

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

----- X

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,

----- X

Index No. 657387/2017

Hon. Marcy S. Friedman

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

TABLE OF CONTENTS

I. The Write-Up First Method Is Required.....2

 A. The Governing Documents Are Not Silent and Require Write-Up First.....2

 B. Nothing Outside the Four Corners Of the Governing Documents Compels
 Pay First7

II. Conclusion10

The Institutional Investors'¹ entire argument against the use of the Write-Up First method rests on a premise that the Olifant Funds have shown to be false: that the Governing Documents for the Olifant Fund Trusts² are silent about the order of operations. In fact, these Governing Documents require Write-Up First. The Institutional Investors' rebuttal only fleetingly engages with the plain language of the Olifant Fund Trusts Governing Documents and primarily discusses six *other* Settlement Trusts whose governing documents, they say, require Pay First. The Olifant Funds do not disagree that *those other* governing documents specify Pay First. But they are materially different from the Governing Documents for the Olifant Fund Trusts and a comparison reinforces that the Write-Up First is required for the Olifant Fund Trusts.

Even were it necessary and appropriate to look beyond the governing documents, the other materials cited by the Institutional Investors do not support the use of Pay First for the Olifant Fund Trusts. The Settlement Agreement's provision on the timing of the write-ups is materially different from the comparable provision in the prior *Countrywide* settlement agreement that required Pay First, and the reason is obvious: *Countrywide* required Pay First across the board while this Settlement Agreement does not. And while the Institutional Investors appropriately concede that "non-litigated settlement distribution judgments . . . are evidence of nothing," Institutional Investors and AIG Responsive Br. (NYSCEF No. 663) at 14, they bizarrely still argue that *other* unadjudicated global RMBS settlement agreements involving different governing documents are somehow persuasive evidence that Pay First is required here.

Because the Settlement Agreement requires the write-up and distribution of the settlement payment "in accordance with" the governing documents – and the Olifant Fund

¹ The AIG parties join the Institutional Investors; this brief refers to both as the "Institutional Investors."

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

Trusts' Governing Documents require the use of the Write-Up First method – the Court should instruct the Petitioners to distribute the Allocable Shares to the Olifant Fund Trusts using the Write-Up First method.³

I. The Write-Up First Method Is Required

A. The Governing Documents Are Not Silent and Require Write-Up First

As the Olifant Funds explained in their opening and responsive briefs, at least three sections of the Olifant Fund Trusts Governing Documents require Subsequent Recoveries to be distributed using the Write-Up First method. *See* Olifant Opening Br. (NYSCEF No. 545) at 4-6; Olifant Responsive Br. (NYSCEF No. 651) at 2-3. *First*, the definition of Certificate Principal Balance includes Subsequent Recoveries (without any limitation on when those Subsequent Recoveries were received) while other components of the definition are limited to amounts distributed or allocated “on previous distribution dates.” *Second*, the Governing Documents specify that Realized Losses are allocated *after* distributions, a restriction that is not present in the section regarding the write-ups of certificate balances. *Third*, the Governing Documents instruct that interest will not accrue on written-up balances, a restriction that would be unnecessary if distributions occurred before write-ups.

The Institutional Investors fail in their attempt to show that, despite this language, the Governing Documents are “silent.”⁴ The Petitioners' statement that the Governing Documents “do not clearly specify” an order of operations is not dispositive and, in any event, is no longer

³ Regarding Exhibit G, the Olifant Funds stand on the arguments set forth in their opening and responsive briefs, and further adopt the arguments made in Nover's responsive brief. Nover Responsive Brief (NYSCEF No. 698) at 14-20. The other issues raised by the Petition (Exhibits E, F, and H) are fully addressed in the Olifant Funds' opening and responsive briefs.

⁴ At different points in their brief, the Institutional Investors assert that the Governing Documents are “silent,” that they do not “specify” the order of operations, and that they do not “clearly specify” an order of operations.

the position of all of the Petitioners. All interested parties other than the Institutional Investors and the GMO Funds disagree with the Petitioners and take the position that the governing documents clearly specify the order of operations. In addition, Wells Fargo (one of the Petitioners) evidently has reconsidered its position and now agrees with the Olifant Funds that materially similar governing documents are clear and require the Write-Up First method. *See* Olifant Responsive Br. (NYSCEF No. 651) at 2-3. In contrast, no Petitioner has taken the position that materially similar governing documents require the Pay First method.

The Institutional Investors' response to the three specific sections identified by the Olifant Funds fares no better.⁵ Curiously, rather than directly address the language in the Olifant Fund Trusts Governing Documents, the Institutional Investors argue that *other* trusts (the "JPALT trusts") whose governing documents contain clear Pay First instructions – requiring the certificate balances to be measured "as of the close of business of the immediately preceding Distribution Date" – means that the Olifant Fund Trusts' Governing Documents – which the Institutional Investors admit "contain no such provision" – are silent on the order of operations. In fact, this shows the opposite. When the parties to governing documents intended to employ a Pay First method, they knew how to do so and did so clearly. This Pay First language that the Institutional Investors focus on, but try to unnaturally twist to their cause, is absent from each of the Olifant Fund Trusts Governing Documents.

⁵ Tellingly, the Institutional Investors do not adopt HBK's arguments that the governing document section regarding write-up *mechanics* requires Pay First. *See* HBK Responsive Br. (NYSCEF No. 687) at 10-13. HBK's argument is unavailing. The referenced section merely instructs that the write-up occurs after deposit of Subsequent Recoveries into a trust. It does not mention distributions, let alone mandate that the write-up occurs after a distribution. Trustees perform trust accounting regularly and do not need to actually distribute Subsequent Recoveries in order to take them into account for purposes of various calculations mandated by the Governing Documents that inform how the distributions should occur.

The Institutional Investors are wrong that the definition of Certificate Principal Balance in the JPALT trusts, other than the final sentence, is identical to the definition in the Olifant Fund Trusts Governing Documents. *See* Institutional Investors Responsive Br. (NYSCEF No. 663) at 12. The definition as a whole is, in fact, fundamentally different. Write-Up First is mandated by the Olifant Fund Trusts Governing Documents because (a) the definition of Certificate Principal Balance in those documents designates as the starting point for the Certificate Principal Balance calculation *the Distribution Date on which the distribution in question is to be made* and (b) within that framework, it is dispositive that the Subsequent Recoveries component of the definition of Certificate Principal Balance does not contain any temporal limitation, while *all other* components are limited to amounts allocated or distributed “on previous Distribution Dates.” This means that as of any Distribution Date (the point at which the calculation is to be performed) the Certificate Principal Balance *includes* Subsequent Recoveries received since the prior Distribution Date, but *does not include* any distribution of cash or allocation of Realized Losses since the prior Distribution Date.

The calculation to be performed is fundamentally different in the governing documents for the JPALT trusts. In the JPALT trusts, the definition of Certificate Principal Balance employs a starting point that is not the current distribution date but the “close of business of the immediately preceding Distribution Date.” Accordingly, the temporal concepts are expressed differently in the definition. In the JPALT trusts, this different starting point leads to a Pay First result because the calculation *excludes* Subsequent Recoveries received after the immediately preceding Distribution Date. Therefore, the last sentence of the definition of Certificate Principal Balance that the Institutional Investors try to downplay is actually a critical differentiator of the two structures. That last sentence is what makes the JPALT trusts like the

trusts actually adjudicated in *Countrywide* while the Olifant Fund Trusts are very different from the trusts actually adjudicated in *Countrywide*.

JPALT Trusts	Olifant Fund Trusts ⁶
<p>With respect to any Certificate, <u>at the time of determination</u>, the maximum specified dollar amount of principal to which the Holder thereof is then entitled hereunder, such amount being equal to the initial principal amount set forth on the face of such Certificate, (A) plus any Subsequent Recoveries added to the Certificate Principal Amount of such Certificate pursuant to Section 5.03 (B) minus (i) the amount of all principal distributions previously made with respect to such Certificate; (ii) all Realized Losses allocated to such Certificate; and (iii) in the case of a Subordinate Certificate, any Subordinate Certificate Writedown Amount allocated to such Certificates. <u>For purposes of Article V hereof, unless specifically provided to the contrary, Certificate Principal Amounts shall be determined as of the close of business of the immediately preceding Distribution Date, after giving effect to all distributions made on such date.</u></p>	<p>As to any Certificate (other than any Class R Certificate) and <u>as of any Distribution Date</u>, the Initial Certificate Principal Balance of such Certificate plus, in the case of a Class A, Class M or Class B Certificate, any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b), less the sum of (i) all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof on previous Distribution Dates pursuant to Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate <u>on previous Distribution Dates.</u></p>

The Institutional Investors do not dispute that the section of the Olifant Fund Trusts Governing Documents dealing with Realized Losses specifies that Realized Losses are allocated after distributions, a timing provision that is missing from the corresponding section governing write-ups. The drafters' decision *not* to specify that write-ups occur after distributions is further evidence that the drafters did not intend a Pay First order of operations. The governing documents for the JPALT trusts lack this distinction between the Realized Loss and Subsequent Recovery timing, another way in which they differ from the Olifant Fund Trusts' Governing Documents.

⁶ SACO 2005-WM3 PSA § 1.01. The definition of Certificate Principal Balance for the other Olifant Fund Trusts is materially identical.

The Institutional Investors advance an interpretation of the Interest Accrual Provision that would give that provision meaning under either a Pay First or Write-Up First method, but that interpretation is not credible. They contend that the provision clarifies that certificates are not entitled to interest that accrues between a write-down due to a realized loss *on a particular loan* and the write-up due to a subsequent recovery *on that particular loan*. Institutional Investors Responsive Br. (NYSCEF No. 663) at 13-14. But a subsequent recovery on a particular loan is not necessarily allocated to the same certificate that took a realized loss on that loan; losses and recoveries are commingled and applied to certificates as set forth in the governing documents.

* * *

While the Institutional Investors rely on trusts excluded from Exhibit D that have demonstrably different governing documents, other trusts excluded from Exhibit D forcefully show that Write-Up First is required for the Olifant Fund Trusts. Like the JPALT trusts, SACO 2006-10, BSMF 2006-SL2, BSMF 2006-SL3, and BSMF 2006-SL4 (the “Write-Up First Excluded Trusts”) were excluded from Exhibit D. Unlike the JPALT trusts, however, the governing documents for the Write-Up First Excluded Trusts contain materially similar provisions as are present in the Olifant Fund Trusts, they are from the same shelves as many of the Olifant Fund Trusts, and the Allocable Shares actually have been distributed to investors using the Write-Up First method.⁷ Without obtaining judicial instruction on the order of operations, the Petitioners distributed the Allocable Shares for the Write-Up First Excluded Trusts *after* certificates were written up. *See* Reply Affirmation of Peter W. Tomlinson Exs. 1-4 (January 2018 remittance reports for the Write-Up First Excluded Trusts) at 1. That the Petitioners distributed the Allocable Shares to the Write-Up First Excluded Trusts using the

⁷ The Allocable Shares for the JPALT trusts have not yet been distributed.

Write-Up First method is powerful evidence that the Petitioners formed the independent view that (1) the Write-Up First method is appropriate for trusts where the operative provisions are materially similar to those in the Olifant Fund Trusts and (2) the Settlement Agreement does not prescribe a contrary result. If the Court looks to *other* trusts to determine the proper distribution to the Olifant Fund Trusts, it should consider what the Petitioners actually did when faced with trusts with materially similar governing documents and decline the Institutional Investors' invitation to predict what the Petitioners *might* do in trusts with materially different governing documents.⁸

B. Nothing Outside the Four Corners Of the Governing Documents Compels Pay First

The Institutional Investors continue to assert that materials other than the Governing Documents require the Pay First method of distribution. Because the Governing Documents are not silent, these extrinsic sources should not be considered, but in any event, they do not support a Pay First method. The Olifant Funds rely on the points made in their opening and responsive briefs and add the following responses to the Institutional Investors' responsive brief.

1. *The Settlement Agreement Does Not Require Pay First*

The Olifant Funds and Tilden Park each highlighted how the Settlement Agreement is materially different from the only settlement agreement that was found by a court to require Pay First across the board. *See* Olifant Responsive Br. (NYSCEF No. 651) at 10-11; Tilden Responsive Br. (NYSCEF No. 668) at 8-10. Instead of copying the *Countrywide* settlement agreement and specifying that write-ups would occur “after distribution *to investors*” the parties

⁸ The Olifant Funds incorporate the argument made in their responsive brief that temporary overcollateralization – a result most parties agree would be commercially unreasonable – is not compelled by the Governing Documents if Write-Up First is used. *See* Olifant Opening Br. (NYSCEF No. 651) at 16-17. In the event the Court instructs the use of Pay First for the Olifant Fund Trusts, temporary overcollateralization should not be recognized.

to the Settlement Agreement here made a conscious decision to change this provision and provide that write-ups occur “after distribution *to a Settlement Trust*.” The Institutional Investors negotiated both settlement agreements yet have not provided any explanation – let alone a credible one – why, contrary to the plain language, this clearly intentional revision should have no effect on the interpretation of the Settlement Agreement.

The Institutional Investors’ arguments for why the Settlement Agreement requires Pay First are easily dispatched. First, their claim that Section 3.06(a) contemplates only one “distribution” – and that the “deposit” of the Allocable Share into a trust’s collection account is not a “distribution” – is incorrect. Section 3.06 requires that each Allocable Share “be deposited” into the trust’s collection or distribution account “for *further* distribution to Investors.” The word “further” confirms that the distribution “to Investors” is the second distribution, following the preceding distribution to the trust. The verbs “deposit” and “distribute” are interchangeable; what matters is that the object of the “deposit” or “distribution” referenced in Section 3.06(b) is a *Settlement Trust*, not “investors” like in *Countrywide*. If the drafters meant to refer to the distribution *to investors*, they would have used the same language as in the *Countrywide* settlement agreement.

The Institutional Investors also are wrong that, because Section 3.06(b) follows Section 3.06(a), the write-up described in Section 3.06(b) must occur after the distribution to investors. The Institutional Investors have provided no authority suggesting that the sequence of contract provisions is meaningful. The fallacy of their argument is apparent because even under the Pay First method advanced by the Institutional Investors, the write-up would occur before all “operations described in Paragraph 3.06(a) are complete.” Institutional Investors Responsive Br. (NYSCEF No. 663) at 7. Section 3.06(a) provides that if “distribution of a Settlement Trust’s

Allocable Share would become payable to a class of REMIC residual interests . . . such payment shall be maintained in the collection or distribution account for distribution on the next distribution date . . .” Under either Write-Up First or Pay First, the write-up would occur *before* this Section 3.06(a) event.

Finally, as the Olifant Funds explained in their responsive brief, the “for the avoidance of doubt” sentence at the end of Section 3.06(b) does not require Pay First. *See* Olifant Responsive Br. (NYSCEF No. 651) at 5. It means simply that the *write-up* section of the Settlement Agreement does not affect the *distribution* provisions of the Governing Documents; the distribution and write-up mechanics operate independently. A comment referencing this sentence from a hearing before Judge Chapman in the Lehman bankruptcy means nothing; Judge Chapman did not rule on the meaning of the Lehman settlement agreement and the distribution issues in Lehman are before this Court, not Judge Chapman. *See* Olifant Responsive Br. (NYSCEF No. 651) at 8-10; Tilden Park Responsive Br. (NYSCEF No. 668) at 10 n.9.

2. *Other Global RMBS Settlement Agreements Do Not Support the Use of Pay First Here*

In their responsive brief, the Olifant Funds explained why the Institutional Investors were wrong to rely on distributions in other global RMBS settlements that were either unadjudicated or resolved on consent, or where there was no economic difference between the Write-Up First and Pay First methods. *See* Olifant Responsive Br. (NYSCEF No. 651) at 6-11. The Institutional Investors appear to concede this point, by asserting the following:

[T]he entry of non-litigated judgments approving the Write Up First methodology in Minnesota proceedings is completely irrelevant to this Court’s consideration of the disputed order of operations in *this* Article 77 proceeding, which concerns a different settlement agreement, different waterfalls, different outstanding certificate balances, different realized losses, and actual disagreements among interested investors.

Institutional Investors Responsive Br. (NYSCEF No. 663) at 14-15 (emphasis in original).⁹ Yet in another section of their brief, the Institutional Investors continue to rely on four *other* global RMBS settlements, in all but one of which the order of operations was not adjudicated and there was no dispute regarding the distribution methodology.¹⁰ Do the Institutional Investors think that “non-litigated judgments” approving the Write-Up First method in *Minnesota* are not persuasive while “non-litigated judgments” allowing the Pay First method in *New York* are? Distributions that occurred either without litigation or on consent – or that involved trusts with materially different governing documents – are not probative of the correct order of operations here.

II. 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.

⁹ The Olifant Funds did not cite these Minnesota proceedings as controlling authority that Write-Up First is required here, but rather to show that RMBS settlement agreements generally have more clearly required Write-Up First over time.

¹⁰ The Olifant Funds refer the Court to their responsive brief for a complete explanation why the sole adjudicated settlement (Countrywide) supports the implementation of Write-Up First here. *See* Olifant Responsive Br. (NYSCEF No. 651) at 10-11.

Date: October 10, 2018

By:

/s/ Peter W. Tomlinson

**PATTERSON BELKNAP WEBB &
TYLER LLP**

Peter W. Tomlinson

Daniel A. Friedman

1133 Avenue of the Americas

New York, NY 10036-6710

Tel: (212) 336-2000

Fax: (212) 336-2222

pwtomlinson@pbwt.com

dfriedman@pbwt.com

**Attorneys for Olifant Fund, Ltd., FFI Fund Ltd.
and FYI Ltd.**