

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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In the matter of the application of

WELLS FARGO BANK, NATIONAL
ASSOCIATION, U.S. BANK NATIONAL
ASSOCIATION, THE BANK OF NEW YORK
MELLON, THE BANK OF NEW YORK
MELLON TRUST COMPANY, N.A.,
WILMINGTON TRUST, NATIONAL
ASSOCIATION, HSBC BANK USA, N.A., AND
DEUTSCHE BANK NATIONAL TRUST
COMPANY (as Trustees, Indenture Trustees,
Securities Administrators, Paying Agents, and/or
Calculation Agents of Certain Residential
Mortgage-Backed Securitization Trusts),

Petitioners,

For Judicial Instructions under CPLR Article 77 on
the Administration and Distribution of a Settlement
Payment,

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Index No. 657387/2017

Hon. Marcy S. Friedman

**OPENING MERITS BRIEF OF
OLIFANT FUND, LTD., FFI FUND
LTD. AND FYI LTD.**

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I. Introduction

Olifant Fund, Ltd., FFI Fund Ltd. and FYI Ltd. (collectively, the “Olifant Funds”) appear in this proceeding as holders of more than \$100 million in current Certificate Principal Balance of Class A and Class M certificates in 18 trusts (the “Original Olifant Fund Trusts”) out of the 330 trusts (“Settlement Trusts”) that are included in the J.P. Morgan Global RMBS Settlement. On January 29, 2018 the Olifant Funds responded to the Petition dated December 15, 2017 (the “Petition”)¹ filed by the Petitioners seeking this Court’s instruction as to the distribution of Allocable Shares under the Settlement Agreement. Five of the Original Olifant Fund Trusts have since been severed from this proceeding. The Olifant Funds respectfully submit this brief setting forth the appropriate means of distributing the Settlement Payment for 11 of the 13 remaining Original Olifant Fund Trusts.² Those 11 trusts are identified on Appendix A hereto, and are hereinafter referred to as the “Olifant Fund Trusts.”

First, for the Olifant Fund Trusts listed on Exhibit D to the Petition, the Write-Up First method for distributing the Settlement Payment must be applied.³ The text of the Olifant Fund Trusts’ Governing Documents,⁴ which govern the distribution of funds to certificateholders, unambiguously requires that the Certificate Principal Balance be written up by the amount of the Allocable Shares before distributions are made to certificateholders. The Petitioners themselves have interpreted materially identical Governing Documents to require the Write-Up First

¹ Capitalized terms not defined herein have the meanings given to such terms in the Petition.

² Two of the thirteen remaining Original Olifant Fund Trusts (BSMF 2006-SL5 and SACO 2005-3) are the subject of severance orders currently pending before the Court. The Olifant Funds reserve the right to present additional arguments concerning those trusts in the event that the severance orders are not signed and entered.

³ Because each Trust’s Governing Documents control the issues raised by the Petition – and the Governing Documents for different trusts may differ – issues or arguments made for other Trusts do not necessarily apply to the Olifant Fund Trusts, and vice versa.

⁴ For most Olifant Fund Trusts, the Governing Document is a Pooling and Servicing Agreement (“PSA”). For one Olifant Fund Trust (SACO 2006-12), the Governing Document is an Indenture. All Governing Documents have been provided to the Court on a compact disc. (Petition, NYSCEF No. 1, at 3 n.8).

method. And use of the Pay First method would lead to commercially unreasonable results that could not have been intended by the parties.

Second, the single Olifant Fund Trust that appears on Exhibit E to the Petition (BSABS 2006-2) has been miscategorized because the identified issue has no practical consequence to that trust.

Third, there are three Olifant Fund Trusts on Exhibit F to the Petition. For one such trust (BSSLT 2007-SV1A), the identified issue has no practical consequence. In another such trust (BALTA 2007-3), the PSA clearly requires both loss allocation and write-ups to be done sequentially. In the third trust (BSABS 2006-IM1), the PSA is silent on the appropriate method for writing up Subsequent Recoveries but the Olifant Funds take the position of accepting what the Trustee is currently doing: writing up *pro rata* by balance.

Fourth, the Olifant Funds take the position that the Retired Class Provision does not prevent the distribution to or writing up of certificates with Certificate Principal Balances of zero due to the allocation of Realized Losses.

Fifth and finally, one Olifant Fund Trust (SACO 2005-5) appears on Exhibit H to the Petition. The Allocable Share for SACO 2005-5 should be treated as principal, a point on which there is no dispute among the parties to this proceeding.

II. The Petitioners Should Distribute the Designated Allocable Shares to the Olifant Fund Trusts Using the Write-Up First Method

A. The Language of the Governing Documents for the Olifant Fund Trusts Is Unambiguous and Requires the Write-Up First Method

In the Petition, the Petitioners seek the court's direction on whether the distribution of the Settlement Payment to certificateholders should be done via the Write-Up First method or the Pay First method. (Petition ¶¶ 21-40). While the Petitioners state that the Settlement Agreement

and the Governing Documents are ambiguous about the order of operations, they highlight several commercially unreasonable and unintended results that would follow from the Pay First method. (*Id.* ¶¶ 31-40).

There is no ambiguity and the Court should instruct the Petitioners to use the Write-Up First method for the Olifant Fund Trusts. Both the Governing Documents and the Settlement Agreement are governed by New York Law, wherein it is established that in the absence of ambiguity, the plain meaning of the contract must be enforced.⁵ (SACO 2005-WM3 PSA (Tomlinson Aff. Ex. 1) § 11.03⁶; Settlement Agreement § 7.19).⁷

The Governing Documents provide instructions for how payments are to be distributed to certificateholders. Indeed, the Settlement Agreement cannot amend the Governing Documents; in the Settlement Agreement, the parties expressly agreed “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.” (Settlement Agreement § 7.05). In the Settlement Agreement, the parties agreed that the Allocable Shares are to be treated as though they were Subsequent Recoveries under the Governing Documents. (Settlement Agreement § 3.06(a)) (providing that the Allocable Shares are made “for further distribution to Investors in accordance with the distribution provisions of the Governing

⁵ “Under New York law, written agreements are construed in accordance with the [contracting] parties’ intent and the best evidence of what parties to a written agreement intend is what they say in their writing. As such, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (quotations and citations omitted).

⁶ This Response uses as an example the PSA from SACO I Trust 2005-WM3. For the Court’s convenience, relevant excerpts from this PSA are attached as Exhibit 1 to the accompanying Affirmation of Peter Tomlinson. The Governing Documents for each of the Olifant Fund Trusts are materially identical with respect to the provisions relevant to the issue of whether the Write-Up First method is appropriate, unless otherwise noted.

⁷ The Settlement Agreement is available at Ex. B to the Petition, NYSCEF No. 3.

Agreements . . . as though such Allocable Share was a ‘subsequent recovery’ relating to principal proceeds available for distribution on the immediately following distribution date . . .”).

1. The Definition of “Certificate Principal Balance”

Subsequent Recoveries serve the dual role of increasing distributions of principal to certificateholders and reversing applied Realized Losses, and it is the definition of Certificate Principal Balance in the Governing Documents that coordinates the two related elements. Because the amount of all distributions of principal under the Olifant Fund Trusts’ Governing Documents depends on the Certificate Principal Balance as of the applicable Distribution Date, the Governing Documents’ definition of “Certificate Principal Balance” is critical. Importantly, that definition requires that amounts received as Subsequent Recoveries be added to increase the Certificate Principal Balance *before* they are paid out to certificateholders.

The Governing Documents of the Olifant Fund Trusts define Certificate Principal Balance, as of any Distribution Date, as comprising four components:

1. “the Initial Certificate Principal Balance,” which is the Principal Balance as of the Closing Date of each Trust; plus
2. “any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b),” which is the all-important “write-up”; minus
3. “all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof *on previous Distribution Dates*,” which, crucially, do not include those related to the current Distribution Date; minus
4. “any Applied Realized Loss Amounts allocated to such Certificate *on previous Distribution Dates*,” which, again, do not relate to the current Distribution Date.

(SACO 2005-WM3 PSA § 1.01).

The timing of the subtraction or addition of each component is therefore clearly specified in the text of this central definition. While the definition of Certificate Principal Balance makes clear that the last two components are subtracted only to the extent that amounts were distributed

or allocated “on previous Distribution Dates,” there is no such temporal reference with respect to Subsequent Recoveries. Accordingly, the definition makes clear that, with respect to any given Distribution Date, all Subsequent Recoveries are to be included in the calculation of Certificate Principal Balance. Therefore, since Certificate Principal Balance must be calculated before any distribution can occur with respect to a Distribution Date, the write-up must occur before distribution of the Settlement Payment.

2. *Other Provisions of the Olifant Funds Trusts’ Governing Documents Reinforce the Write-Up First Method*

The order of operations compelled by the definition of Certificate Principal Balance is further supported by other sections of the Olifant Fund Trusts’ Governing Documents. The section that deals with the allocation of Realized Losses states “[a]ll Realized Losses to be allocated to the Certificate Principal Balances . . . of all classes on any Distribution Date shall be so allocated *after* the actual distributions to be made on such date as provided above.” (SACO 2005-WM3 PSA § 5.05(a)) (emphasis added). Unlike this provision governing the *writing down* of Certificate Principal Balances, no such statement as to the order of operations is included in Section 5.04(b), which addresses the *writing up* of Certificate Principal Balances for Subsequent Recoveries. If the drafters of the Governing Documents had intended that write-up for Subsequent Recoveries occur after the distribution, they would have similarly so specified in Section 5.04(b) (or its equivalent for other Olifant Fund Trusts).

The Subsequent Recovery write-up instructions in most of the Olifant Fund Trusts’ Governing Documents provide further support for the Write-Up First method by directing that written-up Certificates shall not receive any interest that accrues on the written-up balances prior to the date of distribution. *See* SACO 2005-WM3 PSA § 5.04(b) (providing that certificateholders “will not be entitled to any payment in respect of Current Interest on the

amount of such increases for any Interest Accrual Period preceding the Distribution Date on which such increase occurs”). This limitation on the accrual of interest on the written-up balances would be entirely unnecessary if Subsequent Recoveries were applied after distributions (including the distribution of interest), as would occur under the Pay First method. In New York, contracts are not read in a manner that would render clauses superfluous. *See Matter of Viking Pump, Inc.*, 52 N.E.3d 1144, 1154 (N.Y. 2016) (holding that a construction that rendered a contract clause surplusage “cannot be countenanced under our principles of contract interpretation”); *FCI Grp., Inc. v. City of N.Y.*, 54 A.D.3d 171, 177 (1st Dep’t 2008) (“[A] court should not adopt an interpretation which will operate to leave a provision of a contract without force and effect.”) (internal quotation marks and citation omitted).

B. The Petitioners Have Subsequently Ratified the Intention to Use the Write-Up First Method

The Petitioners’ own conduct since the Settlement Agreement was executed confirms that the Settlement Payment must be distributed via the Write-Up First method. *First*, at least one Petitioner – Wells Fargo – has taken the position in three separate Trust Instruction Proceedings that Governing Documents that are materially identical to the Olifant Fund Trusts’ Governing Documents “require the ‘write-up first’ method for the distribution of the” settlement payment. *In the matter of the MASTR Adjustable Rate Mortgages Trust 2007-3*, No. 62-TR-CV-18-47 (Minn. Dist. Ramsey Cnty.), Petition ¶ 36 (Tomlinson Aff. Ex. 2); *see also In the matter of the MASTR Adjustable Rate Mortgages Trust 2007-1*, No. 62-TR-CV-18-46 (Minn. Dist. Ramsey Cnty.), Petition ¶ 37 (Tomlinson Aff. Ex. 3); *In the matter of the MASTR Adjustable Rate Mortgages Trust 2006-OA2*, No. 62-TR-CV-18-48 (Minn. Dist. Ramsey Cnty.), Petition ¶ 36 (Tomlinson Aff. Ex. 4). Those Governing Documents’ definition of Certificate Principal Balance contain the same temporal provisions as do the corresponding definitions in the Olifant

Fund Trusts' Governing Documents. *See supra* Section II(A)(1). As Wells Fargo explains in its Petitions, “[t]he definition of Certificate Principal Balance supports the “write up first” method for processing Subsequent Recoveries . . . because the definition suggests a specific order to the steps for calculating a Certificate Principal Balance.” Ex. 2 ¶¶ 37-38. The definition “require[s] the write up of Certificate Principal Balances before paying principal or allocating Applied Realized Loss Amounts for any given Distribution Date.” *Id.* ¶ 38. The same is required here.

Second, since the alleged ambiguities in the Settlement Agreement have arisen, the Petitioners have accepted and executed other RMBS settlement agreements. In these subsequent agreements, the Petitioners have even more clearly specified that the Write-Up First method is to be used to distribute settlement payments. These subsequent clarifications are probative evidence of the Petitioners' intent that the Allocable Shares here also should be distributed via the Write-Up First method.

For example, U.S. Bank, the Trustee for BSMF 2006-SL1 rejected the Global RMBS Settlement Offer on behalf of that trust on August 1, 2014. (BSMF 2006-SL1 petition ¶ 14 (Tomlinson Aff. Ex. 5)). Later, on July 27, 2016, U.S. Bank accepted a separate, trust-specific Settlement Offer for that trust, whose Subsequent Recovery application provisions mirrored the Global Settlement Agreement. (*Id.* ¶ 22). The BSMF 2006-SL1 Settlement Agreement incorporated amended language, making perfectly explicit that the Write-Up First method is to be used to distribute the Settlement Payment and confirming that the definition of Certificate Principal Balance mandates this order of operations:

On the Distribution Date immediately following [the deposit of the Settlement Payment in the Trust], ***the amount of the Subsequent Recoveries represented by the Settlement Payment [will] be applied to increase the Certificate Principal Balance*** of the Class of Certificates with highest payment priority to which Realized Losses have been allocated . . . in accordance with Section 5.04(b) of the PSA and as contemplated by the definition of ‘Certificate Principal Balance’

[The] Trustee *[will] next distribute* the Settlement Payment on that Distribution Date . . .

(*Id.* ¶ 20) (emphasis added). The relevant provisions of the BSMF 2006-SL1 PSA are materially identical to the Olifant Funds Trusts' Governing Documents at issue here. The Second Judicial District Court in Ramsey County, Minnesota subsequently approved the settlement, including use of the Write-Up First method. (BSMF 2006-SL1 Order (Tomlinson Aff. Ex. 6)).

At least four other settlement agreements for trusts that rejected the Global Settlement and later accepted stand-alone settlements (where the accepting trustees were U.S. Bank or Wilmington Trust) included similar clarifying language.⁸ While the clarifying language was not necessary, its inclusion in these subsequent settlement agreements confirms that the Petitioners have always interpreted the Settlement Agreement and the Olifant Fund Trust Governing Documents to require the Write-Up First method.

C. The Only Court To Order The Pay First Method Was Interpreting Materially Different Documents

To the Olifant Funds' knowledge, no court has interpreted materially similar Governing Documents or settlement agreements to authorize the Pay First method. In the Petition, the Petitioners state that other judicial instruction proceedings "have yielded conflicting results." (Petition ¶ 68). This statement is misleading. The lone prior proceeding that approved the Pay First method involved materially different Governing Documents and a materially different settlement agreement. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d 356 (Sup. Ct. N.Y. Cnty.

⁸ See *In the matter of the SACO I Trust 2006-3*, No. 62-TR-CV-16-56 (Minn. Dist. Ramsey Cnty.), Petition ¶ 22 (Ex. 7) and Order (Ex. 8); *In the Matter of the trusteeship created by Bear Stearns Asset Backed Securities LLC relating to the issuance of certificates by SACO I Trust 2006-6*, No. 62-TR-CV-16-60 (Minn. Dist. Ramsey Cnty.), Petition ¶ 32 (Ex. 9) and Order (Ex. 10); *In the Matter of the trusteeship created by Bear Stearns Asset Backed Securities I LLC relating to the issuance of certificates by SACO I Trust 2006-5*, No. 62-TR-CV-16-59 (Minn. Dist. Ramsey Cnty.), Petition ¶ 33 (Ex. 11) and Order (Ex. 12); *In the Matter of the trusteeship created by Bear Stearns Asset Backed Securities I LLC relating to the issuance of certificates by SACO I Trust 2007-2*, No. 62-TR-CV-16-61 (Minn. Dist. Ramsey Cnty.), Petition ¶ 33 (Ex. 13) and Order (Ex. 14).

2017) (“*Countrywide*”). Because the functioning of RMBS trusts is governed by their unique operative documents, that court’s interpretation of those documents provides no reason to use the Pay First method in this case. It merely confirms that a court must look to the governing documents, which here require the use of the Write-Up First method.

First, and most crucially, the governing documents at issue in *Countrywide* were materially different from the Olifant Fund Trusts’ Governing Documents. The key provision for purposes of adjudicating that dispute was the definition of “Principal Distribution Amount,” which begins:

the excess, if any of (1) the aggregate Class Certificate Balance of the Certificates related to such Loan Group ***immediately prior to such Distribution Date***

Id. at 363 (emphasis added). The court determined that this express language required the calculation of certificate balances as they were “immediately prior” to the distribution date, which did not yet include subsequent recoveries, namely the settlement payment. *Id.* at 363-366.⁹ The applicable defined term in the Olifant Fund Trusts’ Governing Document requires a calculation of the Certificate Principal Balance ***on*** the applicable Distribution Date, not immediately prior to it. (*See* SACO 2005-WM3 PSA § 1.01, definition of Certificate Principal Balance), *supra* Section II(A)(1).

Second, unlike the Settlement Agreement here, the settlement agreement in *Countrywide* unambiguously required write up to occur ***after*** distribution of the settlement proceeds to certificateholders. (*Compare* Tomlinson Aff. Ex. 15 (Countrywide Settlement Agreement) at 12) (directing write up “after the distribution of the Allocable Share ***to Investors***”) (emphasis added), *with* JP Morgan Settlement Agreement § 3.06(b) (directing write up “[a]fter the distribution of

⁹ The Governing Documents for certain other trusts in this proceeding similarly may require use of the Pay First method. *See* Respondent Tilden Park’s Answer to the Petition (NYSCEF No. 129) at 8-9.

the Allocable Share *to a Settlement Trust*)” (emphasis added). The objectors who advocated for the write-up first method in *Countrywide* were therefore arguing against clear and contrary language in that settlement agreement. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 362 (“The parties do not dispute that the distribution provisions in the settlement agreement direct the trustee to pay out the allocable share first, and then to write up the certificates in the amount of the allocable share . . .”). Even though, like here, the *Countrywide* settlement agreement could not amend the Governing Documents, the objectors in *Countrywide* who favored the write-up first method were arguing for an interpretation of the Governing Documents that would negate the settlement agreement; the court instead chose an interpretation that harmonized the Governing Documents and the settlement agreement.

Here, the Write-Up First method is fully consistent with the Settlement Agreement, whose language regarding timing of the write up is different than in *Countrywide*. If the parties to the Settlement Agreement intended to require the Pay First method, they would have directed the write up to occur “after the distribution of the Allocable Share *to investors*”; they did not.¹⁰

D. The Pay First Method Would Lead To Results Not Intended By the Parties

Besides being unsupported by the express terms of the Olifant Fund Trusts’ Governing Documents, the Pay First method would lead to commercially unreasonable results that, as Petitioners highlight in the Petition, could not have been intended by the parties to those documents. (Petition ¶¶ 28-34). The Governing Documents should not be interpreted to cause such results. *See Cole v. Macklowe*, 99 A.D.3d 595, 595 (1st Dep’t 2012) (“[A] contract should

¹⁰ Further, in *Countrywide*, the trustee took the position that the settlement agreement required it to use the Pay First Method. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 360. Here, the Petitioners do not contend that the documents require the Pay First Method and, in fact, themselves readily point out numerous thorny issues that would arise from the use of that method. (Petition ¶¶ 31-40).

not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties.”).

First, the Pay First method could cause Settlement Trusts to appear to be overcollateralized when they are not. (Petition ¶¶ 28-30). All of the Olifant Funds Trusts have an overcollateralization structure (“OC Trusts”). (Petition ¶ 24). An OC Trust is one in which the aggregate mortgage loan balances held by the trust are structured to be greater than the aggregate principal balances of the certificates issued by the trust. (Petition ¶¶ 24-27). The purpose of an overcollateralization structure is to ensure that certificateholders benefit from a larger base of assets and provide a cushion against the risk of loss. (See Petition ¶ 6). In an OC Trust, when overcollateralization exceeds an “Overcollateralization Target Amount” established under the Governing Documents, funds that would otherwise have been distributed as part of the Principal Distribution Amount to senior certificateholders are redirected as the Overcollateralization Release Amount and distributed as Excess Cashflow (Petition ¶ 26).¹¹ Use of the Pay First method would frustrate the very purpose of the overcollateralization structure by making the Trusts incorrectly appear temporarily to have achieved the Overcollateralization Target Amount despite the fact that the Trusts have performed very poorly. This illusory overcollateralization would result in an improper distribution of part of the Settlement Payment as Excess Cashflow instead of as part of the Principal Distribution Amount and would divert part of the Settlement Payment to Class C certificates, the most junior certificate in the capital structure of the trust.

¹¹ This results in a different distribution because excess cashflow is distributed pursuant to a different waterfall than principal, with different priorities. (Petition ¶ 30). Excess cashflow distributions also generally do not reduce certificate principal balances. (Petition ¶ 6).

Second, the Pay First method could lead to an ending Certificate Principal Balance that is unsupported by the future cashflow of the mortgage loans. As the Petitioners recognize, under the Pay First method, the portion of the Settlement Payment that is distributed as Excess Cashflow would not necessarily reduce the Certificate Principal Balance. (Petition ¶ 34). This could result in the Certificate Principal Balance exceeding the actual balance of the underlying mortgage loans, causing an unintended consequence known as “undercollateralization.” (*Id.*). This undercollateralization would cause future cashflows from the mortgage loans to potentially be insufficient to support distributions to certificateholders, and would distort future principal and interest. (*Id.*).

Third, in trusts where the Allocable Share exceeds the outstanding certificate balance of certificates that are entitled to be written up by the amount of the Allocable Share, the Pay First method would cause “some portion, and even perhaps a large portion” of the Allocable Share to be distributed to junior certificates even though some losses on the more senior certificates remain unreimbursed. (Petition ¶ 33). The absurdities of using the Pay First method can be illustrated with the following example using actual figures from the SACO I 2005-WM3 Trust. The Allocable Share of the settlement payment is approximately \$17.0 million.¹² Currently, the sum of the Certificate Principal Balance of the remaining certificates (A1, A3 and M1 certificates) is approximately \$11.2 million and the M1 certificate has \$46.8 million in losses. *See* SACO 2005-WM3 Monthly Report for Distribution dated Aug. 27, 2018 at 1, 2 (Tomlinson Aff. Ex. 16). If the Pay First method is used, the first \$11.2 million of the Allocable Share will be paid to the A1, A3 and M1 certificates and their Certificate Principal Balance will go to zero. The remaining \$5.8 million will flow through the Excess Cashflow waterfall and be paid to the

¹² NYSCEF No. 178.

Class C holder even though the M1 certificate has not been reimbursed for all losses. The M1 Certificate Principal Balance will then be written up by the full amount of the Allocable Share to \$17.0 million, causing a discrepancy with the principal balance of the underlying mortgage notes, which is approximately \$12.7 million.

III. The Other Issues Have Clear and Simple Resolutions As Applied to the Olifant Fund Trusts.

The Olifant Funds also set forth below their position on each of the other issues raised by the Petition that apply to any of the Olifant Fund Trusts.

A. Trusts With Write-Up Instructions Applicable Only to Subordinate Classes (Petition Ex. E)

The Olifant Funds own subordinate certificates in a single Trust (BSABS 2006-2) that Petitioners highlight as having “subsequent recovery write-up instructions that apply only to” subordinate classes of certificates. (Petition ¶¶ 45-48; Ex. E). While the Petitioners accurately describe the BSABS 2006-2 PSA, they will not be faced with a decision about whether to write up senior certificates in this trust. Only subordinate certificates have certificate balances for BSABS 2006-2; all senior certificates have been paid off in full with no applied Realized Losses. All future distributions and write-ups – including the Settlement Payment – will be applied to subordinate certificates only, which undisputedly are permitted to be written up.

B. Trusts Where Petitioners Allege There Are Realized Loss Allocation Methods That Differ From Subsequent Recovery Write-Up Methods (Petition Ex. F)

Three of the Olifant Fund Trusts are included on Exhibit F to the Petition.

The PSA for one such trust (BALTA 2007-3) clearly requires both loss allocation and write-ups to be done sequentially. *See* BALTA 2007-3 PSA § 6.02(b) (“[T]he amount of such Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class

of Certificates with the highest payment priority to which Applied Realized Loss Amounts have been allocated The amount of any remaining Subsequent Recoveries first will be applied to *sequentially* increase the Certificate Principal Balance of the Certificates . . .”) (emphasis added); *id.* (Definition of “Applied Realized Loss Amount”) (instructing that Realized Losses are allocated first to B-4 Certificates, then to B-3, B-2, B-1, M-2, M-1, I-A-2, and I-A-1, in that order).

Realized Losses in BSABS 2006-IM1 are applied to the senior certificates *pro rata*. *See* BSABS 2006-IM1 PSA § 5.05(a) (applying Realized Losses “to the Class or Classes of Class A Certificates, on a *pro rata* basis . . .”). The PSA for BSABS 2006-IM1 is silent on the method for writing up principal from Subsequent Recoveries.¹³ Because the Settlement Agreement specifies that the Allocable Share should be applied “in the reverse order of previously allocated losses,” (Settlement Agreement § 3.06(b)), the Trustee’s practice of writing up Subsequent Recoveries for BSABS 2006-IM1 in the same manner that Realized Losses are allocated – *pro rata* – is consistent with the Settlement Agreement and is appropriate for the write-up of the BSABS 2006-IM1 Allocable Share.

Realized Losses in BSSLT 2007-SV1A are applied to the senior certificates *pro rata*. *See* BSSLT 2007-SV1A PSA § 6.05(a) (applying Realized Losses “to the Class A Certificates, on a *pro rata* basis . . .”). Subsequent Recoveries are applied sequentially. *See id.* § 6.04(b). However, this mismatch will not affect the write-up of senior certificates because no Realized Losses have been applied above the M2 Certificate.

¹³ The definition of Certificate Principal Balance specifies that Subsequent Recoveries are to be “added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b).” *See* BSABS 2006-IM1 PSA. But the reference to Section 5.04(b) is erroneous; Section 5.04(b) deals with the mechanics for making distributions to certificateholders and does not address write-up for Subsequent Recoveries. *See id.* § 5.04(b).

C. Trusts With Zero-Balance Classes (Petition Ex. G)

1. *Retired Class Provision*

There are seven Olifant Fund Trusts that appear on Exhibit G as trusts whose Governing Documents contain a Retired Class Provision (BSABS 2006-IM1; BSSLT 2007-SV1A; SACO 2005-4; SACO 2005-5; SACO 2005-7; SACO 2005-WM1; SACO 2005-WM3). The Olifant Funds take the position that the Retired Class Provision does not prevent the distribution to or writing up of certificates with Certificate Principal Balances of zero due to the allocation of Realized Losses. This provision only applies where certificates have been paid in full and have been formally retired.¹⁴ As other interested parties have noted, the Governing Documents contain strict procedures for de-classifying certificates as “outstanding” – procedures that are outside the contours of waterfall mechanics.¹⁵ Moreover, preventing distribution to or write up of zero balance certificates would disregard the basic capital structure of these Trusts and allow distributions to leak to equity-like certificates, leaving more senior certificates unreimbursed for losses.

D. Trusts Where Petitioners Allege the Governing Agreements Do Not Specify That Subsequent Recoveries Should Be Treated As Principal (Petition Ex. H).

One Olifant Funds Trust (SACO 2005-5) was identified by the Petitioners as being governed by a PSA that “appear[s] to specify that subsequent recoveries should be treated as interest instead of principal.” (Petition ¶¶ 8, 63-65 and Ex. H). Because the PSA and the Settlement Agreement specify that Subsequent Recoveries should be treated as principal and

¹⁴ In its initial submission, the Olifant Funds took the position that certain Governing Documents may prevent distribution to classes of certificates that had been reduced to zero, particularly when combined with Redirection provisions. Having had additional time to review the Governing Documents and consider the positions set forth by other parties in this action, the Olifant Funds contend that the Governing Documents do not forbid distributions to, or the writing up of, classes of certificates whose Certificate Principal Balances have been reduced to zero due to allocation of Realized Losses.

¹⁵ See, e.g., Strategos Capital Management, LLC’s Response to Petition (NYSCEF No. 171) at 2-6.

there is no dispute among interested parties on this issue, the SACO 2005-5 Allocable Share should be treated as principal.

SACO 2005-5 has two loan groups and a bifurcated waterfall of payments, wherein the distribution of payments to Loan Group I is governed by § 6.04(a) and distribution to Loan Group II is governed by § 6.04(b). As far as Loan Group I is concerned, the paragraph referencing the distribution of Subsequent Recoveries has an obvious typographical error, as it references an unrelated section of the Loan Group II waterfall. The Settlement Agreement resolves any ambiguity in the PSA by stating that Allocable Shares are to be treated as Subsequent Recoveries “relating to principal proceeds.” Settlement Agreement § 3.06(a). The only other interested party in SACO 2005-5 agrees that Subsequent Recoveries should be treated as principal. *See* Institutional Investors’ Response to Petition (NYSCEF No. 136) at 7.¹⁶ As there is no dispute, the Petitioners should be directed to treat the SACO 2005-5 Allocable Share as principal.

IV. CONCLUSION

For these reasons, the Court should instruct and authorize the Petitioners to distribute the applicable Allocable Shares to the Olifant Fund Trusts using the Write-Up First method and as otherwise set forth in this response as soon as possible.

¹⁶ Nover Ventures appeared on this trust and also took the position that Subsequent Recoveries should be treated as principal. *See* Nover Ventures Response to Petition (NYSCEF No. 15) at 13. Nover was found to lack standing to appear on this trust. (NYSCEF No. 471).

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By:

/s/ Peter W. Tomlinson

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Appendix A – Olifant Fund Trusts

BALTA 2007-3

BSABS 2005-1

BSABS 2006-2

BSABS 2006-IM1

BSSLT 2007-SV1A

SACO 2005-4

SACO 2005-5

SACO 2005-7

SACO 2005-WM1

SACO 2005-WM3

SACO 2006-12