

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

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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,

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Index No. 651625/2018

Hon. Marcy S. Friedman

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

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I. Introduction

Olifant Fund, Ltd., FFI Fund Ltd. and FYI Ltd. (collectively, the “Olifant Funds”) appear in this proceeding as holders of Class A and Class M certificates in 20 trusts (the “Original Olifant Fund Trusts”) out of the trusts (“Settlement Trusts”) that are included in the Lehman Covered Loan Settlement Agreement.¹ On May 30, 2018 the Olifant Funds responded to the Petition dated April 4, 2018 (the “Petition”) filed by the Petitioners seeking this Court’s instruction as to the distribution of Allocable Shares under the Settlement Agreement. Ten of the Original Olifant Fund Trusts have since been severed from this proceeding. The Olifant Funds respectfully submit this brief setting forth the appropriate means of distributing the Settlement Payment for the ten remaining Original Olifant Fund Trusts. Those ten trusts are identified on Appendix A hereto, and are hereinafter referred to as the “Olifant Fund Trusts.”

The Write-Up First method for distributing the Settlement Payment to the Olifant Fund Trusts is required.² The Settlement Agreement requires write-ups of the Certificate Principal Amount and distributions to occur as set forth in the Governing Agreements. The text of the Olifant Fund Trusts’ Governing Agreements,³ which govern the distribution of funds to certificateholders, unambiguously requires that the Certificate Principal Amount be written up by the amount of the Allocable Shares before distributions are made to certificateholders. The Pay First method is contrary to the language in the Governing Agreements.

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

² Because each Trust’s Governing Agreements control the issues raised by the Petition – and the Governing Agreements for different trusts may differ – issues or arguments made for other Trusts do not necessarily apply to the Olifant Fund Trusts, and vice versa.

³ For each of the Olifant Fund Trusts, the Governing Agreement is a Trust Agreement. All Governing Agreements have been provided to the Court on a compact disc. Petition (NYSCEF No. 1) at 4 n.9.

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

The Petitioners seek the court's direction on whether the distribution of the Settlement Payment to certificateholders should be done via the Write-Up First method or the Pay First method. Petition (NYSCEF No. 1) ¶¶ 34-54. While the Petitioners state that the Settlement Agreement and the Governing Agreements "do not clearly specify" the order of operations, (*id.* ¶ 36), they highlight several commercially unreasonable and unintended results that could follow from the Pay First method, (*Id.* ¶¶ 37-54). In fact, there is no ambiguity. The Settlement Agreement is clear that the Governing Agreements control the order of operations and the Olifant Fund Trusts Governing Agreements, in turn, unambiguously require Write-Up First. In the absence of ambiguity, the plain meaning of the Governing Agreements – the Write-Up First method – must be enforced. *See Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) ("Under New York law, written agreements are construed in accordance with the [contracting] parties' intent and the best evidence of what parties to a written agreement intend is what they say in their writing. As such, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.")⁴

A. The Governing Agreements Control the Order of Operations

The Settlement Agreement requires the Petitioners to take three actions regarding the Settlement Payment: (1) deposit the Allocable Shares into each trust's collection or distribution account (Settlement Agreement (NYSCEF No. 3) § 3.06(a)); (2) write up the certificate balances (§ 3.06(b)); and (3) distribute the Allocable Shares (§ 3.06(a)). By providing that the write-up

⁴ Both the Governing Agreements and the Settlement Agreement are governed by New York Law. *See* LXS 2007-1 Trust Agreement § 11.06; Settlement Agreement § 6.18. This brief uses as an example the Trust Agreement from LXS 2007-1. For the Court's convenience, relevant excerpts from this Trust Agreement are attached as Exhibit 1 to the accompanying Affirmation of Peter Tomlinson. The Governing Agreements for each of the Olifant Fund Trusts are materially identical with respect to the provisions cited in this brief unless otherwise noted.

occurs “[i]n connection with the distribution of Plan Payments *to Participating Trusts*,” rather than “*after* the distribution of Plan Payments *to investors*,” the Settlement Agreement strongly implies that the write-up occurs after the distribution to a Settlement Trust’s collection or distribution account but before the distribution to investors. But whether the Settlement Agreement requires Write-Up First or is silent on the order of operations is not significant. What matters is that the Settlement Agreement incorporates the distribution and write-up mechanics and timing in the Governing Agreements.

Section 3.06(a) of the Settlement Agreement specifies that Allocable Shares are first distributed among the Settlement Trusts and “deposited into the related Trust’s collection or distribution account *pursuant to the terms of the Governing Agreements*.” *Id.* § 3.06(a) (emphasis added). The Allocable Shares are held “for further distribution *in accordance with the distribution provisions of the Governing Agreements* as though such Plan Payments are a subsequent recovery available for distribution on the related distribution date.” *Id.* (emphasis added). Section 3.06(b) deals with the write-up of certificate balances; “[i]n connection with the distribution of Plan Payments to Participating Trusts pursuant to Subsection 3.06(a), *to the extent permitted under each Trust’s Governing Agreement*,” the trustee shall apply the Settlement Payment “to increase the balance of securities within that Trust . . . in the reverse order of previously allocated losses.” *Id.* § 3.06(b) (emphasis added). Each step of the write-up and distribution is undertaken pursuant to, and in accordance with, the Governing Agreements.

Were Sections 3.06(a) and (b) not clear enough that the Governing Agreements control the details and timing of the write-ups and distribution, the next section of the Settlement Agreement confirms the primacy of the Governing Agreements:

Should the party responsible for calculating distributions and/or making distributions to Investors under the terms of the Governing Agreements of a given

Trust or a court determine that the payment procedure described in Sections 3.06(a) and 3.06(b) may not conform to the terms of the Governing Agreement for a particular Accepting Trust, the distribution described above shall be modified to distribute that Trust's Plan Payments as a payment of principal under the Governing Agreement for that Trust, or in such other manner as the party responsible for calculating distributions under the terms of the Governing Agreements of a given Trust or a court should determine is in conformance with the terms of the Governing Agreement for a particular Trust.

Id. § 3.06(c). Thus, even if the Settlement Agreement specified a Pay First order of operations – and it does not, *see infra* at 7-9 – the Settlement Agreement requires that such instruction be modified to conform with Governing Agreements that require Write-Up First, like the Olifant Fund Trusts' Governing Agreements do here, *see infra* at 4-6. The Settlement Agreement also contains another provision that prohibits the Settlement Agreement from amending the Governing Agreements. *See id.* § 6.04 (“[T]his 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.”). These Settlement Agreement provisions require adherence to the order of operations in the Governing Agreements, which is Write-Up First for the Olifant Fund Trusts.

B. The Language of the Governing Agreements for the Olifant Fund Trusts Is Unambiguous and Requires the Write-Up First Method⁵

1. *The definition of Certificate Principal Amount*

Subsequent Recoveries serve the dual role of increasing distributions of principal to certificateholders and reversing applied Realized Losses, and it is the definition of Certificate Principal Amount in the Governing Agreements that coordinates the two related elements. Because the amount of all distributions of principal under the Olifant Fund Trusts' Governing Agreements depends on the Certificate Principal Amount as of the applicable Distribution Date,

⁵ The Governing Agreements for one Olifant Fund Trust – SASC 2005-SC1 – specify a Pay First order of operations.

the Governing Agreements' definition of "Certificate Principal Amount" is critical. Importantly, that definition requires that amounts received as Subsequent Recoveries be added to increase the Certificate Principal Amount *before* they are paid out to certificateholders. The definition of Certificate Principal Amount in the Trust Agreement for LXS 2007-1 is exemplary:

With any Offered Certificates **as of any Distribution Date**, its initial Certificate Principal Amount as of the Closing Date, as reduced by all amounts previously distributed on that Certificate in respect of principal prior to such Distribution Date, as reduced by, in the case of any Group 1 Senior Certificate, Group 2 Senior Certificate or Group 1-2 Subordinate Certificates, any Pool 1-2 Applied Loss Amount and in the case of any Group 3 Certificates, any Pool 3 Applied Loss Amount, as applicable, previously allocated thereto; provided, however, that **on each Distribution Date on which a Subsequent Recovery is distributed, the Certificate Principal Amount** of any Class of Group 1 Senior Certificate, Group 2 Senior Certificate or Group 1-2 Subordinate Certificates whose Certificate Principal Amount has previously been reduced by application of a Pool 1-2 Applied Loss Amount and the Certificate Principal Amount of any Class of Group 3 Certificates whose Certificate Principal Amount has previously been reduced by application of a Pool 3 Applied Loss Amount, as applicable, **will be increased**, in order of seniority, **by an amount** (to be applied pro rata to all Certificates of such Class) **equal to** the lesser of (1) any Deferred Amount for each such Class immediately prior to such Distribution Date⁶ and (2) **the total amount of any Subsequent Recovery distributed on such Distribution Date to such Certificateholders**, after application (for this purpose) to any more senior Classes of such Certificates. The Class X, Class 3-X, Class LT-R, Class 3-LT-R, Class R and Class 3-R Certificates are issued without Certificate Principal Amounts. The Class P Certificates are issued with an initial Class P Principal Amount of \$100.

The definition of Certificate Principal Amount, as of any Distribution Date, comprises four components. Because the Allocable Shares are treated as though they are Subsequent Recoveries, the relevant component for the order of operations is the one regarding "Subsequent Recoveries." The definition specifies that "***on each Distribution Date*** on which a Subsequent Recovery is distributed, the Certificate Principal Amount" is increased by "the total amount of any Subsequent Recovery distributed ***on such Distribution Date***." Because the Allocable Shares

⁶ Clause (1) of this definition is not applicable for any of the Olifant Fund Trusts because "Deferred Amounts" represent unreimbursed Applied Loss Amounts and exceed the Allocable Shares for each of the Olifant Fund Trusts.

are distributed “on such Distribution Date” and the Certificate Principal Amount is calculated before any distribution, the Certificate Principal Amount must be written up by the amount of the Allocable Shares *before* the Allocable Shares are distributed as principal via the principal distribution waterfall.

The rest of the definition of “Certificate Principal Amount” further affirms that the Write-Up First method is required. Unlike Subsequent Recoveries, *other* components of the definition are limited to amounts distributed or allocated prior to the current Distribution Date. The definition starts with the initial Principal Amount as of the Closing Date of each Trust. Subtracted from the initial Principal Amount are “all amounts previously distributed on that Certificate in respect of principal *prior to such Distribution Date*.” Crucially, and different from Subsequent Recoveries, this component does not include those related to the current Distribution Date. Also subtracted are Applied Loss Amounts “*previously allocated*” which, again, do not relate to the current Distribution Date.

2. *The operative Governing Agreement provision is materially different from the only provision found by a court to require Pay First*

No court has interpreted materially similar governing agreements to require a Pay First method. In the Petition, the Petitioners state that other judicial instruction proceedings “have yielded conflicting results.” (Petition ¶ 62). This statement is misleading. The lone prior proceeding that specifically approved the Pay First method involved materially different governing agreements (and a materially different settlement agreement). *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d 356 (Sup. Ct. N.Y. Cnty. 2017) (“*Countrywide*”). Because the functioning of RMBS trusts is governed by their unique operative documents, that court’s interpretation of those documents provides no reason to use the Pay First method in this case. It merely confirms

that a court must look to the governing agreements, which here require the use of the Write-Up First method.

The governing agreements at issue in *Countrywide* were materially different from the Olifant Fund Trusts Governing Agreements. The key provision for purposes of adjudicating that dispute was “Principal Distribution Amount,” which was defined as:

the excess, if any of (1) *the aggregate Class Certificate Balance of the Certificates related to such Loan Group immediately prior to such Distribution Date*, over (2) the excess, if any, of (a) the aggregate Stated Principal Balance of the Mortgage Loans in that Loan Group as of the Due Date in the month of that Distribution Date (after giving effect to Principal Prepayments received in the related Prepayment Period), over (b) the Group 1 Overcollateralization Target Amount or the Group 2 Overcollateralization Target Amount, as the case may be, for such Distribution Date

Id. at 363 (emphasis added). The court determined that this express language required the calculation of certificate balances as they were “immediately prior” to the distribution date, which did not yet include subsequent recoveries, namely the settlement payment. *Id.* at 363-366. The applicable defined term in the Olifant Fund Trusts Governing Agreements requires a calculation of the Certificate Principal Amount *as of* the applicable Distribution Date, not immediately prior to it. *See, e.g.*, LXS 2007-1 PSA § 1.01, definition of Certificate Principal Amount), *supra* at 5. *Countrywide* provides no support for the use of Pay First for the Olifant Fund Trusts.

C. The Settlement Agreement Does Not Require Pay First

As discussed, *supra* at 3-4, the Settlement Agreement requires reference to the Governing Agreements for the order of operations. It does not require Pay First. The only term referencing the timing of the write-up is the instruction that it takes place “[i]n connection with the distribution of Plan Payments to Participating Trusts pursuant to Subsection 3.06(a).” Settlement Agreement § 3.06(b). The Settlement Agreement does not specify whether “in connection” with

means “before” or “after” the distribution of the Allocable Shares to each Settlement Trust.

Thus, the Settlement Agreement is at best silent about the order of operations.

The applicable language is materially different from the corresponding provision in the *Countrywide* settlement agreement that was found to require Pay First. Indeed, there was no dispute that the *Countrywide* settlement agreement prescribed Pay First. *See Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 362 (“The parties do not dispute that the distribution provisions in the settlement agreement direct the trustee to pay out the allocable share first, and then to write up the certificates in the amount of the allocable share . . .”).⁷ That settlement agreement provided that the write-up took place “after the distribution of the Allocable Share to Investors.” The *Countrywide* instruction differs from the comparable Settlement Agreement instruction here in two ways. First, it required the write-up to take place “after” a distribution – a clear timing instruction – rather than merely “in connection with” a distribution. Second, it required the write-up to occur after distribution “to Investors” rather than in connection with a distribution “to Participating Trusts.” Because the distribution referenced in the Settlement Agreement is the distribution of the Allocable Shares into the Settlement Trusts’ collection account, it provides no basis for Pay First. If the parties intended to require Pay First they would have used the clear Pay First language in the *Countrywide* settlement agreement.

Settlement Agreement	Write-Up Timing
<i>Countrywide</i>	“ <i>after</i> the distribution of the Allocable Share <i>to Investors</i> ”
<i>Lehman</i>	“ <i>In connection with</i> the distribution of Plan Payments <i>to Participating Trusts</i> .”

⁷ Further, in *Countrywide*, the trustee took the position that the settlement agreement required it to use the Pay First Method. *Matter of Bank of N.Y. Mellon*, 51 N.Y.S.3d at 360. Here, the Petitioners do not contend that the documents require the Pay First Method and, in fact, themselves readily point out numerous thorny issues that would arise from the use of that method. (Petition ¶¶ 37-54).

III. Conclusion

For these reasons, 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 as soon as possible.

Date: October 19, 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.**

Appendix A – Olifant Fund Trusts

LXS 2005-2

LXS 2005-3

LXS 2006-5

LXS 2007-1

LXS 2007-3

LXS 2007-6

SAIL 2006-BNC3

SASCO 2004-S3

SASCO 2005-2XS

SASCO 2005-SC1