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VIA ECF AND HAND DELIVERY
Justice Marcy S. Friedman, Part 60
New York State Supreme Court
60 Centre Street, Courtroom 248
New York, New York 10007

Re: *In the Matter of U.S. Bank Nat'l Ass'n, et al.*, Index No. 652382/2014

Dear Justice Friedman:

Respondents write to request a pre-motion conference to discuss their proposed motion to strike certain portions of the Trustees' requested relief that are not necessary for the approval of the proposed settlement by the Court.[1]

The issue before the Court is whether the Trustees abused their discretion, and whether the Trustees' discretionary power was exercised reasonably and in good faith. *Matter of Bank of N.Y. Mellon*, 127 A.D.3d 120, 125 (1st Dep't 2015). The Trustees have insisted repeatedly that factual issues under the Governing Agreements, such as whether Events of Default have occurred, are irrelevant and need not be resolved to approve the settlement, *see, e.g.*, 12/16/14 Tr. at 71-72; 7/23/15 Tr. at 35-36, claiming that the settlement "process" is the sole issue in this proceeding. 12/16/14 Tr. at 15; 3/20/15 Tr. at 24. The Trustees, however, request a declaration that their acceptance of the settlement "comports with all applicable duties under the Governing Agreements and any other applicable law," and that all Certificateholders are barred from asserting against the Trustees any claims relating to the settlement or its implementation. Am. Petition ¶ 77 (NYECF 57). Such a declaration would require the Court to determine the same kinds of factual issues under the Governing Agreements that the Trustees have repeatedly contended the Court need not resolve.

To expedite completion of discovery and streamline the upcoming trial, Respondents offered to withdraw their objections based on Events of Default, to forego discovery on that issue and to forego presentation on the issue at trial, provided the Trustees withdraw their request for the declaration in Paragraph 77 of the Amended Petition. This proposal would accept the Trustees' contention that Events of Default are irrelevant in this proceeding, and eliminate the need for the Court to make unnecessary factual rulings under the Governing Agreements. The Trustees, however, rejected that proposal.

[1] This letter is submitted pursuant to Commercial Division Rule 24 on behalf of Respondents Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation; QVT Fund V LP, QVT Fund IV LP, and Quintessence Fund L.P.; and Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1.

Accordingly, Respondents have no choice but to move to strike Paragraph 77 of the Amended Petition. As the Court has observed, this is not "a case in which the issue was whether the trustees had breached their contractual or fiduciary duties." 6/19/15 Tr. at 62. In an action for breach of contract or duty by the Trustees, the Event of Default issue will be a critical factual determination. If no Event of Default, then the relevant Trustee's contractual obligations are limited to those duties specifically set forth in the Governing Agreements and the "duty to perform its ministerial functions with due care." *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 157 (2008). In contrast, if an Event of Default has occurred, then the Trustee's duties "resemble those of an ordinary fiduciary," and the Trustee has a heightened obligation to act as a reasonably prudent person in order to maximize the trust estate. *Beck v. Manufacturers Hanover Trust Co.*, 632 N.Y.S.2d 520, 527 (1st Dep't 1995).

Answers to the factual question of the occurrence of an Event of Default may vary from trust to trust, leaving different groups of Certificateholders with different contract rights. Each Certificateholder is entitled to have the obligations owed to it determined only after full discovery in an action at law, with the attendant right to a jury guaranteed by the state and federal constitutions. Actions alleging that the Trustees breached their contractual obligations with respect to many of the same trusts now before the Court are already underway. *E.g.*, *FDIC v. The Bank of New York Mellon*, No. 15-cv-6560 (S.D.N.Y.); *Phoenix Light v. Wells Fargo Bank, N.A.*, No. 14-cv-10102 (S.D.N.Y.). For these reasons, the Court should strike the requested relief in Paragraph 77 of the Amended Petition that implicates Certificateholders' contract rights.

This is the same approach taken by Justice Kapnick in the Countrywide Article 77 proceeding. Having denied certain respondents' motion for a jury trial on whether BNY Mellon breached its contractual duties, Justice Kapnick struck BNY Mellon's request for an order approving its conduct "in all respects" and barring all claims against it by Certificateholders. *See In re Bank of New York Mellon*, 986 N.Y.S.2d 864 (Sup. Ct. 2014). Moreover, in the Citigroup Article 77 proceeding, this Court expressed considerable skepticism to a requested declaration that closely paralleled Paragraph 77 of the Amended Petition: "I do not see how it could be feasible to make a finding that the Trustees' acceptance of the Settlement Agreement comported with all of their duties under the governing agreements and all applicable laws." 5/19/15 Tr. at 9-10 (Citigroup Article 77 NYECF 142). The Citigroup trustees subsequently abandoned their request for any such declaration.[2]

Were Respondents' proposed motion to strike granted, Respondents would withdraw their objections based on the existence of Events of Default and would limit their objections at trial to other reasons why the proposed settlement should not be approved.

Respectfully submitted,

David H. Wollmuth

cc: Counsel of Record (via ECF)

[2] Observing that the same concerns apply to the requested declaration in this case, Your Honor directed the Citigroup trustees to bring this issue to the attention of counsel for all parties in this case. The Trustees never did so and failed to mention this fact during the parties' pre-motion communications.