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

In the Matter of the Application of

U.S. BANK N.A., WELLS FARGO BANK, N.A., WILMINGTON TRUST, N.A., WILMINGTON TRUST COMPANY, and CITIBANK, N.A. (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts),

Petitioners,

For Judicial Instructions under C.P.L.R. Article 77 on the Administration and Distribution of a Settlement Payment.

Index No. 651625/2018

IAS Part 60

Mot. Seq. #001

Hon. Marcy Friedman

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INTRODUCTION

As Tilden Park explained in its opening brief, the first question raised in the Trustees' petition – the Order of Operations – has a simple answer for the Tilden Park Trusts. The other respondents' opening briefs now confirm just how straightforward that result is. Every party agrees that the Governing Agreements control the Order of Operations where they apply. And no party disputes that the plain text of the Tilden Park Trusts' Governing Agreements unmistakably requires Pay First. For those trusts, that should be the end of the matter.

Some respondents argue that the Court should do something other than enforce the Governing Agreements' plain text. Each of those arguments fails. Nover cannot show that the Tilden Park Trusts' Governing Agreements are commercially unreasonable. The Institutional Investors and AIG fail to show that any agreements are silent, let alone that such purported silence requires applying any gap-filling device from the Settlement Agreement instead. Those same investors' premature attempts to refer the Order of Operations to the Bankruptcy Court would waste judicial resources. And their "motion to dismiss" is both procedurally improper and substantively unsound. The Court should reject all these attempts to avoid the Governing Agreements' text and enforce the Tilden Park Trusts' Pay First terms as written.

ARGUMENT

I. THE TILDEN PARK TRUSTS REQUIRE THE PAY FIRST METHOD

Tilden Park's opening brief explained that the Governing Agreements for the Tilden Park Trusts require the Pay First Method. Dkt. 141 (Tilden Br.) at 10-11. While no party offers a different reading of those agreements, Nover argues that the Pay First Method would produce "absurd, commercially unreasonable distributions that are contrary to the reasonable expectations of investors and drafters of the Settlement Agreement," namely, "leakage to subordinate certificateholders . . . ." Dkt. 150 (Nover Br.) at 2. This argument fails for two reasons.

First, *res judicata* bars Nover's challenge to the reasonableness of the Settlement Agreement. *See* Tilden Br. 18-20; *see also Ins. Co. of State of Pa. v. HSBC Bank USA*, 10 N.Y.3d 32, 38 (2008) ("Res judicata 'applies with full force to matters decided by the bankruptcy courts.' " (quotation omitted)). The Bankruptcy Court has already found that the Settlement Agreement's terms are "reasonable, fair and equitable and supported by adequate consideration." *In re Lehman Bros. Holdings, Inc.*, No. 08-13555, 2017 WL 2889658, at *1 (Bankr. S.D.N.Y. July 6, 2017). Because the Bankruptcy Court has already found reasonable the Settlement Agreement's decision to refer the Order of Operations to the Governing Agreements, Nover is precluded from challenging any particular Governing Agreement's payment methods as unreasonable now.

In any event, Nover's commercial-reasonableness argument is irrelevant because Nover has not shown that any Governing Agreement is ambiguous. Where, as here, "sophisticated, counseled parties" have negotiated an "unambiguous" agreement, its "reasonableness is beside the mark." *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 20 N.Y.3d 438, 445 (2013).

Moreover, even if any Governing Agreement ***were*** ambiguous, the "leakage to subordinate certificateholders" that Nover describes is in no way commercially unreasonable. To the contrary, courts have upheld similar distribution methods as reasonable. For example, the Countrywide Article 77 case enforced Governing Agreements whose use of a Principal Distribution Amount with the Pay First method caused greater distributions to more junior certificates with losses compared to more senior certificates. *See In re Bank of N.Y. Mellon*, 56 Misc. 3d 210, 223-25 (Sup. Ct. N.Y. Cty. 2017). Specifically, the Court rejected a virtually identical unreasonableness argument, holding that distributions to less senior certificates were "neither an absurd nor an unenforceable result." *Id.* at 223-24. The Court should reach the same result here

and enforce Pay First where the Governing Agreements require it, even if Nover would prefer a different result.[1]

II. THE GOVERNING AGREEMENTS CONTROL THE ORDER OF OPERATIONS

As Tilden Park noted in its opening brief, every party to the Tilden Park Trusts, including the Trustees and all investors, agrees that the Governing Agreements control the Order of Operations if the Agreements apply. Tilden Br. 5; *see* Pet. ¶36. The other parties' opening briefs confirm that consensus: Every party with a position on the Order of Operations for ***any*** trust asks the Court to apply the order in the Governing Agreements. The Institutional Investors and AIG acknowledge that the "distribution methodology of the Governing Agreements" will "control" over any possibly conflicting instructions in the Settlement Agreement "to the extent they conflict." Dkt. 151 (II/AIG Br.) at 8. Nover describes how the "Settlement Agreement expressly requires the Court to defer to the language of the Governing Agreements when determining how to distribute" the Settlement payment. Nover Br. 1-2. And Olifant affirms that "[t]he Settlement Agreement requires" that distributions must "occur as set forth in the Governing Agreements." Dkt. 147 (Olifant Br.) 1. Thus, the only remaining question about the Order of Operations is ***what*** order the Governing Agreements specify, not whether the Trustees should ignore that order and follow some other approach.

The Institutional Investors and AIG claim that every Governing Agreement here is somehow "silent as to the order of operations." Dkt. 151 (II/AIG Br.) at 8-9. They offer no proof for

[1] Tilden Park does not believe that the Tilden Park Trusts' Governing Agreements' undercollateralization provisions would have a material impact on those trusts' distributions. To the extent those provisions have a material effect, they should be enforced as written. For the same reason, Tilden Park takes no position on the calculation of overcollateralization amounts or similar amounts in this proceeding.

that sweeping claim and make no attempt to analyze the Governing Agreements' text. Instead, they merely cite the Trustees' own pleading that the Governing Agreements do not always specify an Order of Operations. *Id.* at 9 & n.21 (citing Pet. ¶36). But that is wrong: The definitions of "Certificate Principal Amount" in the Tilden Park Trusts specify Pay First by requiring the Trustees to use the prior month's certificate balances when distributing funds. Tilden Br. 6-7. Olifant has likewise made arguments about how their trusts' definition of "Certificate Principal Amount," by contrast, require Write Up First. Olifant Br. 1-4. Because the Institutional Investors and AIG do not bother to engage with the Governing Agreements' text, there is no reason to find those agreements "silent" simply because they say so.

Moreover, the conclusion the Institutional Investors and AIG seek to draw from the Governing Agreements' purported "silence" simply does not follow. They ask the Court to find that the Settlement Agreement provides Pay First as a gap-filling device. Dkt. 151 (II/AIG Br.) at 9. They claim that the last sentence of Section 3.06(b) of the Settlement Agreement requires that result because it states that write ups "shall not affect the distribution of Plan Payments on the Net Allowed Claim provided for in Subsection 3.06(a)." *Id.* at 7 (citing Settlement Agmt. § 3.06(b)). But their argument fails for at least four reasons.

First, if the Governing Agreements provide an Order of Operations – as the Tilden Park Trusts do – then there is no gap to be filled. The Institutional Investors and AIG acknowledge, as they must, that Section 3.06(c) "provides a mechanism for the distribution methodology in the Governing Agreements to control." Dkt. 151 (II/AIG Br.) at 8. Thus, the Court ***need not interpret Section 3.06(b) at all*** if it determines that the Governing Agreements specify the Order of Operations for a given trust. Because the Governing Agreements' plain text resolves this issue, any argument about what back-up method the Settlement Agreement may provide is

academic.

Second, if any Governing Agreement were ambiguous or silent, the Court can use traditional rules of contract interpretation to resolve that uncertainty. Each Governing Agreement necessarily intended that the Trustees would apply ***some*** Order of Operations. Otherwise, the Trustees could not coherently make distributions. As a result, even if the Governing Agreements were unclear, this Court should examine parol evidence about those contracts to decide what Order of Operations should apply. *See Impala Partners v. Borom*, 133 A.D.3d 498, 499 (1st Dep't 2015) ("where a contract term is ambiguous," "parol evidence" can "be considered to clarify the disputed portions of the parties' agreement[s]"); *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 122 (2d Cir. 2014) (an "'omission as to a material issue can create an ambiguity'" to be resolved by extrinsic evidence where "'the context within the document's four corners suggests that the parties intended a result not expressly stated'" (quoting *Hart v. Kinney Drugs, Inc.*, 67 A.D.3d 1154 (3d Dep't 2009)). Unless the Court finds that the Governing Agreements' drafters somehow, bizarrely, intended ***no*** Order of Operations, there is no reason to look beyond those agreements' text, structure, and drafting history and ask whether the Settlement Agreement provides a back-up method to use instead.

Third, the Institutional Investors' and AIG's reading of Section 3.06(b) is simply wrong. The last sentence of Section 3.06(b) merely provides that write ups must not "affect the distribution" that is "***provided for in Subsection 3.06(a)***," Ellis Decl. Ex. A (Settlement Agmt.) § 3.06(b) (emphasis added) – and Section 3.06(a) requires "distribut[ing]" Settlement funds "in accordance with the distribution provisions of the Governing Agreements," *id.* § 3.06(a). The Court should read those two sentences together. *See Diamond Castle Partners IV PRC, L.P. v. IAC/InterActivecorp*, 82 A.D.3d 421, 422 (1st Dep't 2011). As a result, Section 3.06(b), rather

than dictating a particular Order of Operations, merely makes clear that the write up process does not affect the Trustees' duty to distribute funds in accordance with the Governing Agreements.

Fourth, interpreting Section 3.06(b) as the Institutional Investors and AIG want brings that clause into irreconcilable conflict with Section 3.06(c). Tilden Br. 12-13. In effect, the Institutional Investors unpersuasively contend that the parties to the Settlement Agreement had two contradictory goals: (1) to "require[ ] Pay First" for all trusts, and (2) to allow "the distribution methodology in the Governing Agreements to control." Dkt. 151 (II/AIG Br.) at 7-8. New York law forecloses that tortured, paradoxical interpretation of the Settlement Agreement. *See Moulton Paving, LLC v. Town of Poughkeepsie*, 98 A.D.3d 1009, 1012 (2d Dep't 2012) ("[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is ***required*** to do so and to give both effect." (quoting *LI Equity Network, LLC v. Vill. in the Woods Owners Corp.*, 79 A.D.3d 26, 35 (2d Dep't 2010) (emphasis added)). Instead, for the reasons explained in Tilden Park's opening brief, Sections 3.06(b) and 3.06(c) consistently require the Trustees to defer to the Order of Operations set forth in each Governing Agreement. *See* Tilden Br. 11-13.

III. THE BANKRUPTCY COURT HAS NOT DECIDED AND NEED NOT DECIDE THE ORDER OF OPERATIONS

The Institutional Investors also invoke the Bankruptcy Court in two ways to argue against having this Court determine the Order of Operations. Dkt. 151 (II/AIG Br.) at 8. They suggest that the Bankruptcy Court already decided that the Settlement Agreement requires Pay First. *Id.* And they also ask that "if this Court concludes that there is a question as to whether the Settlement Agreement requires Pay First, the Court refer that question to the Bankruptcy Court." *Id.* Neither argument has merit.

A. The Bankruptcy Court Did Not Decide the Order of Operations

The Institutional Investors and AIG rely on extemporaneous comments by the Bankruptcy Court during an April hearing to claim that that court already interpreted the Settlement Agreement to require Pay First. Their reliance is misplaced. *See* Tilden Br. 15-16; Ellis Decl. Ex. C (transcript). Contrary to the Institutional Investors' contentions, the Bankruptcy Court ***abstained from*** the issue that the Institutional Investors claim it decided. And it retracted the offhand comments on which they rely.

When they moved to enjoin this Petition in the Bankruptcy Court, the Institutional Investors made the same failed argument that they repeat here. They claimed that the last sentence of Section 3.06(b) "speaks directly to the order of operations, and . . . resolves it" by always requiring Pay First. Ellis Decl. Ex. C (transcript) at 11:6-7. While the Bankruptcy Court initially expressed sympathy for the Institutional Investors' Pay First argument, *id.* at 45:25-46:4, it soon retracted its comments once it understood the Settlement Agreement's full picture, including the crucial fact that the Institutional Investors now admit – that Section 3.06(c) requires that the "distribution methodology in the Governing Agreements [] control over that in the Settlement Agreement." Dkt. 151 (II/AIG Br.) at 8 (citing Settlement Agmt. § 3.06(c)). During the hearing, the Trustees' counsel noted that Section 3.06(c) "says that if the distributions required by the settlement agreement deviate from the terms of the governing agreements, then we don't follow the settlement agreement, we follow[] the governing agreements." Ellis Decl. Ex. C (transcript) at 50:6-9. The Bankruptcy Court then said, "***You're right***. We were focusing on the one provision," that is, Section 3.06(b), "and ***it's more complicated than that***." *Id.* at 51:10-12 (emphasis added).

Moreover, counsel for certain noteholders (including Tilden Park) advised the Bankruptcy Court that they had not received "notice" or a chance to "weigh in" on interpreting the Set-

tlement Agreement. Ellis Decl. Ex. C (transcript) at 49:20-23. Realizing that fact, the Bankruptcy Court made clear that it was ***not*** ruling on the Settlement Agreement and that it was "not making evidentiary findings" because "the due process point is . . . serious." *Id.* at 51:18; *see also id.* at 51:15-20 ("Due process is a nonnegotiable right and it is of concern to me that appropriate notice be given."). Thus, rather than rule that Section 3.06 requires Pay First, as the Institutional Investors wanted, the Bankruptcy Court entered an order that did not address the Order of Operations at all. *See* Ellis Decl. Ex. D (Bankruptcy Court order).

At most, the April 19 transcript shows that the Bankruptcy Court withdrew its first impression after realizing it was formed without the benefit of full briefing and argument. Contrary to the claims of the Institutional Investors, those retracted comments neither bind this Court nor require referral of the issue that the Bankruptcy Court declined to resolve. The Bankruptcy Court directed the Trustees only to "strictly enforce[ ]" the Settlement Agreement, Ellis Decl. Ex. D (Bankruptcy Court order) at 2-3 – a contract that all parties here agree requires looking first to the Governing Agreements to decide the Order of Operations. Thus, the correct way to follow the Bankruptcy Court's order is to determine in the first instance what Order of Operations the Governing Agreements provide.[2]

B. Referral to the Bankruptcy Court Would Be Premature and Potentially Wasteful

The Institutional Investors also ask that this Court refer the interpretation of the Settlement Agreement to the Bankruptcy Court. Dkt. 151 (II/AIG Br.) at 8. The Institutional Inves-

[2] The Institutional Investors and AIG also note that the Bankruptcy Court "retains exclusive jurisdiction to hear and determine any dispute regarding the interpretation or enforcement of the RMBS Settlement Agreement." Ellis Decl. Ex. D (Bankruptcy Court order) at 2; *see* Dkt. 151 (II/AIG Br.) at 8. Because the parties agree that the Governing Agreements control to the extent they specify a Order of Operations, until the Governing Agreements' meaning is resolved, there is not yet (and may never be) any dispute implicating the Bankruptcy Court's jurisdiction.

tors' request is premature and, if granted, could waste judicial resources. As noted above, all parties accept that the Governing Agreements control the Order of Operations if they address that issue. *See* p. 3, *supra*. There is thus no dispute that referring the Order of Operations to the Governing Agreements complies with the Bankruptcy Court's order – that the "Settlement Agreement shall be strictly enforced, including without limitation Sections 3.06(a)-(c)." *See* Ellis Decl. Ex. D (Bankruptcy Court order) at 3. And determining the meaning of the Governing Agreements is a job for this Court, not the Bankruptcy Court. Ellis Decl. Ex. C (transcript) at 53:9-13 (interpreting the Governing Agreements is not "an appropriate exercise of [the Bankruptcy Court's] jurisdiction"); *see* 28 U.S.C. § 1334(c)(2) (bankruptcy courts "shall abstain" from a "proceeding based upon a State law claim or State law cause of action"). Thus, before the Court can refer any question about the Settlement Agreement to the Bankruptcy Court, it must first interpret the Governing Agreements and find that the parties to those agreements intended no Order of Operations whatsoever. *See* p. 8, *supra.* Because that has not happened – and may never happen – the Institutional Investors' request for referral is premature.

Moreover, referral to the Bankruptcy Court risks wasting judicial resources on a nonjusticiable dispute. In light of the parties' consensus about the Settlement Agreement, *see* p. 3, *supra*, their disputes concerning the Settlement Agreement only present a live controversy to resolve if the Court concludes that the Governing Agreements do not specify an Order of Operations. Unless and until that contingency occurs, referral would only produce an advisory opinion that will not affect distributions. But neither this Court nor the Bankruptcy Court "make mere hypothetical adjudications, where there is no presently justiciable controversy." *Prashker v. United States Guarantee Co.*, 1 N.Y.2d 584, 592 (1956); *In re: Motors Liquidation Co.*, 829 F.3d 135, 168 (2d Cir. 2017) (the federal rule against "advising what the law would be upon a hypo-

thetical state of facts . . . appl[ies] to bankruptcy courts" (quotations omitted)). The Court should not risk wasting the Bankruptcy Court's resources in that way. Instead, it should only refer questions to the Bankruptcy Court if it finds such proceedings actually necessary after first interpreting the Governing Agreements.

IV. THE COURT SHOULD DENY THE INSTITUTIONAL INVESTORS' MOTION TO DISMISS

Finally, the Institutional Investors' "motion" to dismiss the Petition, Dkt. 151 (II/AIG Br.) at 5-6, fails for three reasons.

First, their "motion" is procedurally improper – and, in fact, is not a motion at all. In New York practice, "[a] motion on notice is made when a notice of the motion or an order to show cause is served." C.P.L.R. 2211. The "law is clear that a demand for relief cannot properly be interposed . . . without a notice of motion." *Escava v. Escava*, 9 Misc. 3d 1101(A) (Sup. Ct. Kings. Cty. 2005) (collecting cases); *see, e.g.*, *Myung Chun v. N. Am. Mortg. Co.*, 285 A.D.2d 42, 45 (1st Dep't 2001) (in the "absence of a notice," a court is "virtually without jurisdiction to grant the relief" requested); *Sutton v. Cobb*, 50 A.D.2d 995, 995 (3d Dep't 1975) (a party is "not entitled" to relief "without a notice of motion"). Because the Institutional Investors and AIG have served no notice of motion or order to show cause, there is no "motion" that this Court may grant. And the need for a notice of motion is no technicality, but "[a] serious aspect of due process," *Myung Chun*, 285 A.D.2d at 45: Without a notice of motion, neither the Trustees nor the respondents have a clear method or schedule to respond. The Institutional Investors' and AIG's "motion" should be denied on that basis alone.

Second, any notice of motion the Institutional Investors and AIG would file now would be simply too late. In a special proceeding like this one, a respondent may only make "a motion to dismiss the petition . . . upon notice within the time allowed for answer." C.P.L.R. § 404(a);

see id. § 7701 (trust-instruction proceedings are a "special proceeding"). Here, the Court required interested parties to answer the Petition by May 30, 2018, Dkt. 35 (Order To Show Cause) at 6, but the Institutional Investors and AIG did not move to dismiss the petition then (or now). That blatant failure to comply with the CPLR's rules also requires denying their motion.[3]

Third, even if their motion had been properly brought, it lacks all merit. The Court may exercise advisory jurisdiction in trust-instruction cases "to protect trustees in the class of cases where the advice of competent lawyers is not sufficient protection, because of the doubtful meaning of the trust instrument or because of uncertainty as to the proper application of the law to the facts of the case." *City Bank Farmers Trust Co. v. Smith*, 263 N.Y. 292, 296 (1934). Here, the Trustees need to determine the Order of Operations for dozens of Governing Agreements, Dkt. 2 (Pet. Ex. A), and different parties disagree in good faith about what those Governing Agreements say. For example, the Institutional Investors (mistakenly) argue that all trusts are silent about the Order of Operations, while both Tilden Park and Olifant both argue that their trusts mandate either Pay First or Write Up First. Tilden Br. 6-7; Olifant Br. 4-7; II/AIG Br. 8-9. Since the Institutional Investors themselves disagree with other respondents about what the Governing Agreements mean, they cannot plausibly deny that a good-faith dispute exists warranting this Court's advisory jurisdiction. *City Bank*, 263 N.Y. at 296. Their motion to dismiss should therefore be denied.

CONCLUSION

The Court should instruct the Trustees (1) to follow the Order of Operations set forth in

[3] Nor would the Institutional Investors' motion resolve this case any more efficiently. "Motions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time." C.P.L.R. 406. As a result, the Court would have to hear and consider the respondents' submissions on the merits even if the Institutional Investors and AIG had properly moved to dismiss the Petition.

the Governing Agreement for a given Trust; and (2) to apply the Pay First Method for the LMT 2007-2 and LMT 2007-4 Trusts.

Dated: November 2, 2018
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 2, 2018, I caused the foregoing Response Brief to be served on all counsel of record and unrepresented parties by filing the same with the Court's NYSCEF system.

/s/ Justin M. Ellis