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

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,	Index No. 657387/2017 Hon. Marcy S. Friedman **RESPONSIVE MERITS BRIEF OF OLIFANT FUND, LTD., FFI FUND LTD. AND FYI LTD.**

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I. Introduction

In their opening merits brief, the Institutional Investors and AIG[1] ignore the clear language in the Olifant Funds Trusts' Governing Documents requiring the use of the Write-Up First method for the distribution of the Allocable Shares.[2] Their focus on everything but the Governing Documents – the Settlement Agreement; *other* RMBS settlement agreements; unadjudicated severance orders; transcripts from other proceedings; and the doctrine of *res judicata* – is telling and demonstrates the weakness of their position in favor of a Pay First distribution.

In fact, both the Olifant Funds Trusts' Governing Documents and the Settlement Agreement require the Settlement Payment to be distributed via the Write-Up First method. Several provisions of the Governing Documents dealing with the timing of payments require Write-Up First. The Settlement Agreement also requires the Write-Up First method (or is, at best, silent) and, as the Institutional Investors and AIG concede, if the Settlement Agreement conflicts with the Governing Documents, the Governing Documents must control. Other RMBS settlement agreements or proceedings do not dictate an order of operations here because they either involve materially different governing documents or settlement agreements, or were not adjudicated, or both. The desperation of the Institutional Investors and AIG is most apparent when they attempt to improperly invoke *res judicata* to prevent a decision on the merits of this highly disputed issue.

[1] HBK and the GMO Funds also argue for Pay First but, because they do not own certificates in any of the Olifant Funds Trusts and their arguments largely mirror the arguments of the Institutional Investors and AIG, this response primarily responds to the Institutional Investors' and AIG's brief.

[2] Unless otherwise defined, all capitalized terms have the meaning given to them in the Petition or in the Olifant Funds' opening merits brief.

Because the Governing Documents are clear and controlling, the Court should order the Allocable Shares for the Olifant Funds Trusts to be distributed using the Write-Up First method and as otherwise specified herein and in the Olifant Funds' Opening Brief.

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

A. The Clear Language of the Olifant Fund Trusts' Governing Documents Requires Write-Up First

In their opening brief, the Olifant Funds described in detail how multiple provisions of the Olifant Fund Trusts' Governing Documents require the use of the Write-Up First method in distributing the Settlement Payment. *See* Olifant Opening Br. (NYSCEF No. 545) at 2-6. Numerous other parties to this proceeding agree that the Governing Documents control this issue and require Write-Up First.[3] At least one of the Petitioners – Wells Fargo – also has gone on record interpreting similar Governing Documents to require the Write-Up First method for the distribution of settlement payments. In three petitions seeking judicial instruction filed earlier this month involving materially similar Governing Documents, Wells Fargo described how the Governing Documents' plain language requires Write-Up First:

> The definition of Certificate Principal Balance supports the "write up first" method for processing Subsequent Recoveries. It does so because the definition suggests a specific order to the steps for calculating a Certificate Principal Balance. The calculation begins by adding to the Denomination, or the initial principal balance, of the related Certificate any increases to the original balance resulting from the application of Subsequent Recoveries up to the amount of such Certificate's Applied Realized Loss Amounts.
>
> Then, the Trust Administrator subtracts from this increased balance (1) all principal previously paid to that Certificate, and (2) any Applied Realized Loss Amounts allocated to the Certificate on previous Distribution Dates. Although

[3] *See* D.E. Shaw Opening Br. (NYSCEF No. 516); DW Partners and Ellington Opening Br. (NYSCEF No. 609); Nover Opening Br. (NYSCEF No. 600) at 14-18; Poet and Prophet Opening Br. (NYSCEF No. 568); Tilden Park Opening Br. (NYSCEF No. 515) at 10-16.

> the amount subtracted from the Certificate Principal Balance . . . is limited to "distributions of principal previously made" and "Applied Realized Loss Amounts allocated . . . on previous Distribution Dates", there is no such time limitation on the amount of Subsequent Recoveries added to the Denomination . . . Thus, the amount of Subsequent Recoveries included in the calculation encompasses Subsequent Recoveries applied in the current payment period, but not principal paid or Applied Realized Loss Amounts allocated in the current payment period. Accordingly, the provision appears to require the write up of Certificate Principal Balances before paying principal or allocating Applied Realized Loss Amounts for any given Distribution Date.[4]

These provisions are controlling. The Settlement Agreement expressly specifies that the Governing Documents control the distribution of the Settlement Payment. *See* Settlement Agreement § 3.06(a) ("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*.") (emphasis added).

Despite the clear consensus that the Governing Documents speak to the order of operations and require Write-Up First, the Institutional Investors and AIG contend that "the Governing Agreements are silent as to the order of operations." Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 5-6. But wishing the Governing Documents were silent on this issue does not make them so. The Institutional Investors and AIG cannot remove the language in the Governing Agreements that requires Write-Up First by blinding themselves to these provisions. Because the Settlement Agreement instructs that the Governing Documents control distribution issues – and the Olifant Fund Trusts' Governing Documents require Write-

[4] *See* Petition, *In the matter of the MASTR Adjustable Rate Mortgages Trust 2007-3*, No. 62-TR-CV-18-47 (Minn. Dist. Ct., Ramsey Cnty.) (Sept. 11, 2018) (submitted in this matter at NYSCEF No. 548) at ¶¶ 37-38; *see also* Petition, *In the matter of the MASTR Adjustable Rate Mortgages Trust 2007-1*, No. 62-TR-CV-18-46 (Minn. Dist. Ct., Ramsey Cnty.) (Sept. 11, 2018) (NYSCEF No. 549); Petition, *In the matter of the MASTR Adjustable Rate Mortgages Trust 2006-OA2*, No. 62-TR-CV-18-48 (Minn. Dist. Ct., Ramsey Cnty.) (Sept. 11, 2018) (NYSCEF No. 550).

Up First – the Settlement Payment must be distributed after the relevant certificates are written up.

B. The Settlement Agreement Does Not Require Pay First and Cannot Amend the Governing Documents In Any Event

The Institutional Investors and AIG ignore the plain language of the Governing Documents and contend that the Settlement Agreement requires the Pay First method. This argument fails for two reasons. *First*, the Settlement Agreement requires the Write-Up First Method, or, at a minimum, does not require Pay First. *Second*, even if the Settlement Agreement required Pay First – and it does not – the Settlement Agreement cannot displace the plain language in the Governing Documents requiring Write-Up First.

1. The Settlement Agreement Does Not Require Pay First

The Institutional Investors and AIG cite two provisions of the Settlement Agreement in support of their argument that the Settlement Agreement specifies Pay First but these sections, standing alone or together, do not require Pay First.

Section 3.06(a) directs the deposit of each Allocable Share "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 it were a Subsequent Recovery relating to principal proceeds. Settlement Agreement § 3.06(a). The next section, Section 3.06(b), provides for an associated write-up. In terms of timing of the write-up, Section 3.06(b) instructs that the write-up take place "[a]fter the distribution of the Allocable Share *to a Settlement Trust* pursuant to Subsection 3.06(a)." *Id.* § 3.06(b) (emphasis added). As the Olifant Funds explained in their opening brief, beyond specifying that the write-up occurs after the Settlement Payment is paid to a Trust, the Settlement Agreement does not further elaborate when the write-up occurs. Olifant Opening Br. (NYSCEF

No. 545) at 9-10. In either the Write-Up First or Pay First scenario, the write-up takes place after the Settlement Payment is paid *to the Trust*. Although Section 3.06(a) contemplates a further distribution to investors, Section 3.06(b) speaks only of the distribution *to a Settlement Trust*. If anything, Section 3.06(b)'s instruction that the write-up take place after distribution "*to a Settlement Trust*," rather than after distribution "*to Investors*," or "after *all distributions* described in Section 3.06(a)" signals that the write-up occurs after the Settlement Payment has been paid to the Trust but before it has been distributed to investors. *See id.*

Contrary to the contentions of the Institutional Investors and AIG, Section 3.06(b)'s instruction that the write-up "shall not affect the distribution of the Settlement Payment" does not require or support the Pay First method. This provision simply means that the Settlement Agreement does not displace the distribution mechanics present in the Governing Documents. It is consistent with Section 3.06(a)'s instruction that distributions occur "in accordance with the distribution provisions of the Governing Agreements." The Olifant Funds concur with Tilden Park on this point: "AIG and the Institutional Investors have it backwards: It is their position (Pay First in every instance) that would 'affect the distribution' under Subsection 3.06(a), thus violating Subsection 3.06(b) in those instances where the Pay First Method would contravene the order of operations provided for in the Governing Agreements." Tilden Park Opening Br. (NYSCEF No. 515) at 13-14.

2. The Settlement Agreement Cannot Amend the Governing Documents

Even if the Settlement Agreement instructed the use of Pay First, it would have to yield to the Write-Up First language in the Governing Documents. The Settlement Agreement 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." Settlement Agreement § 7.05 (emphasis added). Thus, where the Settlement Agreement and the Governing Documents are in conflict, the Governing Documents control. The Institutional Investors and AIG recognize the primacy of the Governing Documents, as they must. They cite Section 7.05 in support of their argument that, for Exhibit F Trusts, the Governing Documents control over conflicting language in the Settlement Agreement. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 24. The Institutional Investors and AIG cannot invoke Section 7.05 when it suits them but ignore Section 7.05 when the Governing Documents prescribe a result they dislike. Their argument that the Settlement Agreement supports Pay First collapses in light of Section 7.05 and the existence of Write-Up First language in the Governing Documents.

C. The Terms of Other Settlement Agreements Do Not Support the Application of Pay First Here

Likely because the Governing Documents and the Settlement Agreement do not support the use of Pay First, the Institutional Investors and AIG invite the Court to consider *other* RMBS settlement agreements. Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 9-14. This is a distraction that the Court should not indulge. The distribution methodology in any particular trust is governed by that trust's governing documents, not by a settlement agreement that does not apply to any trusts at issue in this proceeding.

The other settlements cited by the Institutional Investors and AIG have no probative value here. In all but one of the other settlements cited by the Institutional Investors and AIG, the Write-Up First / Pay First issue was not adjudicated. And the lone litigation that did involve an adjudication of the issue involved both a materially different settlement agreement and materially different governing documents.

1. Consent orders in unadjudicated proceedings lend no support to the Pay First method

In three of the four other RMBS settlements cited by the Institutional Investors and AIG, there was no determination by a court that either Pay First or Write-Up First was required. As such, they are not probative of whether Write-Up First or Pay First is required here. The Institutional Investors and AIG note that some settlement payments have been distributed to some RMBS trusts using the Pay First method. But by the same token, many settlement payments – including settlement payments in this proceeding – have been distributed to RMBS trusts using the Write-Up First method. *See* NYSCEF Nos. 282, 283, 460, 491 (write-up first severance orders); *In the matter of Loan Group I of the Bear Stearns Mortgage Funding Trust 2007-SL1 et al.*, No. 27-TR-CV-17-29 (Minn. Dist. Hennepin Cnty. Sept. 11, 2017), Order ¶ 8 (instructing and authorizing trustee to "apply the 'write-up first method'") (attached as Ex. 1); *In the matter of Bear Stearns Asset Backed Securities I LLC relating to the issuance of certificates by SACO I Trust 2007-1*, No. 27-TR-CV-15-308 (Minn. Dist. Hennepin Cnty. May 30, 2017), Order ¶ 6 (same) (attached as Ex. 2); *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 2006-7*, No. 27-TR-CV-15-309 (Minn. Dist. Hennepin Cnty. May 30, 2017), Order ¶ 6 (same) (attached as Ex. 3). The existence of orders in both directions – entered after a method of distribution was either unopposed or resolved on consent[5] – does not compel the use of one method over another here.[6]

[5] For example, interested parties could agree that lengthy and costly litigation was not warranted due to minor economic differences in distribution methods.

[6] The Institutional Investors and AIG do not support with evidence their statement that the "Trustees have now distributed settlement proceeds to over 1,000 RMBS trusts on the basis of this clear Pay First sequence and structure." Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 9. Specifically, they provide no evidence supporting their claim that the Pay First method was used to distribute the settlement payment to 68

2. All other RMBS settlement agreements cited by the Institutional Investors and AIG are materially different, were not litigated, or both

i. Citigroup

The Write-Up First / Pay First issue was not litigated in the global Citigroup RMBS settlement, making any distribution irrelevant.

ii. ResCap

The Write-Up First / Pay First issue was not litigated in the ResCap RMBS settlement. Additionally, the ResCap settlement agreement differs materially from the JPMorgan Settlement Agreement. The section describing the write-up provided that the write-up would occur "after *any* distribution resulting from an Allocated Allowed Claim." ResCap Settlement Agreement (NYSCEF No. 582) at 37 (emphasis added). Thus, unlike the JPMorgan Settlement Agreement, the ResCap settlement agreement specified that the write-up would occur after *any* distributions, including the distribution to investors.

Global RMBS Settlement	Operative Settlement Agreement Write-Up Language
JPMorgan	Write-up occurs "[a]fter the distribution of the Allocable Share to a Settlement Trust"
ResCap	Write-up occurs "after any distribution resulting from an Allocated Allowed Claim pursuant to section 3 above"

iii. Lehman

As the Court is well aware, whether the Lehman global settlement payment will be distributed using the Write-Up First method or the Pay First method is an open issue that is currently being litigated in an Article 77 proceeding pending before the Court. *See In the Matter of the application of U.S. Bank National Association, et al., Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment*, Index

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Citigroup trusts or to 392 ResCap trusts. Nor do they show that there was any difference between a Pay First Distribution and a Write-Up First distribution for the Citigroup or ResCap trusts.

No. 651625/2018 (Sup. Ct. N.Y. Cnty.). A merits briefing schedule has been set and opening merits briefs on the issue will be filed on October 19. Although the Institutional Investors and AIG might think Pay First is required by the Lehman settlement agreement and/or governing documents, that position is opposed by the Olifant Funds and by other interested parties and the issue has not yet been litigated. Some distributions have taken place pursuant to an agreed-upon severance order. *See id.* (NYSCEF No. 107). That severance order distributed some allocable shares via the Write-Up First method and other payments via the Pay First method. *Id.*

Neither the Bankruptcy Court order declining to enjoin the Lehman Article 77 proceeding nor the transcript of the hearing on the motion to enjoin determined that the Pay First method is required by the Lehman governing documents or settlement agreement, let alone in this unrelated proceeding. Judge Chapman did not entertain the merits of the order of operations issue; the hearing and resulting order were merely to determine whether the Bankruptcy Court or this Court was the appropriate forum for hearing arguments on the appropriate order of operations.[7] *See* Transcript (NYSCEF No. 590) at 49 (recognizing that the hearing was not about interpreting the documents, but "about whether or not I'm going to decide these issues, or whether Justice Friedman is."). Judge Chapman's decision was that she *would not* enjoin the Lehman Article 77 proceeding and she would abstain from exercising jurisdiction over the interpretation of the Governing Documents. *See* Order (NYSCEF No. 589) at 2. She implicitly recognized that it is impossible to determine the order of operations without consulting the Governing Documents, an

[7] The Olifant Funds were not provided notice of the Bankruptcy Court hearing and were not heard.

issue that is reserved to this Court. *See id.* Judge Chapman's statements during the jurisdictional hearing in no way determined whether Write-Up First or Pay First is required.[8]

iv. Countrywide

The Write-Up First / Pay First dispute was actually litigated in only one of the four other global RMBS settlements cited by the Institutional Investors and AIG: Countrywide. In their opening merits brief, the Olifant Funds explained why the *Countrywide* decision – which involved materially different Governing Documents and a materially different settlement agreement – supports the use of Write-Up First, not Pay First here. *See* Olifant Opening Br. (NYSCEF No. 545) at 8-10. The Olifant Funds will not repeat those arguments but reiterate that the Countrywide settlement agreement is not "virtually identical" to the JPMorgan Settlement Agreement with respect to the timing of the write-up. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 12.

Global RMBS Settlement	Operative Settlement Agreement Write-Up Language
JPMorgan	Write-up occurs "[a]fter the distribution of the Allocable Share to a Settlement Trust"
Countrywide	Write-up occurs "after the distribution of the Allocable Share to Investors"

Moreover, the Institutional Investors and AIG appear to agree (as they must) that *Countrywide* involved the interpretation of governing document language that is different from language in the Olifant Funds Trusts' Governing Documents. *See id.* at 12-13 ("[A]s to fourteen trusts with respect to certain *contractual language not present in any of the JPMorgan trusts* . . . the Court held that the Countrywide settlement agreement required the Pay First method.")

[8] Judge Chapman's comments on the meaning of the Settlement Agreement are not binding or final. Neither the Olifant Funds nor many of the other parties who have appeared in the Lehman Article 77 were heard on the issue. In any event, if there is a conflict between the Governing Documents and the settlement agreement, the Governing Documents control. *See* Settlement Agreement § 7.05.

(emphasis added). Because the order of operations depends on the provisions in the relevant governing documents, *supra* at 3, 5-6, the decision interpreting the Countrywide governing documents does not robotically apply here.

In fact, the *Countrywide* decision – the only reasoned judicial decision on the Write-Up First / Pay First issue reached after adversarial briefing – affirms the mode of analysis that the Olifant Funds propose. Even though, unlike here, the Countrywide settlement agreement clearly required Pay First, Justice Scarpulla looked to the governing documents. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d 356, 362-63 (Sup. Ct. N.Y. Cnty. 2017). The court analyzed the timing provisions within the definition of "Principal Distribution Amount" – the equivalent to "Certificate Principal Balance" in the Olifant Funds Trusts' Governing Documents. *Id.* at 363-64. Justice Scarpulla determined that "the governing agreement provides a straightforward directive regarding the amounts that need to be gathered, added together, and subtracted in order to calculate the principal distribution amount." *Id.* at 365. The analogous analysis of the Olifant Funds Trusts' Governing Documents requires the use of Write-Up First. *Supra* at 2-3.

D. The Write-Up First / Pay First Dispute Is Not Res Judicata

The Institutional Investors and AIG contend that the Write-Up First / Pay First dispute is res judicata from the prior Article 77 regarding the trustees' acceptance of the Settlement Agreement even though the order of operations was not litigated, the Olifant Funds (and many other parties who have appeared here) did not appear in the prior proceeding, and there was no judgment on the merits of the Write-Up First / Pay First dispute. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 6-9. They are wrong. "Under the doctrine of *res judicata*, a party may not litigate a claim where [1] a judgment on the merits exists from a prior action [2] between the same parties [3] involving the same subject matter." *In re Hunter*, 4

N.Y.3d 260, 269 (2005). None of these requirements is satisfied. The prior JPMorgan Article 77 did not address whether Write-Up First or Pay First is required and there is no judgment on the issue; Petitioners initiated this proceeding to receive judicial instruction on that very question. While some Petitioners and the Institutional Investors appeared in the prior JPMorgan Article 77, the Olifant Funds did not and had no opportunity to litigate the issue.

The Institutional Investors' and AIG's attempt to invoke New York caselaw allowing for *res judicata* when claims "could have been raised" in a prior litigation is misguided. The prior Article 77 did not provide notice of or involve any of the distribution issues raised in this proceeding. It is apparent that the Institutional Investors and AIG are improperly invoking *res judicata* in an attempt to avoid a ruling on the merits of the issue.

1. The prior JPMorgan Article 77 did not provide notice of a dispute or an opportunity to be heard on the Write-Up First / Pay First issue

The prior JPMorgan Article 77 was initiated for the purpose of obtaining judicial approval of the Trustees' acceptance of the Settlement Agreement. *See* First Amended Petition, *In the matter of the application of U.S. Bank Nat'l Ass'n.*, No. 652382/2014 (N.Y. Sup. Ct. Oct. 2, 2014) (NYSCEF No. 57) (Ex. 4). The Amended Petition sought a declaratory judgment that the Trustees' acceptance of the settlement was made in good faith and that certificateholders are "barred from asserting claims against any of the Trustees with respect to such Trustee's *evaluation and acceptance of the Settlement* and implementation of the Settlement in accordance with its terms as memorialized in the Settlement Agreement." *Id.* ¶ 52 (emphasis added). Certificateholders were notified that anyone supporting or opposing the settlement should appear to be heard. *See* Notice, *In the matter of the application of U.S. Bank Nat'l Ass'n.*, No. 652382/2014 (N.Y. Sup. Ct. Oct. 2, 2014) (NYSCEF No. 64) (Ex. 5). Because the Olifant Funds

did not oppose the Settlement Agreement, no objection was warranted in the prior JPMorgan Article 77. The Olifant Funds simply oppose the Institutional Investors' and AIG's incorrect *interpretation of* the Settlement Agreement and the Governing Documents.[9]

The suggestion that all potential distribution issues must be raised in the first Article 77 regarding the reasonableness of the Trustees' acceptance of a settlement is contrary to the practice of New York courts and the expectations of the parties. It is typical for a "settlement" Article 77 proceeding to be followed, if necessary, by a "distribution" Article 77. The original Countrywide Article 77 was followed by a "distribution" Article 77 in which the Write-Up First / Pay First issue was decided. *See* Verified Petition, *In the matter of the application of The Bank of New York Mellon*, No. 651786/2011 (N.Y. Sup. Ct. June 29, 2011) (Settlement Approval Article 77) (Ex. 6); Verified Petition, *In the Matter of the Application of The Bank of New York Mellon*, No. 150973/2016 (N.Y. Sup. Ct. Feb. 5, 2016) (Distribution Article 77) (Ex. 7). More recently, this Court rejected an attempt by a petitioner to combine questions about the proper distribution of a settlement payment with a determination of whether the acceptance of a settlement was appropriate. *See* Petition, *In the matter of the application of Deutsche Bank National Trust Co. [Harborview 2006-9]*, No. 654208/2018 (N.Y. Sup. Ct. Aug. 23, 2018); Order to Show Cause (Sept. 6, 2018) Insert - ¶ 10 (Ex. 8) ("[N]othing in this Order shall be construed as authorizing a request to be maintained in this proceeding, as opposed to a separate proceeding, for judicial instruction as to distribution of the settlement payment in the event the

[9] No party has alleged that the Olifant Funds' failure to appear and raise the Write Up First issue in the prior JPMorgan Article 77 proceeding was in any way strategic, and it was not. There simply was no notice provided that the mechanics of any distribution of the settlement payment were in question.

settlement is approved.").[10] While reasonable parties can disagree about whether settlement and distribution issues involving the same trusts should be divided among multiple Article 77 proceedings, it would be improper to levy the serious penalty of preclusion on a party who adhered to the practices of the Commercial Division's courts.

2. These distribution issues were not litigated in the prior JPMorgan Article 77

Res judicata can be applied to bar re-litigation of litigated and decided issues but cannot bar an issue from ever being adjudicated. The example of W&L's objection in the prior JPMorgan Article 77 does nothing more than show that *W&L* would be barred if it tried to re-litigate the same issue here. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 6-7. The objection of W&L in the prior JPMorgan Article 77 was a direct challenge to the Settlement Agreement; W&L argued that the Settlement Agreement's treatment of settlement proceeds as subsequent recoveries would be an unauthorized rewrite of the Governing Documents. Pre-Trial Memorandum, *In the matter of the application of U.S. Bank Nat'l Ass'n., et al.*, No. 652382/2014 (N.Y. Sup. Ct. Jan. 19, 2016) (NYSCEF No. 576) at 14-16 (Ex. 10). That objection was appropriately raised in the prior JPMorgan Article 77 because W&L was on notice that the Settlement Agreement would treat the settlement payment as a subsequent recovery. W&L made its argument, the issue was litigated, and the Court overruled the objection in a reasoned opinion. *See Matter of U.S. Bank Nat'l Ass'n v. Fed. Home Loan Bank of Bos.*, 2015 NY Slip Op 32846(U) (Sup. Ct. N.Y. Cnty. Aug. 12, 2015). *Res judicata* does not prevent

[10] In the Lehman Article 77, before it would sign an order for distribution recognizing the certificate insurer's subrogation, this Court required proof that supplemental notice regarding the subrogation issue was provided to certificateholders. Order, *In the Matter of the Application of U.S. Bank Nat'l Ass'n. et al.*, No. 651625/2018 (N.Y. Sup. Ct. Aug. 24, 2018) (NYSCEF No. 131) (Ex. 9). This demonstrates that particularized notice is required, to permit interested parties to appear on a specific issue, even when the general subject of the TIP had been disclosed.

the Olifant Funds from weighing in on an issue that was not presented by any party in the prior JPMorgan Article 77.

In *Countrywide*, the Institutional Investors made the same argument that they advance here – that *res judicata* barred certificateholders from objecting to the order of operations. The argument was rejected. Justice Scarpulla barred TIG from raising, in the follow-on Article 77, an objection similar to that of W&L: that the settlement payment should not be treated as a subsequent recovery. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 361. That objection could have been raised by TIG in earlier proceeding because it was clearly presented on the face of the Settlement Agreement. *Id.* But the court proceeded to decide the Write-Up First / Pay First issue on the merits, rejecting the argument that those objections were *res judicata* in the "distribution" Article 77 because they should have been raised earlier. *Id.* at 362-68.

3. Res judicata would not get the parties any closer to obtaining finality

Perhaps the soundest reason to reject the attempt to apply *res judicata* is that it would frustrate the goal of this proceeding: providing guidance as to the proper distribution of the Settlement Payment. The Institutional Investors and AIG contend that *res judicata* prevents any party from challenging a Pay First distribution. But Tilden Park contends that *res judicata* prevents any party from challenging *a Write-Up First* distribution. Tilden Park Opening Br. (NYSCEF No. 515) at 5-7, 14-16. Indeed, there is no reason why application of *res judicata* would compel a distribution pursuant to Pay First, as the Institutional Investors and AIG prefer. The Write-Up First method – not Pay First – is required by both the Olifant Funds Trusts' Governing Documents and the Settlement Agreement. *Supra*, at 2-6. If anything, *res judicata* should bar the *Institutional Investors* from raising an objection to the use of the Write-Up First method. Unlike the Olifant Funds, the Institutional Investors appeared in the prior JPMorgan

Article 77 and chose not to raise any argument regarding the distribution methodology. The Court should reject the attempt to avoid a ruling on the merits of the proper order of operations.

III. The Appropriate Way To Avoid Temporary Overcollateralization Is to Use the Write-Up First Method.

The Olifant Funds agree that recognizing temporary overcollateralization in trusts that have sustained substantial Realized Losses could lead to absurd results, including the potential distribution of a portion of the Settlement Payment via the excess cashflow waterfall to more junior certificates or even Class C holders. Unfortunately, the Pay First Method would lead to this absurd result unless, as the Institutional Investors and AIG propose, NYSCEF No. 576 at 14-18, the Court rewrites the Governing Documents. The Write-Up First method, on the other hand, would naturally avoid any commercially unreasonable consequences.

The Governing Documents' definition of "Overcollateralization Amount" specifies when and how overcollateralization is calculated. The Institutional Investors and AIG identify "four variants" of this definition but all four variants specify that overcollateralization is measured after principal is distributed. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 17-18; NYSCEF No. 591 (summary chart). A Pay First order of operations poses problems because the distribution – which triggers the overcollateralization calculation – finishes before any accompanying write-up.

To get around this problem, the Institutional Investors and AIG contend that the overcollateralization should be calculated not immediately after the distribution, but rather after a subsequent write-up. Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 14-18. They would redefine "distribution" in the Governing Documents to include both the distribution and the write-up. *See id.* at 16-18. But this is not a reasonable reading of the Governing Documents. While it is true that distributions of principal typically go hand-in-hand with a

write-up of certificate balances, they do not occur at exactly the same time; one must come first. The sequential nature of the write-up and the distribution is the very reason for the Write-Up First / Pay First dispute; if they occurred simultaneously, there would be no difference between the methodologies. In a Pay First scenario, the distribution would occur and then the write-up would occur. The Governing Documents instruct the Petitioners to calculate overcollateralization after the distribution, not after *both* the distribution and the write-up.[11]

The problem of temporary overcollateralization would not exist under the Write-Up First method. Overcollateralization is calculated after a distribution and in the Write-Up First method, a distribution occurs after the certificate balances already have been written up. There will be no mismatch between the certificate balances and the collateral in the Trust at the time overcollateralization is measured. The Write-Up First method is an honest way of avoiding absurd consequences because that's how the Governing Documents were intended to operate. Rewriting the Governing Documents to achieve the same results simply makes no sense.

IV. Zero Balance Certificates Are Not Prevented From Receiving Distributions or Being Written Up

Poet and Prophet and the Institutional Investors and AIG contend that the "Retired Class Provision" prevents the write-up of and distribution to certificates that have not been paid in full. *See* Poet and Prophet Opening Br. (NYSCEF No. 563); Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 25. They are wrong, for the following reasons:

[11] There is no basis for the Court to defer to the *Countrywide* order cited by the Institutional Investors and AIG that allowed the trustee to measure overcollateralization after both the distribution and write-up. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 20-21. The referenced order was an agreed-upon severance order and does not represent the reasoned opinion of a court. *See* Order (NYSCEF No. 586). The Institutional Investors and AIG fail to mention that the only *adjudicated Countrywide* order declined to rewrite the governing documents in the manner advanced by the Institutional Investors and AIG here. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 364-68.

- The Retired Class Provision bars further distributions only to certificates that have been fully paid, not to those that have been written down due to Realized Losses. Any other interpretation would lead to the commercially unreasonable result of paying equity-like certificates while more senior certificates with Realized Losses were passed over. *See* Olifant Opening Br. (NYSCEF No. 545) at 15; Nover Opening Br. (NYSCEF No. 600) at 10-11.
- Certificates are only "retired" upon the satisfaction of certain conditions, which have not been met for zero balance certificates in the Olifant Funds Trusts. *See* Olifant Opening Br. (NYSCEF No. 545) at 15; Nover Opening Br. (NYSCEF No. 600) at 13; DW Partners and Ellington Opening Br. (NYSCEF No. 609) at 19-21.

V. There Appears To Be No Dispute Regarding the Application of Other Issues to the Olifant Fund Trusts

In their opening brief, the Olifant Funds explained that the remaining issues (Exhibits E, F, and H to the Petition) have clear and simple answers as applied to the Olifant Funds Trusts. Olifant Opening Br. (NYSCEF No. 545) at 13-16. There appears to be no dispute about these issues from the other interested parties that have appeared in these trusts.

A. Petition Exhibit E

Because only subordinate certificates have certificate balances in BSABS 2006-2, the issue identified by the Petition for trusts listed on Exhibit E is not applicable to BSABS 2006-2. *See* Olifant Opening Br. (NYSCEF No. 545) at 13. Accordingly, it is unnecessary for the Court to adjudicate this issue as it applies to BSABS 2006-2.

B. Petition Exhibit F

The Olifant Funds set forth the proper method for writing up subsequent recoveries in the three Olifant Funds Trusts on Exhibit F. *See* Olifant Opening Br. (NYSCEF No. 545) at 13-14.

It appears that the other interested parties that have appeared on these trusts – the Institutional Investors, AIG, and Nover – are in agreement but, due to the lack of detail in their briefs, the Olifant Funds have not been able to ascertain definitively whether there is any dispute on this issue. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 23-24; Nover Opening Br. (NYSCEF No. 600) at 22.

C. Petition Exhibit H

Although the Institutional Investors do not address Exhibit H directly in their opening brief, there appears to be no dispute that the Allocable Share for SACO 2005-5 should be treated as principal. *See* Institutional Investors and AIG Opening Br. (NYSCEF No. 576) at 4 (stating that the Settlement Agreement requires distribution of the Allocable Share "as though it were a subsequent recovery relating to principal proceeds").

VI. Conclusion

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 specified in the Olifant Funds' Opening Brief.

Date: September 28, 2018

By:

/s/ Peter W. Tomlinson

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