Settlement Agreement necessitate this outcome, but the Institutional Investors—who actually negotiated and drafted the Settlement Agreement with JPMorgan—agreed that this was the correct outcome.

In addition to being correct under the plain and unambiguous terms of the contracts, the IAS Court's ruling has the benefit of being the most fair and reasonable interpretation of the contracts. The benefit of the bargain is explained in unambiguous detail in the four corners of the Governing Agreements. It would make no sense to permit a Settlement Agreement entered into years after the fact, by a subset of certificate holders, to supersede the terms of the Governing Agreements. Indeed, the Governing Agreements have specific provisions enumerating the methods for amendment that clearly have not been met here. To

disregard the plain language of the Governing Agreements would not only violate the law, but also undermine the investors' interests in the Settlement Trusts and the very objective of the Settlement Agreement. This ruling should not now be disturbed on appeal.

Having resolved the threshold question that the Governing Agreements' terms control, the IAS Court correctly ruled on the remainder of the Petition Issues including, *inter alia*, that: (i) the Trustees should focus on the definition of "Certificate Principal Balance" in the Governing Agreements which, for the majority of the Exhibit D Settlement Trusts, requires application of the write-up first distribution methodology; (ii) the Governing Agreements permit the write-up of certificates whose Certificate Principal Balances were previously reduced to zero; and (iii) where the Governing Agreements contain unmistakable language precluding the write-up of certain classes of certificates, the Certificate Principal Balances of those certificates may not be written-up.

Notwithstanding the careful and well-reasoned decision by the IAS Court, the Appellants, who represent a fraction of the thousands of investors whose rights and interests are impacted by these rulings, have appealed the Order. Boiled down to its essence, Appellants complain that the result of applying the unambiguous terms of the Governing Agreements is unfair to them and/or antithetical to their general securitization expectations. Such arguments, however, do not, and cannot,

override the plain and unambiguous language of the Governing Agreements, which are unique to each trust. The appeals should be rejected in their entirety as the IAS Court correctly resolved the Petition Issues by reference to the plain and unambiguous terms of the Settlement Agreement and the Governing Agreements. The IAS Court's Order reflects its consideration of the varied language of the Governing Agreements and the nuances that distinguish the Settlement Trusts from each other, and nothing raised in the appeals otherwise warrants overturning the IAS Court's well-reasoned Order.

COUNTER STATEMENT TO THE QUESTIONS PRESENTED

1. Whether the IAS Court was correct in holding that the distribution methodologies set forth in Section 3.06(b) of the Settlement Agreement—which includes preferred write-up rules—are inapplicable where the Governing Agreements contain language dictating the order of operations.

Answer: Yes, the IAS Court was correct as a matter of law in holding that the distribution methodologies set forth in Section 3.06(b) of the Settlement Agreement are not applicable where the Governing Agreements contain language dictating the order of operations

2. Whether the IAS Court was correct in holding that the Exhibit E settlement trusts, with Governing Agreements containing language substantively identical to that found in Section 6.04(h) of the BALTA 2006-3 Trust's Governing Agreement, unambiguously preclude the write-up of senior certificates.

> Answer: Yes, the IAS Court was correct as a matter of law in holding that the Exhibit E Settlement Trusts, with Governing Agreements containing language substantively identical to that found in Section 6.04(h) of the BALTA 2006-3 Trust's Governing Agreement, unambiguously preclude the write-up of senior certificates.

3. Whether the IAS Court was correct in holding that the Exhibit G Settlement Trusts' Governing Agreements plainly and unambiguously provide for the write-up of a class certificates whose Certificate Principal Balance had previously been reduced to zero because the Settlement Trust's Allocable Share is to be treated and distributed as though it is a Subsequent Recovery.

> Answer: Yes, the IAS Court was correct as a matter of law in holding that the Settlement Trusts' Governing Agreements plainly and unambiguously provide for the write-up of a class certificates whose Certificate Principal Balance had been reduced to zero because the Settlement Trust's Allocable Share is to be treated and distributed as though it is a Subsequent Recovery.

4. Whether the IAS Court was correct in holding that the Exhibit D Settlement Trusts, with Governing Agreements that define Certificate Principal Balance in a manner that is substantively identical to that set forth in the BSABS 2005-AQ2 Trust, unambiguously provide for the write-up first methodology to be employed.

Answer: Yes, the IAS Court was correct as a matter of law in holding that the Exhibit D Settlement Trusts, with Governing Agreements that define Certificate Principal Balance in a manner that is substantively identical to that set forth in BSABS 2005-AQ2, unambiguously provide for the write-up first methodology to be employed.

5. Whether the IAS Court was correct in holding that Ambac was not entitled to the full Allocable Share for the entire insured loan group in those three Settlement Trusts for which it served as insurer.

Answer: Yes, the IAS Court was correct as a matter of law in holding that Ambac was not entitled to the full Allocable Share for the entire insured loan groups in those three Settlement Trusts for which it served as insurer.

COUNTER STATEMENT OF THE FACTS OF THE CASE

I. RMBS PAYMENT METHODOLOGIES

RMBS trusts, such as the Settlement Trusts at issue here, are debt-based securities similar to bonds, which are backed by the principal and interest paid on the underlying assets—typically thousands (sometimes tens of thousands) of residential mortgage loans. (R.361 (Petition, ¶2).) When an investor buys a "certificate" in an RMBS trust, such as the Settlement Trusts, the investor is in effect acquiring the right to receive some portion of repayment of the principal and interest on the underlying mortgages. How that payment flows to the investors is spelled out in each Settlement Trust's Governing Agreement—colloquially referred to as the "waterfall provisions." (R.361 (Petition, ¶3).)

The waterfall provisions "dictate the principal amounts and interest amounts distributable to classes of certificates and the order of priority in which such amounts are distributed among such classes." (*Id.*) These provisions instruct the Trustee (or administrator) when and how to account for the payments that are collected each month, as well as how to account for any losses that the trust may incur (*e.g.* when a mortgagee defaults), against the value of the investors' certificates. As payments are made, or losses are recognized, the value of the certificates—commonly defined in the Governing Agreements as the "Certificate Principal Balance"—is reduced or "written down." As relevant herein, not all

RMBS certificates have the same right to payment or risk of loss. The waterfall provisions in the Governing Agreements specify whether, and which, classes of certificates will bear a higher risk of loss—i.e. be written-down first.

The inverse is also true. The Governing Agreements often provide when and how a Certificate Principal Balance may be increased, or "written-up" upon receipt of funds other than principal and interest payments. Typically, a Certificate Principal Balance may be written-up when the trust recovers additional funds to offset prior losses (i.e. write-downs)—for example the receipt of funds after the property has been foreclosed and sold. Such proceeds are known as a "Subsequent Recovery," because the recovery comes after the trust recognized the loss for accounting purposes. Whether and when the Certificate Principal Balances should be written-up, can greatly impact which investors receive funds, and how much they receive.

II. THE JPMORGAN SETTLEMENT

JPMorgan was a "sponsor" of hundreds of RMBS trusts that turned out to be replete with toxic mortgage loans. In November 2013, JPMorgan reached agreement in principle to pay up to $4.5 billion (the "Settlement Payment") to resolve its liability stemming from its role in the securitization and servicing of the more than 300 Settlement Trusts. (R.360 (Petition ¶1).) The settlement was negotiated between JPMorgan and the Institutional Investors before being brought

to the Trustees for approval. (*Id.*) The settlement was subsequently modified on July 29, 2014, into its current form (the "Settlement Agreement").[3] (R.360, 366 (Petition ¶¶1, 13).)

The Settlement Agreement provided the means for calculating and distributing the Allocable Share to each of the Settlement Trusts. The Allocable Share was calculated by measuring each Trust's *pro rata* share of the losses suffered as a percentage of all losses suffered by the Settlement Trusts. (R.360 (Petition ¶1).) The Settlement Agreement further provided that each Settlement Trust shall distribute its Allocable Share to investors as though it is a "Subsequent Recovery" under the terms of its Governing Agreement. (R.418 (Settlement Agreement §3.06(a).) The Trustees accepted the terms of the Settlement Agreement on October 1, 2014, subject to court approval. (R.360 (Petition ¶1).) By Decision and Order dated August 12, 2016, the IAS Court found that the Trustees "exercised their discretionary power reasonably and in good faith" in approving the Settlement Agreement. (R.366 (Petition ¶13).)

While the Settlement Agreement provided the methodology for allocating and distributing money to the Settlement Trusts, the Settlement Agreement does not, and was never intended to, control how each Settlement Trust's Allocable Share is to be distributed to its certificate holders. Instead, the Governing

[3] The Settlement Agreement, and the exhibits thereto, may be found at R.405-92.

Agreements, each comprising hundreds of pages, detail how cash flows, losses, and cash collections are to be received, allocated, and processed, including how to distribute Subsequent Recoveries and how and when to apply them against Certificate Principal Balances. (*See, e.g.*, R.7094-8297 (BALTA 2006-3 Governing Agreement).)

Importantly, the drafters of the Settlement Agreement never intended that the Settlement Agreement would supersede the Governing Agreements and control how an Allocable Share is to be distributed and accounted for. The Institutional Investors, who negotiated and drafted[4] the Settlement Agreement with JPMorgan, agree that the Settlement Agreement's terms do not supersede, and were not intended to supersede, the distribution methodologies in the Governing Agreements. (*See generally,* R. 5387-415, 10839-64, 13872-85; Joint Opening Br. for the Institutional Investors, AIG, Ellington, and DW (collectively the "Institutional Investor Parties"), NYSCEF Doc. No. 65, at 2 (November 2, 2020) ("The Court, in the Decision and Order, correctly resolved all but one of the issues presented by the Petition.") [hereinafter "Inst. Invs.' Br."].)

[4] Given that the Settlement Agreement expressly disclaims JPMorgan's "responsibility for the maintenance or distribution of the Settlement Payment once paid into the applicable escrow accounts, which maintenance and distribution shall be the sole responsibility of the Accepting Trustees," it seems a fair assumption that the allocation and distribution provisions were drafted by the Institutional Investors, not JPMorgan. (*See* R.415-16 (Settlement Agreement §3.01).)

III. THE UNDERLYING PROCEEDING

On December 15, 2017, the Trustees initiated the instant Article 77 proceeding (the "Proceeding") because they feared that, "[a]bsent instructions, there [would be] a significant risk of challenges to the Settlement Payment Application Process[5] following receipt of the Settlement Payment by Certificateholders and other interested parties." (R.386-87 (Petition ¶69).) The Petition sought: (i) judicial instruction concerning the Petition Issues; and (ii) to provide certificate holders in the Settlement Trusts, as well as other interested persons, the opportunity to express their views on the administration and distribution of each Settlement Trust's Allocable Share to its certificate holders. (R. 365-66 (Petition ¶9).) The Trustees identified numerous Petition Issues to be resolved in order to distribute the settlement proceeds to the certificate holders, including the following three addressed herein:

i. Whether Petitioners should "first apply the Settlement Payment Write-Up to the pertinent certificate principal balances and thereafter distribute the Settlement Payment to the newly written-up certificate principal balances" (the "Write-Up First" method); or, alternatively, "first distribute the Settlement Payment based on certificate principal balances that do not account for the Settlement Payment Write-Up, and thereafter apply the Settlement Payment Write-Up to the pertinent certificate principal balances" (the "Pay First" method);

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[5] The Settlement Payment Application Process refers to "the administration and distribution of the Settlement Payment with respect to the Settlement Trusts[.]" (R.360 (Petition ¶1).) The Trustees assert that the resolution of the Disputes is a necessary component of effectuating the Settlement Payment Application Process. (*See* R.365 (Petition ¶8).)

ii. Whether certificates with a Certificate Principal Balance that was previously reduced to zero may be written-up in light of a Subsequent Recovery; and

iii. Whether Subsequent Recovery write-up instructions in the Governing Agreements that expressly provide only for the write-up of subordinate certificates, preclude the Trustees from writing up "senior" certificates.

(R.364-65, 369 (Petition ¶¶7-8, 22).)

While the questions surrounding the Petition Issues largely focus on the interplay between the Settlement Agreement and the underlying Governing Agreements, there is no contradiction between the Governing Agreements and the Settlement Agreement. Section 3.06(a) of the Settlement Agreement is unequivocal in providing that each Settlement Trust's Allocable Share should be distributed to the certificate holders in accordance with the distribution provisions of the respective Governing Agreements:

> [e]ach 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 . . ..

(R.418.) Section 7.05 of the Settlement Agreement emphasizes this intent by making clear that the Settlement Agreement does not amend, or otherwise alter, the terms of any Governing Agreement. (R.424 ("The Parties agree that this Settlement Agreement reflects a compromise of disputed claims and is not

intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement.”).)

Section 7.13 of the Settlement Agreement is not inconsistent. Section 7.13 merely clarifies that the Settlement Agreement supersedes all prior agreements and understandings between the Parties, i.e. the prior negotiations and draft settlement agreements. (R.425.) The limited applicability of Section 7.13 is underscored by its remaining “[s]ubject to Section 7.05,” thereby confirming that the Settlement Agreement is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement. (*Id.*)

In sum, the Settlement Agreement contemplates a two-step process for transferring the Settlement Payment from JPMorgan to the investors. (R.418 (Settlement Agreement §3.06(a)).) The Settlement Agreement first requires the distribution of the Allocable Shares to each Settlement Trust, and then, once the Allocable Share is with the relevant Trustee (or administrator), that Trustee (or administrator) distributes the Allocable Share to the certificate holders pursuant to the terms of the Settlement Trust’s Governing Agreement. (*Id.*)

IV. IAS COURT DECISION

In September and October 2018, the parties submitted three rounds of briefing on the Petition Issues to the IAS Court. (*See, e.g.*, R.3492-521; R.3522-23; R.3524-25; R.3621-32; R.4670-90; R.4896-912; R.4930-35; R.4951-65;

R.5387-415; R.5944-49; R.5950-76; R.10336-63; R.10465-92.) On February 13, 2020, the IAS Court issued its 46-page Order resolving the Petition Issues and instructing the Trustees on the proper manner of administering and distributing the Settlement Payment to certificate holders. (R.26-71.) As is relevant here, the IAS Court held that:

i. The plain and unambiguous language of the Settlement Agreement established that Settlement Agreement Section 3.06(b) was a "gap filler" intended only to apply if "the Governing Agreement is silent as to the write-up mechanics." (R.52-53 (Order at 27-28).)

ii. Under the plain and unambiguous language of the Governing Agreements, Settlement Trusts with class certificates whose Certificate Principal Balance had been reduced to zero may be written back up upon receipt of a Subsequent Recovery. (R.63 (Order at 38).) While the "Retired Class" provisions that control the treatment of zero balance certificates, prohibit distributions to those certificates, the Retired Class provisions say nothing about write-ups of their balances as it relates to Subsequent Recoveries. (*Id.*) The IAS Court found that this was important because the write-up provisions of the Governing Agreements do not prohibit zero balance classes from being written-up upon receipt of a Subsequent Recovery. (*Id.*)

iii. Where the plain and unambiguous language of the Governing Agreements provide only for the write-up of subordinate certificates, senior certificates may not be written-up. (R.56-60 (Order at 31-35).)

iv. Under the plain and unambiguous language of the Governing Agreements, Settlement Trusts with Governing Agreements that require distributions to certificate holders "until the Certificate Principal Balance is reduced to zero" were write-up trusts, because the definition of "Certificate Principal Balance" includes "Subsequent Recoveries." Given that any Subsequent Recoveries needed to be taken into consideration in determining the Certificate Principal Balance, the Certificate Principal Balance must necessarily be written-up prior to the

distribution to include any Subsequent Recoveries. (R.36-41 (Order at 11-16).)

v. There were three scenarios where the Pay First method should be applied.[6] The first are those Governing Agreements in which the definition of Certificate Principal Balance "limits the Subsequent Recoveries to be added to the balance." (R.42 (Order at 17); *see also* (R.36-39 (Order at 11-14).) Second, are those Governing Agreements that define Certificate Principal Amount as requiring any Subsequent Recoveries be distributed prior to the increase of principal. (R.42-43 (Order at 17-18).) Third are those Settlement Trusts that fail to address Subsequent Recoveries or otherwise addresses increasing the certificate balance. Reasoning that the absence of such language was tantamount to "silence," the IAS Court held that Section 3.06(b) of the Settlement Agreement, the "gap-filler" provision, controls in such circumstances. (*Id.*)

vi. Certificate insurer Ambac is not entitled to priority reimbursement from Subsequent Recoveries for insurance payments it made to certificate holders. (R.66-68 (Order at 41-43).) The IAS Court reasoned that while Ambac is entitled to be reimbursed for previously paid claims to A2 certificates from Subsequent Recoveries, Section 6.02's priority language did not "modify or contradict section 6.01 to the extent that [Section 6.01] provides that A1 certificates are entitled to payment of Subsequent Recoveries through the principal distribution waterfall." (*See* R.68 (Order at 43).)

vii. Ambac's claims for amounts paid on GPMF 2005-AR5 trust certificates must also fail. (R.67-68 (Order at 42-43).) For this trust, Ambac did not claim priority reimbursement, but instead relied on its subrogation rights and claimed that all classes of certificates must be written-up. The IAS Court rejected this argument for the same reasons it rejected the claims of other respondents that sought to write-up senior certificates. (*Id.*)

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[6] The IAS Court agreed with Tilden Park that a group of JPALT trusts unequivocally provided for the Pay First Method, but was quick to point out that these Trusts were not in dispute and were not identified by the Trustees in the Petition. (R.38-39, 42 (Order at 13-14, 17).)

Respondent-Appellee Nover Ventures, LLC ("Nover") filed Notice of Entry of the Order on February 14, 2020. (R.25.) On November 2, 2020, the Appellants filed their briefs appealing the Order. Notably, the Appellants have abandoned many of the arguments raised to the IAS Court below. In fact, not only did the Institutional Investor Parties not appeal the IAS Court's ruling against them with respect to the write-up of zero balance certificates and the application of the write-up first method over the pay-first method, but in their appellate brief the Institutional Investor Parties concede that the IAS Court "correctly resolved" these issues, notwithstanding their contentions to the contrary before the IAS Court below. (Inst. Invs.' Br. at 2.)

ARGUMENT

I. LEGAL STANDARD

"When engaging in contract interpretation, 'the standard of review is for this Court to examine the contract's language de novo.'" *MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 17 (1st Dep't 2018), *leave to appeal denied*, 32 N.Y.3d 912 (2018) (quoting *Duane Reade, Inc. v. Cardtronics*, LP, 54 A.D.3d 137, 140 (1st Dep't 2018)); *see also*, *U.S. Bank N.A. v. SMBC Holdings, LLC*, 177 A.D.3d 443, 443-44 (1st Dep't 2019) (interpreting RMBS contract in Article 77 proceeding *de novo*). Written agreements are to be "construed in accordance with the [contracting] parties' intent and '[t]he best evidence of what parties to a written

agreement intend is what they say in their writing.'" *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013) (citation omitted). "A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003) (citations omitted). Where the written agreement "is complete, clear and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms." *Schron*, 20 N.Y.3d at 436.

"It is well settled that an appellate court's scope of review is generally limited to those issues that have been appealed and that aggrieve the appealing party, and that arguments raised below but not pursued on appeal are generally deemed abandoned." *McHale v. Anthony*, 41 A.D.3d 265, 266-67 (1st Dep't 2007) (internal citations omitted). Arguments that are not pure questions of law or which otherwise were not raised below, are not properly before the Appellate Division on appeal. *U.S. Bank N.A. v. DLJ Mtge. Cap., Inc.*, 146 A.D.3d 603, 603 (1st Dep't 2017).

II. THE IAS COURT CORRECTLY HELD THAT THE SETTLEMENT AGREEMENT'S WRITE-UP PROVISIONS DO NOT SUPERSEDE THE WRITE-UP PROVISIONS SET FORTH IN THE GOVERNING AGREEMENTS

The IAS Court was correct in holding that the Settlement Agreement's write-up provisions do not supersede or otherwise amend the distribution provisions in the Governing Agreements. In addition to requiring JPMorgan to

make the Settlement Payment and providing the method for allocating the Settlement Payment to each of the Settlement Trusts, the Settlement Agreement contains language "requiring": (i) the distribution of the Settlement Payment to certificate holders, and (ii) the writing up of Certificate Principal Balances in the amount of the Settlement Payment Write-Up. (R.369 (Petition ¶21); R. 418-19 (Settlement Agreement §3.06(b)).) While the Trustees agreed that, under the Settlement Agreement, if the Governing Agreements plainly specified a particular order of operations, the Governing Agreement's distribution methods controlled, (R.370 (Petition ¶23)), for a number of the Settlement Trusts, the Trustees were unclear what the Governing Agreements required, and therefore sought instruction whether to follow the Settlement Agreement or the Governing Agreements. (*Id.*) On this issue, the IAS Court was unequivocal: the distribution methodologies set forth in Section 3.06(b) of the Settlement Agreement are not applicable where the Governing Agreements have provisions expressing in what order Certificate Principal Balances should be "written up." (R.53 (Order at 28).) As the IAS Court explained, only in a handful of cases were the Governing Agreements silent. (R.42-43 (Order at 17-18).)

Tilden Park, and Tilden Park alone, argues that the Settlement Agreement's distribution methodologies supersede the Governing Agreement's distribution methodologies. Tilden Park is wrong. As detailed above, the settlement with

JPMorgan was structured such that the distribution of funds to the certificate holders would be governed by the terms of the respective Settlement Trusts' Governing Agreements. (R.53-56 (Order at 28-31).) Had the parties intended for the Settlement Agreement to supersede the Governing Agreements, the Settlement Agreement would have expressly said so.[7] Tellingly, the Institutional Investors, who actually negotiated and drafted the Settlement Agreement with JPMorgan, do not agree with Tilden Park's contention that Settlement Agreement Section 3.06(b) is intended to supersede the Governing Agreements' express distribution methodologies.[8]

Of course, distributing each Settlement Trust's Allocable Shares per the terms of each Settlement Trust's respective Governing Agreement is consistent with the plain and unambiguous language of the Settlement Agreement. (R.34-35 (Order at 9-10).) The IAS Court correctly focused on Section 3.06(a) of the

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[7] Even if the parties had intended for the Settlement Agreement to supersede the Governing Agreements, such provision would not have been enforceable, as the Governing Agreements expressly require that an amendment of its terms must satisfy certain conditions that are not met here, including express approval by a vote of a certain percentage of investors. (*See* R.7185 (BALTA 2006-3 Governing Agreement §11.02).)

[8] The Institutional Investors asserted before the IAS Court that the Governing Agreements were silent on the order of operations and, because the Governing Agreements were silent, the Settlement Agreement's distribution methodology should apply. The IAS Court agreed with the Institutional Investors that the Settlement Agreement's distribution methodologies should act only as a "gap filler," but disagreed that the Governing Agreements were, by and large, silent on the distribution methodology. (R.53-56 (Order at 28-31).) The Institutional Investors did not appeal this portion of the IAS Court's ruling. (*See generally* Inst. Invs.' Br.) In fact, to the contrary, in their appellate brief the Institutional Investor Parties concede that the IAS Court "correctly resolved" this issue. (*Id.* at 2.)

Settlement Agreement, which "expressly defers to the distribution provisions of the Governing Agreements [such that] the Governing Agreements control where they specify the order of operations, and the Settlement Agreement controls only where the Governing Agreements to do not specify such order." (R.34 (Order at 9).)

It is axiomatic that, had the drafters intended for the Settlement Agreement to prevail over the Governing Agreements—which we know they did not—they would have expressly said so. Tilden Park does not (and cannot) explain why, if its position is correct, the drafters would include language expressly deferring to the Governing Agreements (i.e. Section 3.06(a)), and not include language unequivocally establishing that the Settlement Agreement's distribution methodologies supersede the Governing Agreements distribution methodologies. Given that any change to the waterfall provisions contained in the Governing Agreements could have significant economic ramifications, were it the intent of the drafters to make such a change, they would have done so expressly and taken steps pursuant to the Governing Agreements to effectuate an appropriate amendment to same. Put simply, the absence of any such language is as telling as the presence of Sections 3.06(a) and 7.05.

Recognizing this, the IAS Court reached the only decision it could, that "[b]y its terms, the Settlement Agreement does not supersede or override the Governing Agreements." (R.53 (Order at 28).) The plain language of the

Settlement Agreement necessitates this finding. Section 7.05 of the Settlement Agreement, for one, provides that "[t]he Parties agree that this Settlement Agreement reflects a compromise of disputed claims and is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." (*Id.* (quoting R.424 (Settlement Agreement §7.05)).) As the IAS Court correctly reasoned, "[t]his provision would be rendered meaningless by a holding that the Settlement Agreement controls the write-up of the Settlement Payment or modifies the write-up provisions of the Governing Agreements if they conflict with the write-up provision of the Settlement Agreement." (R.53 (Order at 28).) Had the drafters intended for Section 3.06(b) to be an exception to the Section 7.05 mandate that the Settlement Agreement not amend any term of the Governing Agreements, they would have expressly said so. They did not.

Tilden Park similarly misconstrues Section 7.13 to mean that the Settlement Agreement supersedes the Governing Agreements. Not so. This section simply provides that the Settlement Agreement signed by the "Parties," *i.e.*, JPMorgan, the Institutional Investors, and the accepting Trustees, supersedes "all prior agreements and understandings between the Parties." (R.425 (Settlement Agreement §7.13).) The only rational reading of Section 7.13 is that the "prior agreements and understandings" refers to the prior settlement discussions and agreements between JPMorgan, the Institutional Investors, and the Trustees—not the Governing

Agreements. This must be so because the Governing Agreements were negotiated between parties other than those defined as the "Parties" to the Settlement Agreement and therefore were not "between the Parties." (*Cf.* R.406.) Section 7.13 further clarifies that this is the only correct reading insofar as it is "[s]ubject to Section 7.05," which, as discussed above, provides that the Settlement Agreement does not amend the Governing Agreements. (R.425 (Settlement Agreement §7.13).)

With no response to the Settlement Agreement's plain language, Tilden Park attempts to manufacture an argument that, because in some instances the Settlement Agreement purports to supersede the Governing Agreements, the IAS Court should have held that Section 3.06(b), too, should override the Governing Agreements. But this logic, too, is flawed.

First and foremost, the "superseding" language identified by Tilden Park does not actually conflict with the Governing Agreements. For example, Tilden Park wrongly argues that the Settlement Agreement's definition of "Net Losses," coupled with Settlement Agreement Section 3.05, evidence that the Settlement Agreement was intended to supersede the Governing Agreements. But these provisions do not conflict with the Governing Agreements. Section 3.05 and the definition of "Net Losses" collectively define how the Settlement Payment was to be apportioned amongst and between the Settlement Trusts, *i.e.* the calculation of

each trust's Allocable Share. These provisions are not relevant to the issues presently before this Court, which is how the Allocable Shares, once distributed to the Trustees of the Settlement Trusts, should be distributed to certificate holders. Moreover, Tilden Park's basic reasoning is flawed. Contrary to Tilden Park's assertion, it is only logical that when allocating the Settlement Payment across the Settlement Trusts, the Settlement Agreement should provide its own definition of "Net Losses." Moreover, adopting definitions of Losses from the Settlement Trusts' Governing Agreements, as Tilden Park suggests, would have risked introducing competing definitions and creating conflict where none was necessary. The use of a new definition in the Settlement Agreement hardly evidences intent to supersede the Governing Agreements.

Tilden Park similarly argues that Section 3.06(a) of the Settlement Agreement "expressly overrides the Governing Agreements' distribution instructions" by prohibiting the distribution of settlement funds to "a class of REMIC residual interests." (Opening Br. for Tilden Park, NYSCEF Doc. No. 58, at 11-19 (November 2, 2020) [hereinafter "Tilden Park Br."].) But as Tilden Park itself acknowledges, the "residual certificates in RMBS deals are often held by the deal's sponsor or depositor—here, [JPMorgan] and its corporate affiliates." (*Id.* at 19.) Allocating a portion of the Settlement Payment back to JPMorgan would undermine and frustrate the very purposes of the Settlement Agreement.

Recognizing as much, JPMorgan agreed to Section 3.06(a) and effectively waived its right to receive any distribution of funds stemming from the Settlement Agreement.

Tilden Park also argues, to no avail, that applying the Settlement Agreement's distribution methodologies in lieu of the Governing Agreement's write-up provisions would not constitute an amendment. Tilden Park is again wrong. As the IAS Court explained in rejecting this argument, "the Settlement Agreement expressly elects to apply the existing distribution provisions in the Governing Agreements for distribution of the Settlement Payment." (R.55 (Order at 30).) Even if the Trustees had the discretion to enter into a Settlement Agreement that conflicted with the Governing Agreements—which they did not—the Settlement Agreement, by its own terms, defers to the distribution methodologies set forth in the Governing Agreements.

III. THE IAS COURT CORRECTLY HELD THAT SENIOR CERTIFICATES SHOULD NOT BE WRITTEN-UP WHERE DOING SO IS IN CONFLICT WITH THE GOVERNING AGREEMENTS

The Institutional Investor Parties, Tilden Park, and Ambac argue that senior certificates should be written-up, even where the Governing Agreements contain a "Subordinate Write-Up Provision" expressly limiting the write-up of certificates to subordinate certificates. They are wrong. As the IAS Court correctly held, the plain and unambiguous language of the Subordinate Write-Up Provisions provide

only for the write-up of subordinate certificates—not senior certificates. (R.56-60 (Order at 31-35).)

As detailed in the Petition, 82 (about 25%) of the Settlement Trusts contained a "Subordinate Write-Up Provision" expressly providing that, upon receipt of a Subsequent Recovery, only the subordinate certificates may be written-up. (R. 501-02 (Petition Exhibit E).) The Trustees suggested that if, "under the applicable Governing Agreements, the Settlement Payment Write-Up could only be applied to Class B certificates and Class A could not be written up," it could affect how the Allocable Share is distributed to certificate holders. (R.380 (Petition ¶47).) However, enforcing the Subordinate Write-Up Provision does not, by itself, necessarily and/or materially impact the distribution of the Allocable Shares. Indeed, the Governing Agreements' waterfall provisions still provide that the Allocable Shares first be distributed to "senior" certificates with outstanding balances, and that the "junior" classes of certificates absorb losses first. In sum, irrespective of the Subordinate Write-Up Provision, the holders of "senior" certificates stand to receive the lions' share of the Settlement Trusts' Allocable Share.

Tilden Park alone argues that Settlement Agreement Section 3.06(b) supersedes the Governing Agreements and requires the write-up of senior certificates. But for the reasons detailed in Section II *supra*, the IAS Court rejected

that argument and found that "the write-up provisions of the Governing Agreements control in the event of a conflict with the Settlement Agreement write-up provision[.]" (R.56 (Order at 31).) Interpreting the "Subordinate Write-Up Provisions"[9] of the Governing Agreements, the IAS Court correctly held that, where the Governing Agreements only provide for the write-up of subordinate bonds—conspicuously excluding senior certificates from the write-up instructions—the plain and unambiguous intent is that only subordinate bonds be written-up.

A. <u>The Plain And Unambiguous Language Of The "Subordinate Write-Up Provisions" Provide For The Write-Up Of Only The Subordinate Certificates</u>

The IAS Court correctly held that the plain and unambiguous language of the Subordinate Write-Up Provisions provide only for the write-up of subordinate certificates. In reaching this determination, the IAS Court focused on the BALTA 2006-3 Governing Agreement, which was one of the exemplar trusts identified by the respondents that contained a Subordinate Write-Up Provision. (R.57-60 (Order at 32-35).) The Subordinate Write-Up Provision in BALTA 2006-3 provides in relevant part:

> … If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such Subsequent

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[9] In some trusts, such as BALTA 2006-3, the provision is found in Section 6.04(h). (R.7173.) In other Trusts, such as BSARM 2005-11, the provision is found in Section 6.02(h). (R.11712.) For purposes of this submission, all such provisions are referred to as the "Subordinate Write-Up Provisions."

> Recoveries will be applied to increase the Certificate Principal Balance of the related Class of Group II Subordinate Certificates or Group III Subordinate 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 Group II Subordinate Certificates or Group III Subordinate Certificates, as applicable, pursuant to Section 6.04. The amount of any remaining Subsequent Recoveries will be applied to sequentially increase the Certificate Principal Balance of the Group II Subordinate Certificates or Group III Subordinate Certificates, as applicable, beginning with the related Class of Subordinate Certificates with the next highest payment priority, up to the amount of such Realized Losses previously allocated to such Class or Classes of Certificates pursuant to this Section 6.04.

(R. 7173 (BALTA 2006-3 Governing Agreement, § 6.04(h).)

This language is clear. By making the decision to expressly provide for the write-up of only the subordinate certificates, and to exclude altogether the senior certificates from the Subordinate Write-Up Provision, the Governing Agreements plainly and unambiguously provide for the write-up of only the subordinate bonds. *See Ambac Assur. Corp. v. EMC Mtge. LLC*, 121 A.D.3d 514, 518 (1st Dep't 2014) ("the omission of a term . . . must be deemed an intentional choice of the parties to the agreement"); *Vintage, LLC v. Laws Const. Corp.,* 13 N.Y.3d 847, 849 (2009) (where the provisions under consideration "have a definite and precise meaning, unattended by danger of misconception … [and] there is no reasonable basis for a difference of opinion" there is no ambiguity) (citation omitted). As the IAS Court correctly noted, none of the proponents of writing-up senior certificates were able to identify any provision in the BALTA 2006-3 Governing Agreement,

or similar Governing Agreements, that provide for the write-up of senior certificates in the face of the Subordinate Write-Up Provision. (R.58 (Order at 33).)

With no express language in the Governing Agreements to rely upon, proponents of writing up the senior certificates in the face of the Subordinate Write-Up Provision resort to strained interpretations of the Governing Agreements. The Institutional Investor Parties assert that the Subordinate Write-Up Provisions are merely "silent" regarding the write-up of senior certificates. (Inst. Invs.' Br. at 18-19.) But the Subordinate Write-Up Provisions are not, in fact, silent as to senior certificates; by purposefully omitting the write-up of senior certificates from these provisions, the drafters clearly intended to express that only subordinate certificates be written-up. The Court cannot give the Institutional Investor Parties' interpretation any credence because doing so would strip the Subordinate Write-Up Provisions of their meaning and effect, and this Court must give meaning and effect to the intentional omission of other classes. *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) ("The rules of construction of contracts require us to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect."); *see also Ambac*, 121 A.D.3d at 518 ("omission of a term from the sentence at issue

in a contract . . . must be deemed an intentional choice of the parties to the agreement”).

Nor can the Institutional Investor Parties square their claims of “silence” with the rest of the Governing Agreements. Again, BALTA 2006-3 is illustrative, as it expressly provides for the write-up of Group I senior certificates:

> …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 Group I Subordinate Certificates with the highest payment priority to which Applied Realized Loss Amounts have been allocated, but not by more than the amount of Applied Realized Loss Amounts previously allocated to that Class of Group I Subordinate Certificates. The amount of any remaining Subsequent Recoveries will be applied to sequentially increase the Certificate Principal Balance of the Group I Certificates, beginning with the Class of Group I Certificates with the next highest payment priority, up to the amount of such Applied Realized Loss Amounts previously allocated to such Class or classes of Group I Certificates. Notwithstanding the forgoing, any Subsequent Recoveries will be allocated to the Group I Senior Certificates to the extent of any Applied Realized Loss Amounts before being applied to the Group I Subordinate Certificates . . .. Any such increases shall be applied to the Certificate Principal Balance of each Group I Certificate of such Class in accordance with its respective Fractional Undivided Interest.

(R.7171 (BALTA 2006-3 Governing Agreement § 6.03(b)).) As BALTA 2006-3 makes clear, where the drafters intended for the parties to write-up senior certificates, the Governing Agreements expressly say so. The Institutional Investor Parties cannot explain why the plain language of the Subordinate Write-Up Provisions should be interpreted to permit the write-up of senior certificates when

the drafters of the Governing Agreements knew how to provide for the write-up of senior certificates and, where it was so intended, did so in the very same Governing Agreement. (*Compare* R.7171 (BALTA 2006-3 § 6.03(b) (providing for write-up of senior certificates in Group I)) *with* R.7173 (BALTA 2006-3 § 6.04(h) (not providing for write-up of senior certificates in Groups II and III)).) The different treatment of Subsequent Recoveries within the BALTA 2006-3 Governing Agreement highlights that the drafters of the Governing Agreements were able to provide for the write-up of senior certificates, and the only explanation for the exclusion of such language from the Subordinate Write-Up Provisions was their intent to limit the write-up to subordinate certificates. "Under the *expressio unius* canon of construction, when specific contract language is used in one clause its omission elsewhere 'must be assumed to have been intentional[.]'" (*See* Tilden Park Br. at 17-18 (quoting *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986) (citation omitted).)

The Institutional Investor Parties also unsuccessfully attempt to avoid the plain and unambiguous language of the Subordinate Write-Up Provisions by arguing that the definition of "Realized Losses" provides for the allocation of realized losses to the senior certificates. This argument, too, fails. (R.58-59 (Order at 33-34).) Applying the "Realized Losses" definition to "clarify" the meaning and intent of the Subordinate Write-Up Provisions, as the Institutional

Investor Parties propose, is an apples to oranges application that makes no sense. This is because the Subordinate Write-Up Provisions provide for the allocation of principal and interest at the certificate level, whereas the definitions of "Realized Losses" account for losses at the loan level. The Settlement Agreement, of course, did not allocate the Settlement Payment at the loan level.

This was always understood and contemplated by the drafters of the Settlement Agreement. By its plain terms, the Settlement Agreement did not make the Allocable Share a "Subsequent Recovery" *per se*. Rather, by providing that the Allocable Share should be treated as a "Subsequent Recovery," the drafters were merely dictating which of the Governing Agreements' procedures would govern the distribution of the Allocable Shares to certificate holders. Given that the Governing Agreements specify different instructions for payment distributions, allocation of Realized Losses, and the write-up for Subsequent Recoveries, the drafters were merely ensuring that the Subsequent Recovery rules—and therefore the Subordinate Write-Up Provision—would apply.

Moreover, the Institutional Investor Parties misplace their reliance on the "Realized Loss" definition, which provides in relevant part that "the amount of 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.7116 (BALTA 2006-3 Governing

Agreement, "Realized Loss").) As the IAS Court explained, "while the Realized Loss definition provides for the allocation of losses to reduce certificate balances … including senior certificates, the definition does not address the write-up of balances of certificates to account for subsequent recoveries." (R.58 (Order at 33).) And again, as noted above, none of the proponents of writing up senior certificates have pointed to, or have otherwise identified, any provision in the Governing Agreements that provides for the write-up of senior certificates in the face of the Subordinate Write-Up Provision. (*Id.*) The IAS Court was correct to conclude that the language of the Subordinate Write-Up Provision governs, and where it specifically says that only subordinate certificates are written-up, the senior certificates are simply not eligible for write-up. (R.56-60 (Order at 31-35).)

With no contractual language to cite, the Institutional Investor Parties attempt to distract from the plain and unambiguous language of the Governing Agreements by making broad and wide sweeping assertions regarding how, generally, RMBS Trusts are "supposed" to be structured. But there is no one size fits all RMBS structure. Each deal has its own idiosyncrasies and unique features and, the Institutional Investor Parties' contentions notwithstanding, it is improper to assume that these idiosyncratic differences are anything but intentional. The IAS Court was correct in finding that the only thing that matters when assessing the Settlement Trusts' waterfall provisions, or more specifically, a particular

certificate's right to payment, is what the Settlement Trust's Governing Agreement provides for. The distribution provisions of the Governing Agreements have not changed in the nearly 15 or so years since the Institutional Investor Parties' acquired their interests in the Settlement Trusts, and they should not change now simply because the plain and unambiguous terms of the waterfall provision do not comport with the Institutional Investor Parties' expectations of how they want the funds to be distributed.

Nor is the basic tenet of the Institutional Investor Parties' argument correct. If the Institutional Investor Parties' assertion that there was a uniform way for RMBS trusts to function, then payment distributions would always flow to senior certificates first. That is simply not so. In some trusts payments are distributed sequentially, some apply payments *pro-rata* to senior and junior certificates, and still others provide for a fixed dollar amount based on certain prepayment requirements. Indeed, some trusts require payment first to subordinate certificates before senior certificates. For example in the SAMI 2006-AR5 Trust, while losses are allocated in the reverse order of seniority (the most junior certificates, A-3, absorb losses first, followed by the more senior A-2 certificates, and then finally the most senior A-1 certificates), principal payments are allocated equally *pro-rata* among these certificates. (Structured Asset Mortgage Investments II Trust 2006-AR5, Current Report (Form 8-K) (June 16, 2006), Ex. 1, *available at*

https://www.sec.gov/Archives/edgar/data/1363834/000091142006000378/d118454 8.txt (SAMI 2006-AR5 Governing Agreement, §§ 6.01(a); 6.02(d)); *see also* R.10456-58.) Thus, while technically there be "seniority" in the SAMI 2006-AR5 Trust for purposes of allocating losses, there is not when it comes to receiving distributions. At bottom, each Governing Agreement is different and the language of each Governing Agreements' waterfall provision should be given full effect.

Similarly, and against this backdrop, the Institutional Investors' contention that applying the plain language of the Subordinate Write-Up Provisions produces an "absurd" and "commercially unreasonable" result must be rejected. An "absurd" or "commercially unreasonable" result is not adjudged against some fantasy expectation, as the Institutional Investors argue, but rather must be viewed against the plain and unambiguous language of the Governing Agreements. As detailed above, writing up only subordinate bonds was the exact, express, and intended result of the drafters of the Governing Agreements. Where the drafters wanted senior certificates to be written-up, the Governing Agreements expressly provide for it. Indeed, more than 220 Settlement Trusts expressly provided for the write-up of senior certificates. The Institutional Investor Parties simply cannot explain why for 220 or so Settlement Trusts, the drafters were able to clearly and unambiguously provide for the write-up of senior certificates, but when it came to the Exhibit E Settlement Trusts, they forgot how to so provide.

Nor does refusing to write-up senior certificates produce commercially unreasonable results. Notwithstanding the Institutional Investors false narrative, there is nothing inherently special about labeling a certificate "senior." What matters, and what gives a certificate its "senior" status, is the waterfall language of the Governing Agreements. Moreover, the Subordinate Write-Up Provision is not nearly as draconian as the Institutional Investor Parties argue. The Institutional Investor Parties' certificates still stand to receive distributions before subordinate certificates and will continue to suffer additional losses only after those subordinate certificates.

Lastly, the Institutional Investor Parties' contention that the Subordinate Write-Up Provision would create the appearance of over collateralization is purely hypothetical and not grounded in fact. Using SAMI 2006-AR5 as an example, the Institutional Investor Parties contend that, "[i]f the Subsequent Recoveries received by this Trust were to exceed [the written-up Certificate Principal Balance of the subordinate certificates], then under the IAS Court's construction of [the Subordinate Write-Up Provision], the full amount of the 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 the [written-up Certificate Principal Balance of the subordinate certificates]." (Inst. Invs.' Br. at

26.) The Institutional Investor Parties claim that this would reflect the appearance of over collateralization, as the SAMI 2006-AR5 Trust's assets would appear to be higher than its liabilities. (*Id.* at 25-27.)

But the Institutional Investor Parties' concerns notwithstanding, there is no risk of this happening. There currently exists no reason to believe that application of the Subordinate Write-Up Provision will result in the appearance of over collateralization of any Settlement Trust. For example, the Institutional Investors cite SAMI 2006-AR5 as the poster child for this alleged problem. But the SAMI 2006-AR5 Trust stands to receive an Allocable Share of approximately $15 million, which is substantially below the distribution that would be needed to create the over collateralization scenario the Institutional Investor Parties fear. (Inst. Invs.' Br. at 26.) Indeed, it is telling that, despite knowing the Allocable Share for each of the Settlement Trusts, and the Realized Losses for each of the Settlement Trusts, the Institutional Investor Parties were unable to identify a single Settlement Trust with a Subordinate Write-Up Provision where the distribution of the Allocable Share would result in over collateralization.[10]

[10] Even if the distribution of the Allocable Share had exceeded the Realized Losses of the subordinate certificates, that would be beside the point. Nover does not dispute that, if there was a situation where the Allocable Share exceeded the Realized Losses of the subordinate certificates, the Petitioners should write-up the senior certificates. But of course, as stated above, there are no Settlement Trusts where this is actually an issue.

Moreover, the Institutional Investor Parties purposefully—and tellingly—do not explain which certificate holders stand to receive the SAMI 2006-AR5 Trust's Allocable Share of the settlement funds because doing so would demonstrate the folly of their argument. Specifically, with respect to the SAMI 2006-AR5 Trust, even if the Subordinate Write-Up Provision is enforced, the subordinate certificates only stand to receive the interest payments from the Allocable Share, which represents a very small fraction of the SAMI 2006-AR5 Trust's approximately $15 million Allocable Share.[11] As such, almost all of the benefit of the $15 million for this trust will be paid to the senior certificate holders. There simply is no windfall. Nor is the payment of interest to the subordinate certificate holders unfair. Had there not been massive defaults on the loans in the SAMI 2006-AR5 Trust, its subordinate certificates would not have suffered the extensive losses they did. The Institutional Investors' example undermines their theory.

B. The IAS Court Was Correct To Not Consider Extrinsic Evidence Because The Subordinate Write-Up Provisions Unambiguously Provide For The Write-Up Of Only Subordinate Certificates

The Institutional Investor Parties' contentions that the IAS Court erred in not considering extrinsic evidence is incorrect and belied by the record. Extrinsic evidence of a contract's meaning should only be considered if the contract is ambiguous. *W.W.W. Accocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

[11] This is based on currently available modeling provided by Intex, a widely used service that creates and maintains cash flow models for nearly every public, and numerous privately issued, RMBS trusts.

(“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.”) Notably, the Institutional Investors did not assert that the Governing Agreements were ambiguous to the IAS Court below.[12] (*See* R.5392 (Inst. Invs.’ Br. to IAS Court); *see also* R.10856-57 (Inst. Invs.’ Resp. Br. to IAS Court at 16-17).) Rather they argued that the Governing Agreements were silent, and therefore the Settlement Agreement applied.

The Institutional Investors only now argue ambiguity because they view it as their best chance to overturn the IAS Court’s Order. But, the Institutional Investors’ reliance on this “evidence” to prove its strained contractual interpretation should be disregarded. *See, e.g.*, *U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019); *People v. Walker*, 306 A.D.2d 56, 56 (1st Dep’t 2003). It is axiomatic that “‘extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.’” *W.W.W. Accocs.*, 77 N.Y.2d at 163; *see also, id.*, at 162 (it is well-established that “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.”).

[12] Nor do the Institutional Investors explain the apparent incongruity between asserting, on one hand, that the silence of the Governing Agreements with respect to the write-up of senior classes means that one may infer that those classes are eligible for write-up, while also arguing that the Settlement Agreements’ “gap filler” only applies in the event of a Governing Agreement’s silence as to the order or operations, on the other.

The Institutional Investor Parties now assert that extrinsic evidence somehow renders the Governing Agreements "internally inconsistent," and that the IAS Court erred in not considering extrinsic evidence of the Parties' intent to clarify this inconsistency. However, extrinsic evidence cannot be used to manufacture an inconsistency in a clear and unambiguous contract. After a full and careful review the IAS Court found that the Governing Agreements were neither ambiguous nor "internally inconsistent." (*See* R. 59-60 (Order at 34-35).) Thus, it would have been entirely inappropriate for the IAS Court to consider extrinsic evidence.

But even this point is largely academic. Even if the IAS Court considered extrinsic evidence, it would not have changed the outcome. For example, the Institutional Investor Parties argue that the prospectus supplements support their interpretation that senior certificates should be written-up notwithstanding the plain and unambiguous language of the Subordinate Write-Up Provision. But that is not accurate. The prospectus supplements actually support the conclusion that, for those Governing Agreements that contain the Subordinate Write-Up Provision, only the subordinate certificates should be written-up. Of Nover's 48 Trusts that contain the Subordinate Write-Up Provision, all but three have prospectus supplement language that matches the language found in the Governing

Agreements.[13] On this, BALTA 2006-2 is illustrative. Consistent with the BALTA 2006-2 Governing Agreement, which contains the Subordinate Write-Up Provision, the BALTA 2006-2 prospectus supplement similarly limits the write-up to subordinate bonds. (R.9631 (BALTA 2006-2 Prospectus Supplement) ("Additionally, the Certificate Principal Balance of each class of Subordinate Certificates that has been reduced by the allocation of a Realized Loss to such Certificate will be increased[.]").) Put differently, as with the BALTA 2006-2 Governing Agreement, the prospectus supplement does not provide for the write-up of senior certificates. (*See* R.9572-842 (BALTA 2006-2 Prospectus Supplement).)

While the Institutional Investor Parties identified SAMI 2006-AR5 as having prospectus supplement language that differs from the distribution methodologies in the Governing Agreement, that trust is the outlier. SAMI 2006-AR5 is one of three exceptions—not the rule—and ultimately, beside the point. Even taking the Institutional Investor Parties' argument at face value, it hardly creates an ambiguity. In the event of any genuine conflict between a Settlement Trust's Governing Agreement and prospectus supplement, the language of the Governing Agreement must control. *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, Nos. 2:11–ML–02265–MRP (MANx), 2:11–cv–07166–MRP (MANx),

[13] The three outliers are SAMI 2005-AR1, SAMI 2006-AR5, and SAMI 2007-AR2.

2:11–cv–09889–MRP (MANx), 2012 WL 10731957, at *4 (C.D. Cal. June 29, 2012) ("a prospectus supplement is used to market the asset-backed security, while the PSA is the actual governing document for the trust"); *see also Stichting Pensioenfonds ABP v. Credit Suisse Group AG*, Index No. 653665/2011, 2012 WL 6929336, at *5 (N.Y. Cnty. Sup. Ct. Nov. 30, 2012) ("A prospectus, or a prospectus supplement, is indeed not a contract.")

Nor does the Institutional Investor Parties' "course of performance" evidence provide any further color on the meaning of the Governing Agreements. It is axiomatic that if there were a clear course of performance in handling the write-up of senior certificates, as the Institutional Investor Parties assert, the Trustees would not have needed to seek judicial instruction. The fact that the Trustees did raise the question with the Court, only serves to underscore that the course of performance evidence urged by the Institutional Investor Parties is, itself, not as clear as the language of the Governing Agreements.

Indeed, the "course of performance" evidence is not nearly as infallible as the Institutional Investor Parties assert. The mere fact that the Trustees have been distributing funds in a particular manner does not necessarily mean that the distribution of the Allocable Share should be similarly distributed. *See Shionogi Inc. v. Andrx Labs, LLC*, 2020 N.Y. Slip Op. 05308, at *1 (1st Dep't 2020) (rejecting consideration of course of performance evidence where the contract is

fully integrated and not governed by the UCC); *see also GE Cap. Commer. Auto. Fin. v. Spartan Motors, Ltd.*, 246 A.D.2d 41, 51 (2d Dep't 1998) (even under the UCC, where consistent construction of a contract's express terms and the parties' course of dealing is not possible, the express terms of the contract control). Indeed, thus far, the Institutional Investor Parties have collectively introduced course of performance evidence for only five trusts. But because each Settlement Trust's Governing Agreement provides different distribution and accounting rules, course of performance would necessarily need to be reviewed and scrutinized for each Settlement Trust. The Institutional Investor Parties' cherry-picked sample is therefore, necessarily, insufficient.

C. Should This Court Conclude That The Subordinate Write-up Provision Is Ambiguous, It Must Remand To The IAS Court For Further Consideration

If this Court were to reverse the IAS Court and find the Governing Agreements ambiguous with respect to the Subordinate Write-Up Provision, this Court must remand to the IAS Court for further consideration. Because the IAS Court found the contracts unambiguous, it never considered the extrinsic evidence offered by Ellington and DW, and the extrinsic evidence in the record is insufficiently developed for this Court to make any factual determinations about the true course of performance. *See Strumlauf v. Sandine Originals, Inc.*, 417 N.Y.S.2d 295, 297 (2d Dep't 1979) (reversing judgment following a finding that

the contract at issue was ambiguous and "remanding the action so that the parties can present parol evidence"). If the IAS Court is going to consider course of performance evidence, the Institutional Investor Parties' cherry-picked sampling is insufficient. Instead, any such analysis must include all remittance reports reflecting the application of a Subsequent Recovery for each and every one of the Settlement Trusts with the Subordinate Write-Up Provision.

In addition, the Parties would need discovery into the facts of the previous Subsequent Recoveries to understand the circumstances surrounding how those "Subsequent Recoveries" came to be. This is important because, as noted above, the Allocable Share is not actually a Subsequent Recovery—it is just distributed as one. Nover is unaware of any previous situation where the Trustees were asked to distribute funds to certificate holders as though it were a "Subsequent Recovery," where the funds to be distributed did not actually meet the Governing Agreement's definition of a Subsequent Recovery. (*See* R.7131 (BALTA 2006-3 Governing Agreement, "Subsequent Recoveries").)

IV. The IAS Court Correctly Ruled That Certificates Whose Principal Balance Had Been Reduced To Zero May Be Written Back Up

The IAS Court correctly held that the Governing Agreements provide that zero balance certificates in the Exhibit G Trusts may be written-up in the amounts authorized by the Governing Agreements. (R.63 (Order at 38).) The Retired Class Provision requires certificates to be affirmatively retired and makes clear that reducing a certificate principal balance to zero does not equate to retirement. Although they disputed the issue before the IAS Court, in their brief the Institutional Investor Parties conceded that the IAS Court correctly resolved this issue when it found that zero balance bonds could be written back up.

HBK, joined by the Prophet and Poetic Parties (collectively, the "HBK Parties"), again contend that the Governing Agreements mandate that when certain Certificate Principal Balances have been reduced to zero, such classes are retired and no longer entitled to distributions. They are incorrect. Having a "zero balance" is merely a necessary condition to retirement, it is not, in and of itself, sufficient for a certificate to be deemed "retired." Put another way, a zero balance certificate and a "retired" certificate are not synonymous, as the so-called "Retired Class Provision" makes clear:

> In addition, notwithstanding the foregoing, on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A 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.

(R.382 (Petition ¶54) (emphasis in original).) Under the plain language of the Retired Class Provision, once the Certificate Principal Balance of a class of certificates has been reduced to zero, the certificates are not automatically retired and that class of certificates is not automatically precluded from distributions.[14] In arguing otherwise, the HBK Parties disregard the word "will" in the Retired Class Provisions, which under common usage indicates the existence of another step. If reduction to zero was all that was required, the Retired Class Provision would use "are" instead of "will."

The HBK Parties also ignore the requirement that procedural steps be followed prior to formally retiring a certificate. Only once such formalities have been followed is the certificate actually retired. Absent redemption, replacement with other certificates, and/or discharge or satisfaction of debt, the certificates are not retired. For example, BSABS 2005-HE3 provides that a class of certificates may be retired only after the Trustee determines that a Class of Certificates will receive a final distribution. (R.13161-62 (BSABS 2005-HE3 Governing Agreement, §10.02).) These formalities are no different than those needed to

[14] The HBK Parties also assert that that a zero balance certificate has neither payment priority nor a percentage interest. But that is not correct. A certificate does not lose its "priority unless and until it is formally retired." Zero balance bonds, without more, have not been retired.

recognize Realized Losses, which may only be recognized only after a "Final Recovery Determination" i.e. a determination that all insurance proceeds and other payments have reasonably been recovered with respect to a mortgage.

The HBK Parties also baldly assert that the IAS Court's holding alters an unambiguous commercial contract. Not so. As the IAS Court explained, although the Retired Class Provisions of the Governing Agreements expressly prohibit distributions to zero balance classes, they do not address write-up of certificate balances in connection with subsequent recoveries. (R.63 (Order at 38).) Rather, they provide for the balances of all classes of certificates to be written-up by subsequent recoveries, although only to the extent of realized losses previously allocated to a class. (*Id.*)

Nor do the Governing Agreements require a Certificate Principal Balance to permanently remain zero. As the IAS Court explained, the provisions requiring the write-up of Certificate Principal Balances follow the distribution provisions and are in addition to the foregoing distributions. (R.63-64 (Order at 38-39).) The Court must give weight to the fact that the write-up provisions unambiguously state that they are in addition to (and not limited by) the Retired Class Provision. The language of the Retired Class Provision does not imply permanence merely upon the reduction of a Certificate Principal Balance to zero. Rather permanence applies when, and only when, the certificates are actually retired. (*See, e.g.*, R.

13122 (BSABS 2005-HE3 Governing Agreement § 5.04(a) (once certificates have "been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions…").)

For the foregoing reasons, the IAS Court correctly ruled that certificates with a principal balance that had been previously reduced to zero are not permanently at zero and may be written back up. While the "Retired Class" provisions that control the treatment of zero balance certificates prohibit distributions to those certificates, the Retired Class provisions say nothing about write-ups of their balances as it relates to Subsequent Recoveries. The IAS Court was correct to recognize the significance in this distinction, because the write-up provisions of the Governing Agreements do not prohibit zero balance classes from being written-up upon receipt of a Subsequent Recovery.

V. THE IAS COURT PROPERLY HELD THAT THE WRITE-UP FIRST METHOD IS THE ONLY APPROPRIATE METHOD FOR CERTAIN TRUSTS

Interpreting the language of the Governing Agreements,[15] the IAS Court correctly held that trusts that define Certificate Principal Balance in a manner that is substantively identical to that of BSABS 2005-AQ2 unambiguously require the

[15] As addressed above, the IAS Court correctly held that the Governing Agreements' write-up provisions control in the event of conflict with the Settlement Agreement's write-up provision. (R.53-56 (Order at 28-31).)

use of the write-up first methodology.[16] (R.40-41 (Order at 15-16).) The IAS Court held that, with respect to these "Write-Up First Trusts," "the distribution provisions of the Governing Agreements require distributions to various classes 'until the Certificate Principal Balance thereof is reduced to zero[.]'" (R.36 (Order at 11).) As the IAS Court further explained, "in order to implement the distribution provisions, the [Trustees] must determine the Certificate Principal Balance for each class; and that this determination is, in turn, governed by the definition of Certificate Principal Balance for the Trusts, which provides for the [C]ertificate [P]rincipal [B]alances to be written up before distribution." (*Id.*)

The definition of "Certificate Principal Balance" found in BSABS 2005-AQ2 is illustrative.[17]

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[16] The Institutional Investor Parties have abandoned any argument on appeal that the Pay-First method is the correct order of operations. Curiously, after arguing to the IAS Court that the Governing Agreements unambiguously provide for the Pay First methodology, HBK too abandoned its argument below in favor of the Institutional Investors' previous contention that the Governing Agreements are "silent on the Order of operations." (R.4960-62 (HBK Br. to IAS Court at 7-9); *see also* R.40 (Order at 15) ("HBK appears to assert that the 'structure' of the PSA requires the Pay First Method").) Below HBK asserted that the structure of the Governing Agreements requires the pay first method because the distribution provision, section 5.04(a) appears in the PSA before the write-up provision, section 5.04(b) and the latter provision refers to the foregoing distributions. (R.4960-61 (HBK Br. to IAS Court at 7-8).) The IAS Court rejected this argument, noting that the mere sequence of Sections 5.04(a) and (b) "cannot serve to impose an order of operations and, as held above, neither section imposes an order of operations." (R.40 (Order at 15).) HBK's constantly evolving arguments must again be rejected.

[17] Nover cites BSABS 2005-AQ2 on this appeal as that is the Settlement Trust relied upon by the IAS Court. The language in BSABS 2005-AQ2 is substantially similar to the language in BSABS 2005-AC7, previously cited by Nover in its briefing below to the IAS Court. *Compare* R.3530 (BSABS 2005-AQ2 Governing Agreement, "Certificate Principal Balance") *with* R.9855 (BSABS 2005-AC7 Governing Agreement, "Certificate Principal Balance").

> Certificate Principal Balance: As to any Certificate … and as of any Distribution Date, the Initial Certificate Principal Balance of such Certificate plus … any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b), less the sum of (i) all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof on previous Distribution Dates pursuant to Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates.

(R.3530 (BSABS 2005-AQ2 Governing Agreement, "Certificate Principal Balance").)

By its plain terms, the "Certificate Principal Balance" is measured "as of any Distribution Date" and calculated as follows:

i. Start with the Initial Certificate Principal Balance for each Certificate;

ii. Add any Subsequent Recoveries received since the last distribution date;

iii. Subtract the cumulative amount of all principal distributed with respect to the certificate on "previous Distribution Dates," again meaning all loss amounts for all Distribution Dates before the one on which the calculation is made; and then

iv. Subtract the cumulative amount of any Applied Realized Loss Amounts allocated to said certificate "on previous Distribution Dates," again meaning all loss amounts accounted for on all Distribution Dates before the one on which the calculation is made.

(R.9855 (BSABS 2005-AC7 Governing Agreement, "Certificate Principal Balance").)

The Certificate Principal Balance accounts for all principal payments distributed and Realized Losses allocated on past "Distribution Dates," and

specifically requires that the Petitioner incorporate "Subsequent Recoveries" received since the last distribution date to the Certificate on the present Distribution Date. Because, by the plain and unambiguous language of the Governing Agreements, no distributions of principal can be made under the waterfall provisions without reference to the Certificate Principal Balance of a certificate, and because the Certificate Principal Balance incorporates a write-up for Subsequent Recoveries to be made on the present Distribution Date, it follows that the write-up must occur before performing the distributions. (R.9855; R.41 (Order at 16).)

Not only does the plain language of the Certificate Principal Balance make clear that it applies to the distribution of Substantive Recoveries, it also makes intuitive sense. When a Subsequent Recovery is applied to a Realized Loss, the Realized Loss is reduced by the amount of the Subsequent Recovery. Therefore, the only way to ascribe meaning to the use of the term "Applied Realized Loss Amounts" is that Subsequent Recoveries (or as is the case here, funds to be treated as Subsequent Recoveries) are used to write-up Certificate Principal Balances to take account anticipated losses before distributions are made, and the distribution of those funds then operate to reverse a Realized Loss on a particular Distribution Date.

In sum, the Certificate Principal Balance definition accounts for all principal payments distributed and Realized Losses allocated on past Distribution Dates, and requires that the trustee incorporate Subsequent Recoveries received since the last distribution to the certificates on the present Distribution Date. Because no distributions of principal can be made under the waterfall provisions without reference to the Certificate Principal Balance of a certificate, and because that balance incorporates a write-up for Subsequent Recoveries to be made on the present distribution date, the write-up must occur before performing the distributions, as the IAS Court correctly held. (R.41 (Order at 16).)

VI. THE IAS COURT WAS CORRECT IN HOLDING THAT AMBAC WAS NOT ENTITLED TO THE FULL ALLOCABLE SHARE FOR INSURED LOAN GROUPS IN CERTAIN SETTLEMENT TRUSTS

The IAS Court correctly rejected Ambac's attempt to claim the full Allocable Share based on its insurance payments made on the A2 certificates. (R.65-68 (Order at 40-43).) Before the IAS Court, Ambac asserted that Section 6.02 of the Governing Agreements in GPMF 2006-AR2 and GPMF 2006-AR3 (the "2006 Trusts") entitled it to priority repayment ahead of even the A1 certificates (which it did not insure). The IAS Court rejected that argument out of hand finding that Ambac's position failed to give sufficient consideration to Section 6.01, which directs distribution of principal to each of the Class I-A certificates on a pro rata basis. As the IAS Court explained, Section 6.02 of the agreement does

not modify or contradict section 6.01 to the extent that it provides that A1 certificates are entitled to payment of Subsequent Recoveries through the principal distribution waterfall on a *pro rata* basis until the certificate principal balances are zero. (R.66-69 (Order at 41-44).) As such, Ambac was found to only be entitled to priority over the certificate holders of the A2 certificates and, therefore, entitled only to the *pro rata* payment designated for the A2 certificates, as reimbursement for the payments Ambac made for the A2 certificates. (R.67-68 (Order at 42-43).)

With respect to GPMF 2005-AR5 trust, Ambac argued to the IAS Court that it was entitled to reimbursement based on its subrogation rights and its contention that all classes of certificates—not only subordinate certificates—are eligible for write-up. (R.68 (Order at 43).) The IAS Court rejected this argument finding that as with other Trusts with the Subordinate Write-Up Provision, the GPMF 2005-AR5 Governing Agreement did not provide for the write-up of senior certificates. (*Id.*)

On appeal, Ambac largely rehashes the same arguments that the IAS Court correctly disregarded. While Ambac again claims that Section 6.02 of the Governing Agreements mandates that Subsequent Recoveries be paid to Ambac prior to those funds being distributed to certificate holders, it now argues that the definition of "Principal Funds" does not include all "Subsequent Recoveries," but rather only includes those which have been withdrawn directly from the Custodial

Account prior to the funds reaching the Distribution Account. (Opening Br. for Ambac, NYSCEF Doc. No. 60, at 13-14 (November 2, 2020).) Thus, according to Ambac, such funds are not subject to Section 6.01 but, instead, 6.02(c), which Ambac claims governs Subsequent Recoveries paid directly to Ambac.

But Ambac's tortured definitional argument ignores the plain reading of Section 6.02(c), which serves only to clarify that Ambac is entitled to priority reimbursement over the A2 certificate holders. (*See* R.3708 (GPMF 2006-AR2 Governing Agreement § 6.02(c)).) In other words, 6.02(c) provides the common-sense proposition that any A2 certificates suffering losses are not entitled to a windfall by way of a Subsequent Recovery when insurance has already compensated those same certificates for such a loss. In such circumstances the Certificate Insurer may recover the repayment. 6.02(c) does not give Ambac priority over other certificates that it did not insure.

Ambac similarly rehashes its argument with respect to the 2005 Trust that its right to recovery is based on its subrogation rights. As discussed above at Section III, the IAS Court correctly held that where the Settlement Trust contains a Subordinate Write-Up Provision, only subordinate loans may be written-up. As a result, Ambac's contention as to the 2005 Trust must also fail. (*See* R.68 (Order at 43).)

Accordingly, this Court should affirm the IAS Court and hold that Ambac is not entitled to the priority it seeks.

CONCLUSION

For the foregoing reasons, the Court should affirm in its entirety the IAS Court's Order resolving the Petition Issues.

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Respectfully submitted,

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