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

REPLY BRIEF OF TILDEN PARK

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ARGUMENT

As Tilden Park has noted before, the Trustees' first question raised – the Order of Operations – has a simple answer for the Tilden Park Trusts. Every party to this case agrees that, where the Governing Agreements provide an Order of Operations, the Trustees should do what the Governing Agreements instruct. And no party disputes Tilden Park's showing that the Governing Agreements for the Tilden Park Trusts require the Pay First method.

No dispute remains for the Tilden Park Trusts' Order of Operations. However, certain issues raised in the other parties' responses require clarification:

First, the Institutional Investors' and AIG's response brief mischaracterizes Tilden Park as "agree[ing] with" them that "Pay First should be employed" for all trusts. Dkt. 178 (II/AIG Response Br.) 2. Tilden Park – like the Trustees and every other respondent in this case – agrees that the Governing Agreements control the Order of Operations. Dkt. 65 (Answer) ¶2; Dkt. 175 (Response Br.) 3-6.

Second, the Trustees' brief opposing the Institutional Investors' and AIG's "motion to dismiss" misstates Tilden Park's position as well. Dkt. 180 (Trustee Br.) 6. Tilden Park and Olifant do not disagree with each other or reach an "***opposite*** conclusion" on the Order of Operations. *Id.* They ***agree*** that the Governing Agreements control. They simply hold certificates in different trusts with different Governing Agreements and different contractual language.[1]

[1] The Trustees also assert that the language of the Tilden Park Trusts and LXS 2007-1, a trust in which Olifant holds certificates, are similar. Trustee Br. 8 & n.8. Not so. The definition of "Certificate Principal Amount" in the LXS 2007-1 Trust Agreement lacks the critical clause in the Tilden Park Trusts' Governing Agreements that makes those trusts Pay First – the instruction that "Certificate Principal Amounts shall be determined as of the close of business of the ***immediately preceding Distribution Date*** . . . . " *Compare* Dkt. 143 (LMT 2007-2 Trust Agmt.) art. I at 12 (emphasis added) and Dkt. 144 (LMT 2007-4 Trust Agmt.) art. I at 14 (same) *with* Dkt. 149

Third, no party claims that the Tilden Park Trusts are "silent" on the Order of Operations. In fact, the Institutional Investors have not even shown that ***any*** Governing Agreement is silent on that issue. The Institutional Investors and AIG raise only a single example – the LXS 2005-10 trust[2] – that they claim is silent. II/AIG Response Br. 3-4. They argue that the trust's definition of "Certificate Principal Amount" "does not speak" to whether the Trustee must add Subsequent Recoveries to certificate balances before or after distributions. *Id.* at 4. But a plain reading seems to require the Trustee to write up balances before making distributions. *See* Ellis Reply Decl. Ex. A at 2. At the very least, this particular Governing Agreement could be ambiguous, if there were another reading, but that would just require this Court to examine parol evidence to decide the Order of Operations.[3] There is simply no coherent argument that this Governing Agreement or any other is "silent" with respect to the Order of Operations, and thus no need for a decision – whether from this Court or the Bankruptcy Court – on what, if any, fallback Order of Operations the Settlement Agreement might provide.

Fourth, the Institutional Investors and AIG have offered no cogent reason to refer the

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(excerpted LXS 2007-1 Trust Agmt.) art. I at 25; *see* Dkt. 141 (Tilden Opening Br.) 6-7 (explaining the Tilden Park Trusts' Pay First structure).

[2] Because Tilden Park does not hold certificates in the LXS 2005-10 trust, it takes no position on what instructions, if any, the Court should provide for that trust. Instead, Tilden Park undertakes the following analysis only to show that the Institutional Investors cannot demonstrate that ***any*** Governing Agreement is silent.

[3] That parol evidence suggests that the Trustee has previously read the LXS 2005-10 Governing Agreement as supportive of Write Up First: The Trustee has written up certificates before making distributions when applying Subsequent Recoveries in the past. For example, in the May 2016 distribution, the Trustee distributed Subsequent Recovery funds to the 1-A3 class, even though that class had a prior certificate balance of $0. Ellis Reply Decl. Ex. B (remittance report) at 2, 10. That result would only be possible if the Trustee wrote up the bond first, thus making it eligible for distributions on the same day. While other parol evidence may well point the other way, the Trustee's prior course of dealing exemplifies how the Court can draw on parol evidence to decide the Order of Operations in case any Governing Agreement is ambiguous.

Settlement Agreement to the Bankruptcy Court. Not only have they failed to identify a single silent Governing Agreement, but they cannot and do not dispute that any ambiguity or silence should be resolved by ***this*** Court using traditional tools of contract interpretation. Tilden Opening Br. 17-18; *see also* Tilden Response Br. 7-8. They also do not deny that the Bankruptcy Court never ruled on the Settlement Agreement's meaning, as they claimed earlier. Tilden Opening Br. 15-16; *see also* Tilden Response Br. 7-8. And no party has disputed that referring issues to the Bankruptcy Court only risks wasting that Court's time on nonjusticiable advisory questions. Tilden Response Br. 8-10.

Fifth, the Trustees' brief demonstrates that the Institutional Investors enjoy no privileged position to interpret the Settlement Agreement. The Institutional Investors and AIG have touted their participation in drafting that agreement to suggest that they know best what it means. *See, e.g.*, Dkt. 151 (AIG/II Opening Br.) at 3. They have further claimed, here and in the Bankruptcy Court, that the last sentence of Section 3.06(b) of that agreement unequivocally requires Pay First in all circumstances. *See, e.g.*, *id.* at 6-8; Ellis Decl. Ex. C (Bankruptcy Court transcript) 12:21-13:5. Yet the Trustees – who also participated in drafting the Settlement Agreement but, unlike the Institutional Investors and AIG, have no economic interest in its interpretation – state that "[i]t is not clear . . . that this language was intended ***to have any impact whatsoever*** on the Order of Operations." Trustee Br. 9-10 (emphasis added).

Sixth, the Trustees further elaborate on what Tilden Park already showed in its response brief – that the Institutional Investors' and AIG's "motion to dismiss" is procedurally improper and lacks all merit. Trustee Br.; Tilden Response Br. 10-11. The Court should reject that "motion" and provide Tilden Park, the Trustees, and other investors the judgment on the merits that they deserve.

CONCLUSION

The Court should instruct the Trustees (1) to follow the Order of Operations set forth in the Governing Agreement for each Trust; (2) apply the Pay First method for the LMT 2007-2 and LMT 2007-4 Trusts; and (3) deny the Institutional Investors' and AIG's "motion to dismiss."

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New York, New York

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/s/ Justin M. Ellis

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CERTIFICATE OF SERVICE

I hereby certify that, on November 16, 2018, I caused the foregoing Reply to be served on all counsel of record by filing the same with the Court's NYSCEF system.

/s/ Justin M. Ellis