

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 (as
Trustee, Securities Administrator, Paying Agent,
and/or Calculation Agent under various Pooling and
Servicing Agreements),
Petitioner,
for judicial instructions pursuant to CPLR Article 77.
ANSWER OF THE OLIFANT
FUNDS AND TACONIC FUNDS TO
THE AMENDED PETITION
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Pursuant to this Court’s order to show cause dated November 16, 2021, Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (collectively, the “Olifant Funds”), as well as Taconic Master Fund 1.5 LP, Taconic Opportunity Master Fund LP, and Park Royal II LLC (collectively, the “Taconic Funds” and together with the Olifant Funds, the “Respondents”), by and through their undersigned counsel, respectfully submit this Answer to the First Amended Petition (the “Petition”) of U.S. Bank National Association (the “Trustee”), filed December 28, 2021. Respondents hold certificates issued by 17 of the Subject Trusts at issue in this proceeding, see Exhibit A, and they intend to appear with respect to those trusts.

The Petition seeks judicial instruction with respect to two issues: (1) “the manner in which distributions are calculated and applied under the waterfalls after the aggregate

1 The Trustee’s original Petition was filed on October 18, 2021, but was subsequently amended.
2 Capitalized terms not defined herein have the meanings given to such terms in the Petition.

outstanding principal balances of the Class A, Class M, and/or Class B classes of certificates (the ‘Primary Classes’) are reduced to zero,” (the “Zero-Balance Issue”), and (2) “the treatment of borrower payments of deferred or forborne principal, interest, and/or other amounts on mortgages that have been subject to servicer modifications,” (the “Deferred Principal Issue”). ([Petition](#) ¶ 2.)

With respect to the Zero-Balance Issue, the Trustee suggests that the so-called “Retired Class Provision” in the Subject Trusts’ Governing Agreements “may arguably prohibit distributions to the Primary Classes after such classes’ principal balances have been reduced to zero.” ([Id.](#) ¶ 11.) However, as the Trustee itself acknowledges, the First Department has already addressed this issue in another Article 77 proceeding instituted by the Trustee concerning some of the *exact same trusts* at issue here. ([Id.](#) ¶¶ 112–13.)³ In [In re Wells Fargo Bank, 198 A.D.3d 156 \(1st Dep’t 2021\)](#) (which the Trustee refers to as the “JPM II Appellate Opinion”), the First Department held that “[t]he retired class provisions merely provide that once a certificate has been *paid in full* and *formally retired*, it is no longer entitled to receive distributions that it might have otherwise received under the waterfall.” ([Id.](#) ¶ 112 (citing [Wells Fargo, 198 A.D.3d at 163](#)) (emphases added).) The court reasoned that, because the zero-balance certificates at issue had “neither been fully repaid nor withdrawn from the market,” the Retired Class Provision did not apply. ([Id.](#) at 164) Thus, the First Department held that “zero-balance certificates are eligible for write-ups and distributions.” [Wells Fargo, 198 A.D.3d at 163](#).

Given that there is already binding First Department precedent addressing the Trustee’s concern regarding the Retired Class Provision, the Olifant Funds and the Taconic Funds take the

³ The Trustee was one among several different trustees and securities administrators that initiated the Article 77 proceeding referenced in the petition concerning the JPMorgan global settlement. ([Petition](#) ¶ 23-24.)

position that all funds collected by the Subject Trusts after the Primary Classes' certificate balances have been reduced to zero ("Post-Zero Balance Collections") must be distributed to the Primary Classes until their outstanding losses have been fully repaid. Post-Zero Balance Collections must not be distributed to the residual Class C Classes prior to full repayment of the losses that have been incurred by the more senior Primary Classes.

With respect to the Deferred Principal Issue, the Olifant Funds incorporate by reference the arguments made in the Answer of the Reliance Parties to the Amended Petition. The Taconic Funds take no position with respect to the Deferred Principal Issue.

The Trustee acknowledges that its historical practices with respect to the Zero-Balance Issue and the Deferred Principal Issue have generally been inconsistent with the positions taken by Respondents herein. Because its historical practices are incorrect, the Trustee is not entitled to relief in the form of a court order approving of its historical practices with respect to these issues. (See *id.* ¶¶ 112–14, 124–25, 152.) Rather, the Court should direct the Trustee to administer the Subject Trusts in accordance with Respondents' positions, as set forth above, and to correct any prior misapplications of the trusts' Governing Agreements. Respondents wish to be heard on these issues and reserve the right to participate in the briefing, discovery, and/or the Final Hearing concerning these issues.

Date: January 18, 2022

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