

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

----- X

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION,
WELLS FARGO BANK, NATIONAL
ASSOCIATION, WILMINGTON TRUST,
NATIONAL ASSOCIATION, 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 CPLR Article 77 on
the Administration and Distribution of a Settlement
Payment,

----- X

Index No. 651625/2018

IAS Part 60

Hon. Marcy S. Friedman

Motion Sequence No. ___

**OLIFANT FUND, LTD., FFI FUND
LTD. AND FYI LTD.'S
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
AMEND RESPONSE TO PETITION**

Respondents Olifant Fund, Ltd., FFI Fund Ltd. and FYI Ltd. (collectively, the “Olifant Funds”) respectfully submit this memorandum of law in support of their motion to amend their initial response (the “Response”) to the Petition.¹

BACKGROUND

The Olifant Funds originally appeared in this action as holders of certificates in 20 trusts (the “Olifant Fund Trusts”) included in the Settlement Agreement between Lehman Brothers Holdings Inc., the Petitioners, and various investors, entered into as of November 30, 2016 and modified as of March 17, 2017 (the “Settlement Agreement”). On May 30, 2018, the Olifant Funds submitted their Response to the Petition. *See* Dkt. No. 58. They took the position that the Governing Documents required the use of the Write-Up First Method of distribution of the Settlement Payment for the Olifant Fund Trusts. *See id.* However, since May 2018, the 20 Olifant Fund Trusts have all been severed from this proceeding and are no longer at issue.

The Olifant Funds have recently acquired a substantial majority of the outstanding certificates issued by the SASC 2006-S2 trust (the “SASC 2006-S2 Trust”). This is one of the eleven trusts for which no party has appeared in this proceeding (the “No-Appearance Trusts”), which were the subject of this Court’s July 9, 2018 interim order. *See* Dkt. No. 106. That order provides that all issues relating to the No-Appearance Trusts will be resolved after the Court resolves any disputes concerning the trusts for which parties did appear. *See id.*

The Olifant Funds now seek leave to amend their Response for the purpose of appearing to request severance of the SASC 2006-S2 Trust.

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

ARGUMENT

The Court should grant the Olifant Funds leave to amend their Response for at least three reasons: (1) severance of the SASC 2006-S2 Trust would serve the interests of both the relevant parties that did appear and the absent minority certificateholders, (2) severance would not cause prejudice to any other party, and (3) severance would conserve judicial resources and expedite the resolution of this case. There is no practical reason to delay the resolution of this matter with respect to the SASC 2006-S2 Trust.

Under settled New York law, “[l]eave to amend the pleadings ‘shall be freely given’ absent prejudice or surprise resulting directly from the delay.” *Fahey v. Cnty. of Ontario*, 44 N.Y.2d 934, 935 (1978) (quoting CPLR 3025(b)); *see also Tushaj v. Elm Mgmt. Ass’n, Inc.*, 198 A.D.2d 127, 128 (1st Dep’t 1993) (“Requests for leave to amend should be granted freely in the absence of prejudice or unfair surprise.”); *Sze Kong Realty Corp. v. Tsang*, 59 Misc. 3d 1212(A) (Sup. Ct. N.Y. Cnty. 2018) (“Courts should freely grant leave to amend a pleading if there is no surprise or prejudice to the other party.”). “[M]ere lateness is not a barrier to an amendment. Lateness must be couple with significant prejudice” *Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 306 (1st Dep’t 2004).

The Olifant Funds’ proposed amendment to their Response would not prejudice any party to this proceeding. As the holders of the [REDACTED] [REDACTED]—the Olifant Funds have by far the greatest interest in ensuring the proper distribution of the Settlement Payment for the SASC 2006-S2 Trust. The only other parties to this proceeding with interests in the SASC 2006-S2 Trust—the Trustee and the Payment Administrator—do not object to the Olifant Funds’ proposed amendment. And these parties will not object to the proposed severance order concerning the SASC 2006-S2 Trust

that the Olifant Funds intend to submit. None of the other certificateholder parties could be prejudiced by the severance of the SASC 2006-S2 Trust, as they do not hold any interests in that trust.

In addition, the minority certificateholders in the SASC 2006-S2 Trust that have not appeared in this proceeding would not suffer any prejudice from the Olifant Funds' proposal; rather, they would *benefit* from severance. After conducting further analysis on the contractual interpretation issue that was identified in the Petition as relevant to the SASC 2006-S2 Trust (i.e., the Write-Up First Method versus Pay First Method issue),² the Olifant Funds have determined that it will not have *any* economic impact on the Trust's distribution of the Settlement Payment. In other words, the Court could rule either way on this issue and the resulting distributions to certificateholders would be exactly the same. Accordingly, severance is in the interest of all certificateholders because it would expedite the distribution of the Settlement Payment to all certificateholders. If the Trust is not severed, the certificateholders will not receive their distributions until *after* the Court has resolved all issues relating to the trusts for which parties did appear, *see* Dkt. No. 106—which could take months or even years.

Finally, the Olifant Funds' proposal would serve the interests of this Court. As explained above, the Court's resolution of the Write-Up First Method versus Pay First Method debate will not have any practical consequence for the SASC 2006-S2 Trust. Thus, it would be a waste of judicial resources for the Court to spend time addressing this issue. The Court has already resolved 180 of the 208 trusts that were initially at issue in this proceeding through severance orders. Allowing the Olifant Funds to appear and seek severance of the SASC 2006-S2 Trust would further reduce the burden on the Court and accelerate the resolution of this matter overall.

² *See* Petition, Exhibit A (Dkt. No. 2).

CONCLUSION

For these reasons, the Court should grant the Olifant Funds' motion for leave to amend their Response.

Date: January 31, 2020

By:

/s/ Peter W. Tomlinson

**PATTERSON BELKNAP WEBB &
TYLER LLP**

Peter W. Tomlinson
Diana M. Conner
1133 Avenue of the Americas
New York, NY 10036-6710
Tel: (212) 336-2000
Fax: (212) 336-2222
pwtomlinson@pbwt.com
dconner@pbwt.com

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