SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (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 Distribution of a Settlement Payment.	Index No. 657387/2017 (Friedman, J.) **Motion Sequence No. 010**

HBK'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LEAVE TO AMEND HBK'S ANSWER TO THE PETITION

SCHLAM STONE & DOLAN LLP
John M. Lundin
Niall D. Ó Murchadha
Seth D. Allen
Alexandra M.C. Douglas
Lee J. Rubin
26 Broadway, 18th Floor
New York, New York 10004

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004

Attorneys for Respondent HBK Master Fund L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Respondent HBK[1], by its undersigned counsel, submits this memorandum of law, together with the Affidavit of Dmitri Mirovitski ("Mirovitski Aff.") in further support of HBK's motion pursuant to CPLR 3025(b) for leave to amend its Answer to the Petition.

PRELIMINARY STATEMENT

Throughout this proceeding, the Challenging Respondents repeatedly have told the Court and the other parties that they were concerned about unnecessary delay. Yet the Challenging Respondents have spent the last three months delaying this proceeding. First, the Challenging Respondents created unnecessary delay by challenging HBK's right to appear in this action as a NIM trust certificateholder, only later to agree that even if HBK were found not to have standing, U.S. Bank as NIM Trustee could appear on its behalf and at its direction. Now, the Challenging Respondents are again creating unnecessary delay by opposing HBK's motion for leave to amend, even though HBK is a direct holder of certificates issued by certain Settlement Trusts, which is exactly what the Challenging Respondents previously had claimed was required for a Respondent to have standing.

The Challenging Defendants' opposition ignores the standard for opposing a motion to amend: that the amendment be **entirely devoid of merit** or **highly prejudicial** to the non-moving parties. The Challenging Respondents do not come close to satisfying either prong of this test.

First, the Challenging Defendants' argument that HBK has standing only if it can prove that it will receive part of the Settlement Payment fails because Article 77 standing exists even where the potential receiving a benefit is remote or contingent—or both.

[1] The defined terms used herein have the same meaning ascribed to them in HBK's memorandum of law in support of its motion for leave to amend.

Second, the Challenging Defendants imply that HBK's motion should be denied because it lacks a factual submission explaining what it owns, when it bought it and how much it paid. This of course ignores that an affidavit of merit is not required to support a motion to amend: the Court's analysis is performed only against the amended pleading.

Third, the Challenging Defendants do not even attempt to meet the evidentiary standard they must meet to defeat a motion to amend on the facts. They have submitted no factual affidavits, much less documentary evidence that utterly refutes the notion that HBK will gain an economic benefit—even if contingent or remote—from the distribution of the Settlement Payment to the trusts in which it seeks to plead an interest. Indeed, the Challenging Defendants have played fast and loose with the facts by ignoring HBK holdings that are inconvenient to their analysis and not even attempting to address the question of whether HBK would gain an economic advantage from the Settlement Payment, even if it would not receive a portion of the payment itself.

Fourth, the Challenging Defendants' argument that HBK should pay their fees for making their first, meritless, Standing Motion (or for this, meritless, opposition to HBK's motion to amend), is a fantasy comprised of made up facts and non-existent law. If anyone should pay for repeatedly wasting the Court's and the Respondents' time, it is the Challenging Respondents.

Thus, HBK's motion should be granted, and HBK should be permitted to amend its answer in the form set forth in Exhibit A to the Lundin Affirmation.

ARGUMENT

I. HBK HAS STANDING EVEN IF ITS BENEFIT FROM THE SETTLEMENT PAYMENT IS REMOTE OR CONTINGENT—OR BOTH

A. HBK Has Standing Under Article 77 Even if its Potential Benefit is Remote or Contingent.

Having based their prior challenge to HBK's standing on the proposition that direct holders of certificates in the Settlement Trusts have standing and indirect holders do not, the Challenging Respondents now advance an entirely new theory why HBK—a direct holder in the trusts in which it seeks to assert an interest in its amendment—still does not have standing: a respondent has standing only it is can prove that it will directly receive part of the Settlement Payment.[2] The Challenging Defendants' argument has been rejected by myriad court decisions, which hold that even remote or contingent beneficiaries may appear in an Article 77 proceeding.[3]

"The provisions of the statute [CPLR 7703] are permissive and do not preclude the joining as parties to an accounting proceeding of all **contingent remaindermen** including those who are only **remotely** interested and who, under the terms of the statute, are not necessary parties. A contingent remainderman, though not a necessary party, may very well be a proper party to the proceeding." *In re Cowle's Will*, 22 A.D.2d 365, 370, 255 N.Y.S.2d 160, 166 (1st Dep't 1965) *aff'd* 17 N.Y.2d 567 (1966) (emphasis added). In *Cowle's Will*, the interested persons were children who would only obtain a benefit from the trust if not one but two contingent events took place. *See id*. at 369, 165 ("Accordingly, the Hipkins infants would not take under the trust indentures if Ernest exercised his power of appointment or, having failed to

---

[2] At other points in their brief, the Challenging Respondents go even further, arguing that HBK must show "that it owns a **substantial position** in direct holdings." (Challenging Respondents' Br. at 7 (emphasis added).) Of course, it goes without saying that this is neither a requirement of Article 77 standing nor a standard that any other Respondent in this proceeding had to show that it met.

[3] *See generally* HBK Standing Br. (Dkt. No. 304 at 9 – 10.)

exercise the same, if Louise P. Hipkins, their mother, now age 36, survived Ernest, now about 59 years of age"). And the First Department recognized that the children were not necessary parties to the proceeding. *Id.* ("They would be considered as being properly and sufficiently represented in the proceedings by their mother as the taker of the remainder interest"). But all the same, the First Department held—and the Court of Appeals affirmed—that (a) the children had been properly included as "interested parties" at the outset, and that (b) because they had "a valid interest in having the action or proceeding continue for a determination of issues presented by [them]," they should not be dropped from the proceeding. *Id.* at 371, 167.

The Challenging Respondents rely on two cases discussing the requirements regarding standing to **bring** an action, not the requirements to appear in an Article 77 proceeding as an interested party. *See Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772, 573 N.E.2d 1034 (1991) (discussing standing to bring action challenging environmental statutes and government action); *Lederle Labs. Div. of Am. Cyanamid Co. v. Pub. Serv. Comm'n,* 84 A.D.2d 900, 901, 444 N.Y.S.2d 779 (1981) (discussing Petitioner's standing bring Article 78 proceeding challenging water rates). Of course, as noted in HBK's brief on the Standing Motion, such cases are inapposite here. (*See* HBK Standing Br. at 19 – 21.)

The third case cited by the Challenging Respondents*, Matter of Turner's Will*, 86 Misc. 2d 132, 136, 382 N.Y.S.2d 235 (Sur. Ct. Albany Cty. 1976) contradicts the Challenging Respondents' argument. In *Matter of Turner's Will*, while noting the general rule that "where the objectant's financial interest is the same under the will as it would be in the event of intestacy, the obectant does not have standing to appear in the probate proceeding," the court went on to note that "[t]he exception to this rule is where a person can show that he is interested in a prior will and that if the later instrument can be denied probate and the prior one admitted, he will get

more from the estate." Thus, where a party will not recover under a will under probate, but if whether that will is admitted could impact its recoveries from **other** sources, that party has standing to appear in the probate proceeding regarding the latter will. This is analogous to HBK's position here: even if it were true that for certain Settlement Trusts, HBK might not **directly** recover a portion of the Settlement Payment, the distribution of the Settlement Payment **will** impact the overall waterfall of the Trust, and thus will impact (1) whether HBK will receive payments from other sources in the future or (2) the market value of the certificates it holds. Thus, because HBK will be economically impacted based on the Court's ruling in this proceeding, HBK has standing to appear.

B. HBK is Likely to Benefit From the Settlement Payment.

Regardless of whether HBK's direct certificate holdings will receive payments from the settlement, what happens in this proceeding will directly impact the value of HBK's direct holdings. The closer in the trusts' waterfalls that the settlement funds come to the certificates that HBK owns, the more likely it is, depending on the outcome of this Article 77 proceeding, that they will receive payments in the future from other sources, whether by future litigation (including direct actions, such as trustee actions, by class actions or by other Article 77 proceedings), by the performance of the trusts themselves or by an increase in market value of the certificates. For example, as described in the Mirovitski Affidavit, the first bond listed in the Challenging Respondents' chart (Opp'n at 3) is BSABS 2005-EC1 M6. Challenging Respondents allege that the Settlement Payment for this trust is $11,563,029, while the cumulative write-downs on the bonds that can be interpreted as more senior are $14,725,018, for a net difference of $3,161,989. However, in April 2018, BSABS 2005-EC1 generated approximately $95,000 in excess interest, which is approximately equal to the difference between the interest the underlying loans pay and the sum of interest that is due on the bonds

plus deal fees; this amount is in many cases used to pay additional principal on the bonds further reducing the bond balance compared to the balance of the underlying loans. Thus, it is conceivable that over a period of several years, the sum of these excess interest funds would exceed the shortfall claimed by the Challenging Respondents and thus, depending on the outcome of this proceeding, would result in payments on HBK's certificates. And even if the excess interest payments did not exceed such shortfall, there are numerous other ways that new funds could come into the trust, including by lawsuits against the trustee, servicer(s) and other involved parties or other Article 77 or similar proceedings regarding various settlements.

Whether these funds would be distributed to HBK's certificate is a direct result of the Court's ruling here in that the closer the settlement payment comes to HBK's certificate (even if it does not reach that certificate), the more likely it is that these later funds will fall to HBK's certificate. Finally, even if it is not certain that this would be the case, the value of the bond will be impacted by how close to the money the bond is because a potential purchaser would be willing to pay more for a bond that has a better chance of recovering funds in the future. For these reasons, the Court's decision here will have a direct economic impact on HBK's direct certificates, giving HBK standing to appear.

II. THE CHALLENGING RESPONDENTS AT BEST RAISE QUESTIONS OF FACT NOT PROPERLY RESOLVED ON A MOTION TO AMEND

A. The Burden of Making a Factual Showing Regarding the Merits is on the Challenging Respondents, Not HBK.

The Challenging Respondents complain that HBK has not made a factual submission proving what it owns, when and why it bought it and how much it paid. Once again, the Challenging Defendants get the legal standard exactly backwards. HBK is not required to submit an affidavit of merit proving the evidentiary basis for its amendment. *See, e.g.*, *Hickey v. Kaufman*, 156 A.D.3d 436, 436, 66 N.Y.S.3d 474 (1st Dep't 2017) ("Given the Legislature's

2005 amendment of CPLR 3211(e), plaintiff was not required to support his motion to amend the complaint with an affidavit of merit") (internal citations omitted). Rather, it is the Challenging Defendants who, if they seek to challenge HBK's amendment on the facts, must submit competent evidence utterly refuting HBK's proposed amended claims by showing that they are "palpably devoid of merit" such that leave to amend should be denied. *East Asiatic Co. Inc. v. Corash*, 34 A.D.2d 432, 436 (1st Dep't 1970).

B. <u>The Challenging Respondents Have Not Met Their Burden of Utterly Refuting HBK's Allegations With Competent, Undisputed Documentary Evidence.</u>

The Challenging Respondents' submission of unauthenticated documentary evidence attached to an attorney affirmation does not "utterly refute" HBK's proposed amendment. At best (and only if the Court were to accept their direct payment theory), it raises factual questions that cannot be resolved without factual (and likely, expert) discovery.

First, the chart included in the Challenging Respondents' brief (Opp'n at 3) leaves out at least four certificates owned by HBK that do not fit the Challenging Respondents' narrative. Specifically, it appears that the Challenging Respondents' chart does not include, and thus the Challenging Respondents do not appear to challenge, HBK's direct holdings of the following certificates: BSABS 2006-EC1 M5, BSABS 2007-HE2 2A2, BSABS 2005-FRI M1, and BSABS 2006-EC2 M5. The Challenging Respondents' failure to include these trusts is relevant for two reasons: (1) at the very least, HBK must be allowed to amend to assert its certificate holdings in these trusts; and (2) the Challenging Respondents' attempt to squeeze all of HBK's holdings into a single bucket in which they clearly do not all fit makes clear that there are fact specific, certificate-by-certificate factual issues here that are not properly resolved on a motion to amend.

Second, even as to those certificates and trusts included in the Challenging Respondents' opposition, the Challenging Respondents' opposition merely raises factual questions as to whether these certificates would receive payments or write-ups from any interpretation of the Settlement Agreement which are insufficient to warrant denial of HBK's motion. Specifically, the Challenging Defendants merely submit unauthenticated portions of what they allege are remittance reports for some of the trusts at issue, attached to an attorney affirmation. But these unauthenticated **excerpts** of remittance reports are not documentary evidence, nor do they utterly refute the merits of HBK's proposed amendment on their face, and thus they are insufficient to defeat a motion to amend. As on a CPLR 3211(a)(1) motion to dismiss based on documentary evidence, where a party submits unauthenticated documentary evidence in opposition to a motion to amend that might call into question the merits of a proposed amendment, but does not definitely prove that the proposed amendment is patently lacking in merit nor renders the amendment futile, the motion to amend should be granted. *See Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 53 Misc. 3d 1204(A), 46 N.Y.S.3d 473 (Sup. Ct. Albany Cty. 2016) ("[T]he unauthenticated documentary evidence offered in opposition to the motion, while perhaps calling into question the merits of certain causes of action, fails to establish that the proposed claims are patently lacking in merit such that amendment would be futile."), *aff'd as modified on other grounds*, 2018 WL 2048947 (3d Dep't May 3, 2018).

More generally, a motion to amend is not the proper time to determine the merits of an issue or to decide factual questions raised by a party opposing amendment. *See Acker v. Garson*, 306 A.D.2d 609, 610, 759 N.Y.S.2d 609, 610 (3d Dep't 2003) ("Although Supreme Court cited to proof supporting defendant's contentions that he was not speeding and the collision occurred because the tie rod of his vehicle snapped, such assertions are 'more appropriately raised on a

motion for summary judgment or at trial because a motion to amend is not a proper vehicle for the determination of the merits of an issue.'") (quoting *Dumesnil v. Proctor & Schwartz Inc.*, 199 A.D.2d 869, 871, 606 N.Y.S.2d 394, 396 (3d Dep't 1993)); *Gonyeau v. Vos*, 56 A.D.2d 946, 946, 392 N.Y.S.2d 510, 511 (3d Dep't 1977) (on a motion to amend answer, "absent a showing of prejudice to the plaintiff, and there was none here, the court should not determine factual questions, but should confine itself to the question of whether the pleading as submitted was sufficient on its face"); *Petrozzi v. Passamonte*, 32 A.D.2d 716, 717, 300 N.Y.S.2d 183, 186 (4th Dep't 1969) ("On a motion for leave to amend an answer, a defendant need not establish a prima facie case, and the court is confined to the question of whether the pleading is sufficient upon its face.").

Here, to determine definitively whether any of these certificates would receive funds from the Settlement Payment under one or more interpretation would require both factual discovery as well as expert discovery examining the specific waterfalls of these trusts. The alleged futility of HBK's proposed amendment is not clearly established by the Challenging Respondents' submission of a handful of excerpts from documents to an attorney affirmation, even if the Court were to accept the Challenging Respondents' direct payment theory—which, as explained above, it should not, because it has been repeatedly rejected by courts that have considered it.

If such an investigation is going to be done for HBK's holdings, then all Respondents should be required to produce the same information—something the Challenging Defendants admit that they refused to do—and the Court should require that the same expert analysis of the waterfall of each Settlement Trust and of which specific certificates for each Settlement Trust will or will not receive funds directly from the Settlement Payment be done for all Respondents'

holdings. The Court rejected such discovery when it recently refused to allow discovery of whether any Respondent held certificates through repurchase agreements. It should do the same here.

III. THE CHALLENGING RESPONDENTS DO NOT SHOW THE PREJDUCIE REQUIRED TO DENY A MOTION TO AMEND ON THE GROUNDS OF DELAY

"Mere lateness is not a barrier" to amending a pleading. *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983). Rather, the Challenging Defendants must show "significant prejudice to the other side, the very elements of the laches doctrine." *Id*. In other words, the party opposing the amendment must show that he "has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Kocourek v. Booz Allen Hamilton, Inc*., 85 A.D.3d 502, 504 (1st Dep't 2011).

Because the Challenging Respondents are likely aware of this black letter rule, rather than argue outright that HBK's motion should be denied due to HBK's delay, they instead couch this argument in terms of HBK's "gamesmanship" and rely on the Court's "inherent power to control its calendar." However, regardless of how the Challenging Respondents label it, the argument they are making is clear: the Court should deny HBK's motion for leave to amend because it was filed too late.

The Challenging Respondents do not allege any prejudice that has resulted from such delay, nor do the even attempt to do so, as New York law requires. Nor could they; all that has happened in this action thus far are challenges to standing, and any delay has been the fault of the Challenging Respondents, not HBK. Whether HBK's motion is granted or denied, the parties will be in the same place, awaiting the Court's decision on the Standing Motion, and once that decision is entered, briefing the merits of the issues raised in this proceeding. Because there

has been no delay—much less prejudice—caused by HBK's motion to amend, the Challenging Respondents have no cognizable basis for seeking its denial.

The Challenging Respondents' argument that HBK's motion should be denied because it comes after the time the Court set for parties to **appear** in this action is entirely without merit. Permitting a party that appeared in this proceeding in accordance with the schedule set forth by the Court to amend its answer to include additional holdings in the same Settlement Trusts, without making any change to the Settlement Trusts for which it is appearing or the arguments on the merits it is making, is fundamentally different from allowing new parties, who never before appeared in this proceeding, the ability to appear in this proceeding after the deadline for doing so and potentially to assert new positions on the merits. It was the latter issue, and not the former, that the Court's Order was intended to prevent.

The Court's Order merely provided that any "Interested Person" wishing to be heard on the merits must file an answer by January 29, 2018, and that "no Interested Person shall be heard and nothing submitted by any Interested Person shall be considered by the Court unless such Interested Person serves an answer to the Petition" by this deadline. (Dkt No. 30.) HBK complied with this Order by filing a timely answer, and nothing in the Order prohibits HBK from amending to add its direct holdings. Indeed, as noted in HBK's opening brief, multiple parties amended their answers to assert additional interests after the deadline set by the Court to appear without there being any discussion of the Court's Order. (HBK Br. at 5.) Similarly, it is only the appearance of new **parties** (or parties asserting interests in new **trusts**) after this deadline which raises the concerns about a "litigation play" that the Challenging Respondents address in their brief. There is no risk of a "litigation play" by allowing HBK to amend to assert additional

holdings in the same Settlement Trusts and then to make the same arguments on the merits that it was already going to make.[4]

IV. IF ANY PARTY SHOULD HAVE TO PAY COSTS AND FEES, IT IS THE CHALLENGING RESPONDENTS

Finally, the Challenging Respondents' demand that HBK pay fees and costs is as meritless as it is hypocritical. Despite themselves being the cause of months of delay and likely hundreds of thousands of dollars in legal fees due to their unnecessary Standing Motion and their opposition to this motion, the Challenging Respondents now claim that the delay and costs associated with the Standing Motion were HBK's fault and should be paid by HBK. Any reasonable evaluation of the facts of this last five months of this case makes clear that nothing could be further from the truth.

If any parties should be required to pay costs and fees for filing unnecessary motions and for improperly delaying this action, it is the Challenging Respondents. The only reason that this proceeding is where it currently stands, and not well into merits briefing or even close to resolution, is the Challenging Respondents' decision to challenge the standing of the Challenged Respondents, based upon a novel theory that limits Article 77 standing to an extent not supported by any case law. Moreover, **after** numerous respondents spent a likely combined hundreds of hours briefing the Standing Motion and preparing for and attending argument, the Challenging Respondents for the first time conceded that they would not oppose the substitution of the trustees for the NIM Trusts or other "indirect" instruments through which the Challenged Respondents were interested parties. (Lundin Aff. at Ex. D.) This admission rendered the

[4] Similarly, the Challenging Respondents' appeal to "judicial economy and fairness" is laughable in light of the substantial waste of judicial resources created by the unnecessary Standing Motion, which as discussed in Section IV, because of the Challenging Respondents' late concession regarding substitution will have virtually no substantive effect on this proceeding.

Standing Motion, and the hundreds of hours spent on the Standing Motion, essentially moot, as it ensured that, one way or another, HBK and the other Challenged Respondents who will agree to substitution will be heard in this proceeding.

Just as the Challenging Respondents filing of the Standing Motion, only to essentially concede it was moot, created unnecessary costs and delay only to end up at the same place, so too does the Challenging Respondents' opposition to this motion create unnecessary cost and delay, all for the same inevitable result. Absent opposition, HBK's motion to amend had the potential to avoid the significant costs and delay. Instead, the Challenging Respondents have once again created unnecessary work and delay for all parties involved, even though all roads lead to the same place. Thus, it is the Challenging Respondents, and not HBK, who should be required to pay costs and fees, not only for their opposition to this motion, but also for the Standing Motion as well as the costs to have U.S. Bank as NIM Trustee substitute in for HBK should the Court so-order.

CONCLUSION

For the foregoing reasons, HBK respectfully requests that the Court grant HBK leave to amend its Answer to the Petition in the form submitted as Exhibit A to the Lundin Affirmation.

Dated: New York, New York
June 4, 2018

SCHLAM STONE & DOLAN LLP

By: _____/S/_____
John M. Lundin
Niall D. Ó Murchadha
Seth D. Allen
Alexandra M.C. Douglas
Lee J. Rubin
26 Broadway, 18th Floor
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
E-mail: jlundin@schlamstone.com
nomurchadha@schlamstone.com
sallen@schlamstone.com
adouglas@schlamstone.com
lrubin@schlamstone.com

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004
Telephone: (646) 771-7377
E-mail: jmc@mcferrin-clancy.com

Attorneys for Respondent HBK Master Fund L.P.