

**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

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

Olifant Fund, Ltd., FFI Fund Ltd. and FYI Ltd. (collectively, the “Olifant Funds”) respectfully submit this brief in further support of the use of the Write-Up First method for distributing the Settlement Payment to the Olifant Fund Trusts.¹

In their opening brief, the Olifant Funds described in detail how the Olifant Fund Trusts’ Governing Agreements require the use of the Write-Up First method in distributing the Settlement Payment. *See* Olifant Opening Br. (NYSCEF Doc. No. 147). The Settlement Agreement requires write-ups of the Certificate Principal Amount and distributions to occur as set forth in the Governing Agreements and the Olifant Fund Trusts’ Governing Agreements unambiguously require that the Certificate Principal Amount be written up by the amount of the Allocable Shares before distributions are made to certificateholders. *Id.* at 2-7.

The Institutional Investors and AIG contend that the Pay First methodology must be used, but their arguments rest on an inaccurate foundation:

- **DISPUTE NUMBER 1: The Governing Agreements are silent as to the order of operations.**²

As the Olifant Funds explained in their opening brief, the Governing Agreements are not silent; the definition of Certificate Principal Amount clearly requires Write-Up First. *See* Olifant Opening Br. (NYSCEF Doc. No. 147) at 4-6. The Institutional Investors rely solely on the Petitioners’ statement that the Governing Agreements “do not clearly specify” the order of operations, but the Petitioners’ description is not dispositive or, frankly, correct.

¹ Unless otherwise defined, all capitalized terms have the meanings given to them in the Petition or in the Olifant Funds’ opening merits brief.

² Institutional Investors’ Br. (NYSCEF Doc. No. 151) at 8-9.

- **DISPUTE NUMBER 2: All five global RMBS settlements negotiated by the Institutional Investors and accepted by the Trustees require Pay First.³**

In fact, only one prior global RMBS settlement (*Countrywide*) has been found by a court to require Pay First, and *Countrywide* involved materially different Governing Agreements and materially different operative Settlement Agreement provisions. *See* Olifant Opening Br. (NYSCEF Doc. No. 147) at 6-8.

- **DISPUTE NUMBER 3: The last clause of Section 3.06(b) of the Settlement Agreement (providing that Section 3.06(b) “shall not affect the distribution of” the settlement payment) requires Pay First.⁴**

This clause does not require Pay First; it simply means that the Settlement Agreement does not displace the distribution mechanics present in the Governing Agreements and acknowledges that the writing-up of certificates for prior losses based on subsequent recoveries, on one hand, and the distribution of those subsequent recoveries, on the other hand, are separate and distinct processes. This provision in no way speaks to the appropriate order of operations. In any event, the Institutional Investors admit that Section 3.06(c) specifies that the distribution methodology in the Governing Agreements controls over any contrary instructions in the Settlement Agreement.⁵ Section 3.06(c) would make no sense if Section 3.06(b) required Pay First in all situations, regardless of the Governing Agreements.

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In all other respects, the Olifant Funds stand on their opening brief and will respond to any further responsive arguments in their forthcoming reply brief.

³ *Id.* at 7-8.

⁴ *Id.*

⁵ *See id.* at 8 n.20.

Date: November 2, 2018

By:

/s/ Peter W. Tomlinson

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