

**Wells Fargo Bank, N.A. v All Respondents for this  
Special Proceeding**

2023 NY Slip Op 33727(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 154984/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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WELLS FARGO BANK, NATIONAL ASSOCIATION,

Plaintiff,

- v -

ALL RESPONDENTS FOR THIS SPECIAL  
PROCEEDING,

Defendant.

INDEX NO. 154984/2021

MOTION DATE N/A, N/A, N/A,  
N/A, N/A

MOTION SEQ. NO. 023 024 025  
026 027

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 023) 732, 733, 734, 735, 736, 737, 738, 739, 740, 775, 776, 777, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 814, 815

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 024) 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 778, 816, 817

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 025) 751, 752, 753, 754, 755, 779, 799, 800, 801, 802, 803, 804, 805, 806

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 026) 756, 757, 758, 759, 760, 807, 808, 809, 810, 811, 812

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 027) 761, 762, 774, 780, 781, 782, 813

were read on this motion to/for PRECLUDE.

This is a residential mortgage back security (**RMBS**) Article 77 special proceeding brought by Wells Fargo.

In 2017, Wells Fargo and other petitioners filed an Article 77 proceeding for judicial instruction (the **JPM Proceeding**) related to the administration and distribution of a settlement payment (the **Settlement Payment**) pursuant to a settlement agreement (the **Settlement Agreement**) by and among JP Morgan Chase & Co., its direct and indirect subsidiaries, and a group of institutional investors. The terms of the Settlement Agreement provided for a \$4.5 billion payment to certain RMBS trusts and otherwise provided that the Settlement Payment should be treated as a “Subsequent Recovery” as such term is defined in the governing agreements of certain of the JP Morgan Trusts (the **Subsequent Recovery Write-up Language**). There were multiple objections as to how the court (Friedman, J.) should interpret the Subsequent Recovery Write-up Language (*i.e.*, subordinate certificate holders wanted the Subsequent Recovery Write-up Language to be applied in one way, senior certificate holders in another).

On February 13, 2020, the court (Friedman, J.) issued a decision and order (the **JPM Order**) in the JPM Proceeding resolving the issue by holding that the Subsequent Recovery Write-up Language “expressly provides[s] for the subsequent recovery write-up of specified *subordinate* certificate balances” and that this language “must be applied to permit write-up only of those *subordinate* certificates pursuant to the terms of those provisions” and that senior certificates were not entitled to receive write-ups (2020 WL 735683, at \* 18 [emphasis added]). The JPM court also held that overcollateralization of Trusts could not occur where the Subsequent Recovery Write-Up Language was applied and, even if it were not applied, the PSAs required that the Certified Principal Balance be written up in the same amount as the amount of any Subsequent Recovery distributed, even if applied to the balance of a different class, and that the Overcollateralization Amount must be calculated based on the Certificate Principal Balance,

such that overcollateralization could not occur (*id.*, at \* 12). Notwithstanding the JPM Order, Wells Fargo permitted and continued to permit the write-up of senior certificates resulting from the receipt of ordinary course Subsequent Recoveries in trusts that contain Subsequent Recovery Write-Up Language.

In January 2021, six of the JPM RMBS trusts inquired about Subsequent Recovery Write-Ups, and Wells Fargo changed its policy to then write-up subordinate certificates in a manner consistent with the Subsequent Recovery Write-Up Language as set forth in the JPM Order.

The Wells Fargo Petitioners filed this petition on May 21, 2021, an amended petition on June 25, 2021, and a second amended petition on July 16, 2021 (the **SAP**; NYSCEF Doc. No. 55).

Subsequently, on August 19, 2021, the Appellate Division affirmed the JPM Order.

As relevant, the Appellate Division held:

The court correctly determined that section 3.06 (b) of the settlement agreement is a “gap filler” intended only to apply where the governing agreement is silent as to write-up mechanics and does not supersede or override the governing agreements. ***Section 3.06 (a) provides that each settlement allocable share shall be distributed to the certificate holders in accordance with the distribution provisions of the respective governing agreements: “Each Trust’s Allocable Share shall be deposited into the related Trust’s collection or distribution account pursuant to the terms of the Governing Agreements, for further distribution to Investors in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share [were] a ‘subsequent recovery.’ ”*** As noted by the court, section 3.06 (a) “expressly defers to the distribution provisions of the Governing Agreements [so that] the Governing Agreements control where they specify the order of operations, and the Settlement Agreement controls only where the Governing Agreements do not specify such order” (2020 NY Slip Op 30453[U], \*9).

...

*The court correctly found that where the governing agreements provide only for the write up of subordinate certificates—conspicuously excluding senior certificates from the write-up instructions—the plain and unambiguous intent is that only subordinate certificates will be written up.* The exemplar trust focused on by the court 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 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” (BALTA 2006-3 governing agreement § 6.04 [h]).

This section provides only for the write up of the balances of the specified subordinate certificates to the extent of previously allocated realized losses.

Certain respondents assert that the subordinate write-up provisions are “silent” regarding the write up of senior certificates. *The subordinate write-up provisions, however, 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 are to be written up* (see *Ambac Assur. Corp. v EMC Mtge. LLC*, 121 AD3d 514, 518 [1st Dept 2014] [“the omission of a term . . . must be deemed an intentional choice of the parties to the agreement”]).

*Where the drafters intended the parties to write up senior certificates, the governing agreements expressly so state.* For example, BALTA 2006-3 provides for the write up of Group I senior certificates: “Notwithstanding the foregoing, 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” (§ 6.03 [b]).

*The only explanation for the exclusion of such language from the write-up provisions was the parties' intent to limit the write up to subordinate certificates.*

The institutional investors' reliance on the definition of “realized loss” to argue to the contrary is misplaced. *As the court explained, “[W]hile 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”* (2020 NY Slip Op 30453[U], \*33).

*The court was correct not to consider extrinsic evidence because the subordinate write-up provisions unambiguously provide for the write up of only*

*subordinate certificates. Extrinsic evidence of a contract's meaning should only be considered if the contract is ambiguous (W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990]).*

...

The court correctly found, with respect to the BSABS 2005-AQ2 Trust and, by extension, the HBK Trusts, that the relevant governing agreements require the trustees to apply the write-up-first methodology. ***Because, by the plain language of the governing agreements, no distributions of principal can be made under the waterfall provisions without reference to the Certificate Principal Balance, and because the Certificate Principal Balance is defined to include subsequent recoveries added to the Certificate Principal Balance pursuant to section 5.04 (b) "as of" any distribution date, the write-up-first order of operations must necessarily apply.***

HBK's argument that the sequence of the distribution and write-up provisions in the PSA calls for the use of the pay-first methodology is unavailing. As the court noted, "The mere sequence of these provisions cannot serve to impose an order of operations[,] and . . . neither section imposes an order of operations" (2020 NY Slip Op 30453[U], \*15).

***The trustees' concern about the potential for the pay-first method to cause trusts with an overcollateralization structure to be temporarily overcollateralized is irrelevant, given the court's ruling that the write-up-first method applies.*** As even HBK acknowledges, the court's interpretation of the overcollateralization amount definition is of no consequence to trusts following the write-up-first method

(198 AD3d 156, 161-164 [emphasis added]).

In other words, the Appellate Division held that (i) the Settlement Proceeds are Subsequent Recoveries, (ii) the plain language of the governing agreements and the Subsequent Recovery Write-up Language is not ambiguous and that extrinsic evidence should not be considered in interpreting the PSAs, (iii) the Subsequent Recovery Write-up Language requires write-ups to apply to subordinate certificates only and not senior certificates and (iv) any potential overcollateralization concerns are irrelevant because the write-up first method applies (*i.e.*, not the pay-first method).

In the SAP, the Petitioner seeks an order

1. Concluding that the Petitioner has acted in good faith and appropriately applied all write-ups of Certificates (whether Petitioner wrote up senior or subordinate certificates) in connection with the receipt and distribution of any ordinary course Subsequent Recoveries received and distributed before the date of this Court's judgment resolving this SAP; and
2. Instructing the Petitioner to apply any write-ups resulting from the receipt of future ordinary course Subsequent Recoveries in the manner consistent with the Court's interpretation of the Subsequent Recovery Write-up Language in the JPM Order.

It would seem that much of the relief sought by the SAP is resolved by decisions reached by the JPM Court. To wit, Subsequent Recoveries written-up in favor of subordinate certificates from the date of the JPM Order were appropriate and done in good faith, and any write-ups done in favor of senior certificates from the date of the JPM Order were not. Unquestionably, write-ups from the receipt of Subsequent Recoveries must be done in accordance with the JPM Order – *i.e.*, in favor of subordinate certificates and not senior certificates. In fact, it would appear that the only open question remains whether write-ups done prior to the issuance of the JPM Order (to the extent any were done) were done in good faith. The Court however notes that given that the agreements are not ambiguous, this too may not require a hearing.

The senior certificate holders, for their part, filed a counter-petition on July 14, 2021, an amended counter-petition on August 25, 2021, and a second amended counter petition on

February 17, 2022 (the **SACP**; NYSCEF Doc. No. 271). In the SACP, the senior certificate holders seek an order:

1. Concluding that Deferred Principal Prepayments of deferred principal of modified loans that previously were treated as Realized Losses are not Subsequent Recoveries under the Pooling and Servicing Agreements for the Four BSMF Trusts;
2. Concluding that the Trustee should apply the Applied Realized Loss Amount allocation provision to allocate Deferred Principal Prepayments to first reduce the Realized Losses, and correspondingly increase the outstanding Certificate Balance of the most Senior Classes of Certificates that have prior Realized Losses, for Deferred Principal Prepayments received and distributed before the date of this Court's judgment resolving this Counter-Petition; and
3. Instructing the Trustee to apply the Applied Realized Loss Amount allocation provision to allocate Deferred Principal Prepayments to first reduce the Realized Losses, and correspondingly increase the outstanding Certificate Balance of the most Senior Classes of Certificates that have prior Realized Losses, for Deferred Principal Prepayments received in the future.
4. In the alternative, instruct the Trustee (i) not to apply Deferred Principal Prepayments to write-up the Subordinate Certificates, (ii) to instead pay Deferred Principal Prepayments as directed by the Principal Payment waterfall, which will increase the

Overcollateralization Amount, and (iii) once a Trust reaches its Overcollateralization Target Amount, to pay back previously Unpaid Realized Loss Amounts to Senior Certificates first, as required by the Excess Cashflow waterfall in the Trusts' PSAs.

5. Instructing the Trustee to correct its Overcollateralization Amount calculations for each of the Four BSMF Trusts<sup>1</sup> from April 2021 onwards, to include all outstanding,

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<sup>1</sup> The Four BSMF Trusts were before the JPM Court (Index No. 657387/2017, NYSCEF Doc. No. 2 [List of Settlement Trusts]) and are thus subject to the JPM Order. Even if this were not the case, the BSMF Trusts' PSAs have virtually identical language to the other JPM Trusts and do not provide for application of Subsequent Recovery to senior certificates. As the Appellate Division found significant, senior certificates are not referred to at all in this provision.

Section 6.02(b) of the BSMF Trusts PSAs provide:

If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such **remaining** Subsequent Recoveries will be applied to increase the Current Principal Amount of the *Class of Subordinate Certificates* in the related Loan Group 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 Subordinate Certificates*. The amount of any **remaining** Subsequent Recoveries will be applied to sequentially increase the Current Principal Amount of the *Subordinate Certificates* in the related Loan Group, beginning with the *Class of Subordinate 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 Certificates

(emphasis added).

The JPM Trust PSAs provided:

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 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

unpaid Deferred Principal balances as part of the aggregate principal balances of Mortgage Loans, including Deferred Principal that the Trustee has treated as Certificate Losses; and if such corrected Overcollateralization Amount calculations trigger the Excess Cashflow waterfall, to distribute proceeds to Certificates under the terms of the Excess Cashflow waterfall.

Like the SAP, much of what the SACP seeks has been already resolved by the JPM Court: Deferred Principal Payments are Subsequent Recoveries, the write-up first method applies, write-ups are to be in favor of the subordinate certificate holders not senior certificate holders, and the seniors' over-collateralization concerns are irrelevant.

Although the senior certificate holders may well be correct that the Home Affordable Modification Program Guidelines (the **HAMP Guidelines**) deferment of principal payment to a subsequent period (*i.e.*, a balloon) may cause an undesired and perhaps unintended outcome in that the senior certificate holders may not receive deferred principal payments based on the unambiguous express provisions of the PSAs, it is not for this Court to re-write the HAMP

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(emphasis added).

Although the first sentence of the relevant BSMF Trusts' PSAs provision contains the word "remaining" which word does not appear in first sentence of the relevant first sentence of the JPM Trusts' PSAs provision, this additional word does not change the meaning of the provision or the result that Subsequent Recoveries are to be applied to subordinate certificates. Both provisions provide for Subsequent Recoveries to be applied to increase the Certificate Principal Balance of subordinate and not senior certificates and the word "remaining" emphasizes in both the BSMF Trusts' PSAs and the JPM Trusts' PSAs that the Subsequent Recovery is in fact remaining for payment to certain certificates based on their priority from the point identified in the respective provisions – *i.e.*, at the subordinate (and not the senior) certificate level. The second sentence of the JPM Trusts' PSA provision uses the word "remaining" and makes this clear. In other words, the absence of perfect parallelism is insignificant.

Guidelines or the PSAs. This was an issue to address with the federal government at the time that the HAMP Guidelines were issued and for the federal government to consider when it decided as a policy matter to permit the deferment of the payment of principal amounts due to a later period of time. The fact that these obligations had been securitized to certain bond holders was not unknown, and the federal government made a decision to suspend payments until a later period of time such that these payments of deferred principal became Subsequent Recoveries. Put another way, the PSAs say what they say, the language is not ambiguous, and it is the policy of the federal government's HAMP Guidelines' deferment of principal which dictates this outcome. It is simply not appropriate for the Court to re-write these PSAs now in response to action taken by the federal government which expressly considered the PSAs and determined (i) that the principal forbearance amount is non-interest-bearing and non-amortizing and will result in a balloon payment fully due and payable upon the earlier of the borrower's transfer of the property, payoff of the interest-bearing UPB, or at maturity of the mortgage loan (HAMP Guidelines 6.3.1.4) and (ii) that deferred principal should be allocated as a realized loss such that, for purposes of calculating distributions to security holders, the forborne amount is no longer outstanding under the amortization schedule applicable to the related mortgage loan (HAMP Guidelines 6.6.2, n 5).

Although the merits briefing of the SAP and the SACP are complete (and notwithstanding that the holdings by the JPM court squarely addresses much of what is at issue in this special proceeding), neither party timely moved for summary judgment. A hearing had been scheduled for November 27, 2023 – December 1, 2023.

Following the issuance of this Decision and Order, a status conference is scheduled for October 27, 2023, at 11:30 am to discuss whether a hearing is in fact necessary on what appears to be the sole remaining issue – *i.e.*, whether the Petitioner acted in good faith as to any pre-JPM Order write-ups. As discussed above, any post-JPM Order write-ups that did not comply with the JPM Order could not as a matter of law been done in good faith. No hearing is necessary as to this issue or as to whether the Subsequent Recovery Write-up Language is to be applied to subordinate or senior certificates. This issue is settled. In connection with the scheduled hearing, the parties had filed certain motions *in limine* all of which are addressed below.

Finally, the Court notes, by way of background, that subsequent to the scheduling of the hearing on the SAP and the SACP (and the filing of the motions *in limine*), this Court recently issued a Decision and Order in a case captioned *Deer Park Road Mgt. Co., LP v Nationstar Mtge., LLC*, Index No. 654474/2022, NYSCEF Doc. No. 71. In that case, certain certificate holders sued, alleging that the Termination Price had been set too low by failing to include deferred principal balances as part of the unpaid principal balance. The defendants for their part argued that the HAMP Guidelines require that deferred principal balances be excluded from the Termination Price. This Court rejected the defendants' position and held that the plain language of the governing documents required that the deferred principal balances be included as part of the unpaid principal balance in determining the Termination Price and that the HAMP Guidelines which changed the amortization schedule and treated the deferred principal as a balloon payment (and not loan forgiveness) did not suggest a different result. This decision is not inconsistent with the JPM Order that the Subsequent Recovery Write-Up Language requires the write-up of subordinate and not senior certificates.

***I. HBK's motion is granted (Mtn. Seq. No. 023)***

Danielle Johnson-Kutch's testimony is excluded for two reasons. First, the purpose, intent, and industry practice under the HAMP Guidelines which were issued in 2009 is not relevant to interpreting the clear and unambiguous language in the PSAs which were executed in 2006 and 2007 (*Cortese v Redmond*, 199 AD2d 785, 786 [3d Dept 1993]) or the clear and unambiguous language of the HAMP Guidelines.

Second, her testimony is entirely based on certain hearsay conversations. Ms. Johnson-Kutch started working at Treasury *after* the HAMP Guidelines were issued, and the source of her knowledge is certain alleged conversations she had with colleagues at Treasury. This is patently improper.

Messrs. Burnaman's and Varca's proposed testimony is also excluded. As discussed in the JPM Order, the PSAs and the Subsequent Recovery Write Up Provisions are not ambiguous. Neither Messrs. Bernaman nor Varca had any personal involvement in the PSAs at issue. Their speculative testimony about a potential drafting omission in the PSA based on the HAMP Guidelines which HAMP Guidelines were promulgated years after the PSAs were executed as to PSAs that they had nothing to do with is entirely speculative and otherwise completely improper. Their generalized knowledge of the securitization business does not provide a predicate for the consideration of their opinion as to the meaning of certain unambiguous language by this Court.

The Petitioner's proposed "additional fact witnesses" are also excluded from testifying except as to its own employees (Barry Akers and Serria Lohmeier) to the extent that they may testify solely as to any personal knowledge that they may have as to any Petitioner's pre-JPM Order write-ups and how such pre-JPM Order write-ups were done in good faith. None of the proposed additional fact witnesses were involved in the drafting of the PSAs such that they could offer any testimony as to the PSAs meaning or could offer any relevant testimony as to whether post JPM Order write-ups were done in good faith. As discussed above, if the Petitioner performed write-ups in a manner inconsistent with the JPM Order, such write-ups necessarily were not done in compliance with the court's order and could not have been done in good faith. For the avoidance of doubt, Jason Adams testimony is also completely irrelevant. It does not matter if Mr. Adams was or was not the person who raised his hand on behalf of the subordinate certificate holders and questioned the Petitioner's write-ups. The issue is solely whether the write-ups were done in accordance with the unambiguous language set forth in the PSAs.

Finally, the Petitioner is not entitled to an order crafted based on its systems and modeling capabilities. Any testimony about the Petitioner's systems too is irrelevant. The Petitioner is bound by the unambiguous PSA and must apply the PSA according to its terms. Testimony about recommendations made to the Treasury Department in 2009 (years after the PSAs were executed) regarding the treatment of deferred principal amounts is also irrelevant. The HAMP Guidelines are not ambiguous, and neither are the PSAs. The course of conduct between the parties that postdate the PSAs' execution or what certain (but not all) certificate holders understood is also irrelevant to what the PSAs require and is properly excluded.

**II. The Deer Park Group's motion is granted (Mtn. Seq. No. 024)**

As discussed above, (i) Mr. Akers and Ms. Lohmeier may testify solely to the extent of their personal knowledge as to any pre-JPM Order write-ups and as to whether such pre-JPM Order write-ups were performed in good faith and (ii) the testimony of certain certificate holders is excluded. It simply is not relevant.

Both Evan Siegert and Tom Deutsch are precluded from testifying.<sup>2</sup> As discussed above, both the PSAs and the HAMP Guidelines are unambiguous. Communications by the American Securitization Forum in 2009 as to what the HAMP Guidelines should provide is completely irrelevant. The Treasury made its decision as to what to include and exclude from the HAMP Guidelines, and they mean what they say.

**III. Solula's motions are granted (Mtn. Seq. Nos. 025-027)**

As discussed above, the Appellate Division has already held that the Subsequent Recovery Write-Up Language is not ambiguous and means that write-ups are to be in favor of subordinate and not senior certificate holders. As discussed above, the testimony of Ms. Johnson-Kutch and certain certificate holders is simply not relevant to any of the undecided issues in this case (or is otherwise based on hearsay and is improper). Axonic is simply not correct that this and the motions *in limine* generally are disguised summary judgment motions. It is not improper to seek to preclude testimony which would amount to relitigating the meaning of the Subsequent Recovery Write-Up Language or to otherwise seek to preclude testimony which is either

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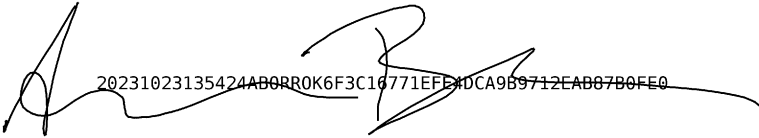
<sup>2</sup> Solula has removed Mr. Deutsch from its proposed witness list such that this is now moot.

improper (because it is based entirely on hearsay) or otherwise utterly irrelevant to any issues before this Court.

The Court has considered the parties' remaining arguments and finds them unavailing.

It is hereby ORDERED that the motions *in limine* are granted to the extent set forth in this Decision and Order; and it is further

ORDERED that a status conference is scheduled for October 27, 2023 @ 11:30 am at 60 Centre Street, Room 238.

<u>10/23/2023</u> DATE	 20231023135424AB0RR0K6F3C16771EFEDCA959712EAB87B0FE0			
	ANDREW BORROK, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	