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

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 Administration and Distribution of a Settlement Payment.

Index No. 657387/2017

IAS Part 60

Honorable Marcy S. Friedman

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO LIMIT STANDING TO CERTIFICATEHOLDERS IN THE SETTLEMENT TRUSTS

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Respondents Tilden Park Investment Master Fund LP, Tilden Park Management I LLC and Tilden Park Capital Management LP, on behalf of themselves and their advisory clients (collectively, "Tilden Park"), AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC, Invesco Advisers, Inc., Kore Advisers, L.P., Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Teachers Insurance and Annuity Association of America, the TCW Group, Inc., Thrivent Financial for Lutherans, Western Asset Management Company (collectively, with the other parties listed after Tilden Park, the "Institutional Investors"), American General Life Insurance Company, American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., The United States Life Insurance Company in the City of New York, The Variable Annuity Life Insurance Company (collectively, with the other parties listed after the Institutional Investors, "the AIG Parties"), DW Partners LP, Olifant Fund, Ltd., FYI Ltd., and FFI Fund Ltd. (collectively, with the other parties listed after DW Partners LP, "the Olifant Funds," and together with all of the aforementioned parties, the "Challenging Respondents"), respectfully submit this Memorandum of Law in Support of their joint motion to limit standing to participate in this proceeding to certificateholders in the Settlement Trusts.[1][2]

[1] Tilden Park has separately moved for an order limiting standing with respect to one particular Settlement Trust — a Trust as to which one of the parties that seeks to be heard has no potential economic interest, regardless of how this Court rules on the issues raised by the Petition. Tilden Park has filed that motion under seal, because it addresses specifics of the challenged party's holdings that, under this Court's February 13, 2018 Scheduling Order, were disclosed on a confidential basis.

[2] The Challenging Respondents acknowledge that a Certificate Insurer in a trust has standing to enforce the terms of a trust instrument. Accordingly, they do not challenge the standing of Ambac Assurance Corporation to appear in this proceeding.

PRELIMINARY STATEMENT

CPLR Article 77 ("Article 77") limits standing to appear in proceedings thereunder to persons with a direct economic interest in the proceeding's outcome. More particularly, under Article 77 and the Surrogate's Court Procedure Act ("SCPA"), referenced therein, standing to appear in an Article 77 proceeding is limited to "persons interested" in the trust that is the subject of the proceeding, and "persons interested" is defined to mean those entitled to share as beneficiaries. *See* N.Y. C.P.L.R. 7703 (McKinney); N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney).

As applied here, these principles mean that standing to appear in this Article 77 proceeding with respect to any particular Settlement Trust[3] is limited to persons holding certificates issued by that Settlement Trust. The Settlement Trusts' Governing Agreements clearly state that the only beneficiaries of those Trusts are their certificate holders. Other persons, including holders of indirect or derivative interests in the Settlement Trusts, are not beneficiaries and consequently lack standing. General standing principles, as set forth by the state and federal courts of New York, mandate the same conclusion, as courts consistently deny standing to parties with only an indirect interest in the matter under consideration.

Five Respondents here (collectively, the Challenged Respondents) are not certificate holders in all the Settlement Trusts with respect to which they have purported to appear.[4] They

[3] Capitalized terms used in this Answer and not defined herein have the meanings given to such terms in the Petition for Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment (the "Petition"), dated December 15, 2017, filed by 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 (collectively, the "Trustees" or "Petitioners").

[4] Pursuant to the Scheduling Order entered by the Court on February 13, 2018 [Dkt. No. 194], information provided by Respondents about the nature of their holdings in the Settlement Trusts is deemed to be Confidential Information. Accordingly, the Challenging Respondents have not named the Challenged Respondents in this memorandum. A table identifying the Challenged Respondents and listing their respective holdings that are the subject of this motion will be filed under seal as Exhibit A to this memorandum.

claim an interest in Settlement Trusts for which they do not own certificates by virtue of owning interests in other structures – CDOs, Re-REMICs and NIMS Trusts – that allegedly own certificates in those Settlement Trusts. As detailed below, however, the fact that the Challenged Respondents are invested in structures that own certificates issued by some of the Settlement Trusts does not make the Challenged Respondents the owners of those certificates. They have neither rights nor obligations under the Governing Agreements, and whatever indirect economic interest they may enjoy does not make them "beneficiaries" of the Settlement Trusts. Accordingly, they lack standing to appear with respect to those Trusts in this proceeding.

STATEMENT OF FACTS

The Trustees commenced this proceeding under CPLR Article 77 to obtain judicial instructions regarding the distribution of each Trust's Allocable Share of a $4.5 billion Settlement Payment to be transferred by JPMorgan Chase & Co. to the Trustees. The Petition raises several issues relating to the distribution, including the order of operations – the Write-Up First Method, the Pay First Method, or a different method – that should be used to distribute the settlement proceeds to certificate holders. Fifteen respondents have filed answers to the Petition. On February 21, 2018, pursuant to the Court's Scheduling Order dated February 13, 2018, the parties exchanged information, on an "attorneys' eyes only" basis, concerning the nature of their interests in the Settlement Trusts.

The February 21 disclosures revealed that the Challenged Respondents do not hold certificates in some or all of the Settlement Trusts in which they have claimed an interest. Instead, the Challenged Respondents each hold their interests in the Settlement Trusts indirectly, though one or more of the following forms: (i) certificates in CDOs that in turn own certificates issued by certain Settlement Trusts, (ii) certificates in re-REMIC trusts that in turn own certificates issued by certain Settlement Trusts, (iii) certificates in NIMS trusts that in turn own certificates issued by

certain Settlement Trusts. The table appended to this brief as Exhibit A contains a list of these holdings of the Challenged Respondents. As detailed below, the holdings listed on Exhibit A are insufficient to give the Challenged Respondents standing to appear in this proceeding with respect to the Settlement Trusts to which they relate. Exhibit A thus describes the scope of the relief sought through this motion.

THE NATURE OF THE CHALLENGED RESPONDENTS' INTERESTS

CDOs, re-REMICs and NIMS Trusts are distinct financial structures, but a feature common to all of them is that investors in those structures do not have an ownership interest in the assets owned by the structure. An investor's interest in the structure generally encompasses certain rights to cash flows generated from the assets, but ownership of the assets is vested in a trustee or similar entity. A more detailed description of each structure follows.

CDOs

As explained by the court in *In re Citigroup Inc. Securities Litigation*, 753 F. Supp. 2d 206, 215 (S.D.N.Y. 2010):

> [C]ollateralized debt obligations ('CDOs') are a form of asset-backed security. An underwriter creates a CDO by purchasing a pool of assets and transferring those assets to a special purpose entity. The entity then issues debt securities whose interest payments are backed by the income stream generated by the entity's assets. Although RMBS and CDOs are similar in many ways, RMBS securitizations purchase mortgages and issue securities backed by those mortgages, whereas many CDOs purchase *other securities*—RMBS, for example—and issue securities backed by those.

(emphasis in original). *Accord House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2014 WL 1383703 at *1 (S.D.N.Y. Mar. 31, 2014) ("A CDO issuer is an investment vehicle that bundles a variety of revenue-generating assets (the 'collateral' or 'underlying assets') and then sells pieces of the expected revenue to investors in the form of debt and equity securities (the CDO securities).").

A CDO is typically governed by an indenture, entered into between the CDO Issuer and the Trustee of the CDO indenture, which transfers "the CDO Issuers' property to the CDO Indenture Trustee and provide[s] to the CDO Indenture Trustee certain rights and duties." *Triaxx Prime CDO 2006-1, Ltd. v. Bank of New York Mellon*, 2017 WL 1103033 at *1 (S.D.N.Y. Mar. 21, 2017). The court in *Triaxx Prime CDO* 2006-1 cited a typical CDO "granting clause," which stated as follows:

> The [CDO] Issuer [ ] hereby Grants to the [CDO Indenture] Trustee . . . ***all of its right, title and interest in, to and under***, in each case, whether now owned or existing, or hereafter acquired or arising, all accounts, general intangibles, chattel paper, instruments, securities, investment property and any and all other property . . . of any type or nature owned by it, including . . . the Collateral Debt Securities . .

Id. at *3 (emphasis added). The "Collateral Debt Securities" in which the CDO Trustee holds all "***right, title and interest***" may include certificates in RMBS trusts. In *Triaxx Prime CDO 2006-1*, for example, the court explained that "the CDO Issuer[] purchased certificates issued by 53 RMBS trusts, which formed the corpus of the [] CDOs." *Id.* at *1. Thus, under the granting clause, the CDO ***Trustee*** —not CDO ***investors***—owns all of the "right, title, and interest in" the underlying RMBS certificates which "form[] the corpus" of that CDO trust.

Typical CDO indentures also contain "no action" provisions, akin to those found in RMBS PSAs, which prohibit CDO investors from instituting suits or pursuing remedies on behalf of the CDO *unless*, among other conditions, (a) they hold a certain threshold of the outstanding notes (generally 25%), and (b) have previously demanded the CDO trustee pursue such remedy for the CDO. For example, in *House of Europe Funding I, Ltd.*, 2014 WL 1383703, at *17, the court held that the CDO indenture's no-action provision barred a CDO investor from obtaining a declaratory judgment claim concerning various indemnification rights related to the indenture. In so holding, the court relied on the CDO indenture's no action provision, which stated that "'[n]o Holder of any Note shall have *any* right to institute *any* Proceedings, judicial or otherwise, with

respect to this Indenture . . . or for any remedy hereunder,' unless, among other conditions, '[s]uch Holder has previously given written notice to the Indenture Trustee of a continuing Event of Default' and holders of at least 25 percent of the controlling class of notes have demanded that the Indenture Trustee bring suit 'in respect of such Event of Default.'" *Id.* (emphasis in original).

RE-REMICS

"Re–REMICs are previously securitized residential mortgage backed securities transactions (RMBS) that are re-packaged and re-sold, and are typically comprised of unsold RMBS [certificates] being held in defendants' inventory of RMBS [certificates]." *CIFG Assur. N. Am., Inc. v. Bank of Am., N.A.*, 2013 WL 5380385 (N.Y. Sup. Ct. Sep. 23, 2013). "In each re-REMIC, the original RMBS [certificates] are deposited into a trust, and certificates [in the Re-REMIC] representing rights to the cash flows are sold to investors in private placement transactions." *Id.; see also* MORTGAGE-BACKED SECURITIES § 4:22 (explaining that "in a simple Re-REMIC, an investor transfers ownership of CMBS or RMBS to a new special purpose entity, which in turn transfers them to a trust" and that by packaging "underperforming" certificates of RMBS transactions to a new structure, "the new structure's tranches can receive higher ratings").

Re-REMICs are typically governed by pooling agreements, which are akin to indentures or pooling and servicing agreements. *See, e.g.*, *Tli Investments, LLC v. C-III Asset Management LLC*, 2013 WL 6778094, at *1-2 (N.Y. Sup. Ct. Dec. 23, 2013). For example, in June 2007, certificates backed by four Bear Stearns RMBS trusts—BSAAT 2007-1, SAMI 2007-AR7, BSABS 2007-AC3, and BSABS 2007-AC5—were "re-securitized" into a separate Re-REMIC trust called "Bear Stearns Structured Products Inc. Trust. 2007-R8," also known as BSSP 2007-R8. The Pooling Agreement governing BSSP 2007-R8 (attached as Exhibit 1 to the Affidavit of Kevin S. Reed ("Reed Aff."), filed herewith) refers to the RMBS certificates in those four RMBS trusts as the "Underlying Certificates."

Importantly, like typical CDO indentures, typical Pooling Agreements for Re-REMICs contain a granting clause that conveys all right, title, and interest in the underlying RMBS certificates to the Re-REMIC Trustee. For example, in BSSP 2007-R8, the Pooling Agreement states that "[t]he Depositor . . . does hereby sell, transfer, assign, set-over and otherwise ***convey to the Trustee***, in trust, for the use and benefit of the Certificateholders [of the Re-REMIC], ***without recourse, all the right, title and interest of the Depositor in and to (i) the Underlying Certificates***, including all amounts payable on the Underlying Certificates in accordance with the terms thereof on or after the Closing Date, (ii) the Sale Agreement and (iii) all its right, title and interest, if any, in all other assets constituting the Trust Fund." *See* Pooling Agreement (Reed Aff., Ex. 1) at § 2.01(a).

Further, Section 9.03(b)-(c) of the Pooling Agreement for BSSP 2007-R8 contains a typical no-action clause, akin to those found in RMBS PSAs:

> (b) ***No Certificateholder shall have any right to vote (except as expressly provided for herein) or in any manner otherwise control the operation and management of the Trust***, or the obligations of the parties hereto . . .
>
> (c) ***No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement***, unless such Holder previously shall have given to the Trustee and the Depositor a written notice of default hereunder, and of the continuance thereof, as hereinbefore provided, and unless also the Majority Certificateholders shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 30 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding.

(emphasis added). As the granting clause and no-action provisions make clear, under a typical Pooling Agreement governing a Re-REMIC, only the Re-REMIC Trustee—and not the Re-REMIC investors– has the ability to pursue rights attendant to the underlying RMBS certificates transferred to such Re-REMICs.

NIMS TRUSTS

A NIMS Trust is a securitization structure created when an issuer securitizes residual cash flows from other asset-backed transactions. Office of Thrift Supervision Regulatory Bulletin, OTS RB 37-51, 2010 WL 1390842 "Liquidity Risk Management Investment Securities." (January 15, 2010.) Certificates held by a NIMS Trust are generally residual asset-backed certificates that receive cash flows from an underlying trust only after all fees and expenses related to the transaction and amounts due on all other classes of certificates have been paid. *Id.* Thus, investors in NIMS Trusts are only entitled to excess payments from underlying securities deals. 20 No. 11 Westlaw Journal Bank & Lender Liability 7, *1 (October 20, 2014). As with CDOs and Re-REMICs, investors in NIMS trusts do not have any ownership interest in the income-generating assets owned by the trusts.

Bear Stearns Structured Products Inc. NIM Trust 2006-16 Notes, Series 2006-16 ("BSSP 2006-16"), one of the NIMS Trusts held by HBK, is an illustrative example. BSSP 2006-16 is governed by an Indenture and a Private Placement Memorandum ("PPM") and consists of four different certificate groups with offered notes that each represent an ownership interest in one of four underlying trusts (the "Underlying Trusts"). Three of the four Underlying Trusts are BSABS 2006-HE3, BALTA 2006-2, and GPMF 2006-AR2, which are Settlement Trusts at issue in these proceedings. *See* PPM (a true and correct copy of which is attached as Exhibit 2 to the Reed Aff.), at 2-3.) The offered notes in BSSP 2006-16 represent a contingent interest to receive either excess cash flows or prepayment charges from the Underlying Trusts. *Id.* at 4-5.

The Issuer of BSSP 2006-16 is CMO Holdings II Ltd., which purchased the underlying certificates in that NIMS Trust from a depositor and then "pledge[d] the Underlying Certificates to the Indenture Trustee". *Id.* at 16. The Indenture Trustee is thus the party that holds a valid and

enforceable first-priority security interest in the assets of the trust. *Id.* at 29. The assets of the trust that the Indenture Trustee holds on behalf of all certificate holders in that NIMS Trust include:

> all right, title and interest in and to (i) the Underlying Certificates and all distributions thereon after the Closing Date, (ii) the Note Account, (iii) the right to enforce remedies against the Administrator under certain agreements, (iv) ***all present and future claims, demands, causes and choses in action in respect of the foregoing*** and (v) all proceeds of the foregoing of every kind and nature whatsoever. . . .

Id. at 26, emphasis added. As such, only the Indenture Trustee holds any right to the Underlying Certificates or to make any claims or demands or bring causes of action pertaining to the trust or the Underlying Certificates.

The governing agreements of BSSP 2006-16 further limit the rights of certificate holders by way of a "no-action clause." The PPM for BSSP 2006-16 provides:

> No Noteholder has any right to institute any proceedings with respect to the Indenture, unless (i) such Noteholder has previously given written notice to the Indenture Trustee of a continuing Event of Default, (ii) the Noteholders of more than 50% of the then aggregate Note Balance will have made written request to the Indenture Trustee to institute proceedings in respect of such Event of Default in its own name as Indenture Trustee thereunder and no direction inconsistent therewith has been given by such Noteholders within 30 days of such written request, (iii) such Noteholder or Noteholders have offered in writing to the Indenture Trustee adequate indemnity or security reasonably satisfactory to the Indenture Trustee against the costs and expenses and liabilities to be incurred in compliance with such request, (iv) the Indenture Trustee for 30 days after its receipt of such notice, request and offer of indemnity has failed to institute any such proceedings and (v) an Event of Default has occurred and is continuing.

Id. at 30. This confirms that only the Indenture Trustee may pursue rights or remedies under the Indenture except in rare instances where the no action clause has been satisfied. Further, only certificate holders representing a majority of the voting rights in the trust have the ability to "direct in writing the time, method, and place of conducting any proceeding for any remedy available to the Indenture Trustee or ***exercising any trust or power conferred on the Indenture Trustee on behalf of or with respect to the Offered Notes.***" (*Id.* emphasis added.) Finally, the PPM provides

that "the voting rights evidenced by the Underlying Certificates are insufficient to cause or prevent the exercise of any remedies under the related Underlying Pooling and Servicing Agreement. . . ." (*Id.* at 14.)

ARGUMENT

I. A RESPONDENT MUST HOLD A CERTIFICATE ISSUED BY A SETTLEMENT TRUST TO HAVE STANDING.

A. A Respondent That Does Not Hold a Certificate Issued by a Settlement Trust Fails to Satisfy Article 77 Standing Requirements Because it is Not a Trust Beneficiary.

i. Article 77 Limits Standing to Beneficiaries.

Under Article 77, standing is limited to beneficiaries of the Settlement Trusts.[5] Article 77 provides that the "joinder and representation [in an Article 77 proceeding] of persons interested in express trusts" shall be governed by "[t]he provisions as to joinder and representation of persons interested in estates as provided in the surrogate's court procedure act." N.Y. C.P.L.R. 7703 (McKinney). The SCPA defines "Person interested" as "[a]ny person entitled or allegedly ***entitled to share as beneficiary*** in the estate or the trustee in bankruptcy or receiver of such person." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney) (emphasis added).[6] The definition further states that "[a] creditor shall not be deemed a person interested." *Id.* Thus, only beneficiaries of the trust(s) at issue in an Article 77 proceeding would qualify as "persons interested" who may take part in the proceeding.

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[5] The Court has power to enforce standing requirements in special proceedings like this one. *See, e.g.*, *Friends World Coll. v. Nicklin*, 249 A.D.2d 393, 394 (2d Dep't 1998) (affirming trial court that struck answer of respondent who lacked standing in special proceeding); CPLR § 7701 (Article 77 proceedings are "special proceeding[s]").

[6] Because Article 77 incorporates the SCPA's "provisions as to joinder and representations of persons interested in estates," the SCPA's definition of "Person interested" should be read as: "[a]ny person entitled or allegedly entitled to share as beneficiary in the [trust] estate . . . ." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney). Similarly, the SCPA's definition of "Beneficiary" should be read as: "[a]ny person entitled to any part or all of a[] [trust] estate." *Id.*

ii. The Only Beneficiaries of the Settlement Trusts are their Certificate Holders.

The same section of the SCPA that defines "Person interested" in a trust defines a "Beneficiary" as "[a]ny person entitled to any part or all of an estate." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney). Further, the Restatement (Third) of Trusts, widely cited by New York courts,[7] makes clear that only those *intended* to receive a benefit are beneficiaries: "[a] person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest; a person who merely benefits incidentally from the performance of the trust is not a beneficiary." Restatement (Third) of Trusts § 48 (2003) (emphasis added).

Here, the unambiguous plain text of the Governing Agreements – the best evidence of the settlors' intent – shows that certificateholders were the only intended beneficiaries under those contracts. *See Gary Friedrich Enterprises, LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 313 (2d Cir. 2013) (under New York law, "the best evidence of intent is the contract itself"). The Governing Agreements typically provide that the "Certificates eviden[ce] the entire beneficial ownership interest in the Trust Fund." *See e.g.* BSMF 2006-SL5 Pooling and Servicing Agreement (a true and correct copy of which is attached as Exhibit 3 to the Reed Aff.), at Preliminary Statement. This same or similar language is printed on the trust's certificates. *See id.* at pp. 71, 74, 76, 77, 79, 81, 83. The Governing Agreements also typically provide that the Trustees are to act for the benefit of the certificate holders. *See, e.g.*, BSABS 2006-AC1 Pooling and Servicing Agreement (a true and correct copy of which is attached as Exhibit 4 to the Reed Aff.), at § 2.06

[7] *See, e.g.*, *Matter of Wood*, 177 A.D.2d 161, 166 (2nd Dep't 1992) ("The Court of Appeals has recently cited the Restatement as an authority in trust administration. We adopt the quoted portion of the Restatement as an authoritative declaration of the duty of a trustee upon termination of a trust with a single remainderman.") (citations omitted). The Restatement of Trusts has been cited and relied upon in RMBS-related Article 77 proceedings. *See Matter of Bank of N.Y. Mellon*, 127 A.D.3d 120, 126 (1st Dep't 2015); *Matter of Bank of N.Y. Mellon*, 2014 WL 1057187 (N.Y. Sup. Ct. Jan. 31, 2014).

("The Trustee agrees to hold the Trust Fund and exercise the rights referred to above [in the agreement] *for the benefit of all present and future Holders of the Certificates* and the Insurer and to perform the duties set forth in this Agreement in accordance with its terms.") (emphasis added). Thus, the Governing Agreements and certificates make clear that only certificate holders are beneficiaries of the Settlement Trusts.

iii. The Challenged Respondents Are Not Beneficiaries.

The Challenged Respondents do not qualify as beneficiaries of the Settlement Trusts because, as they have admitted, they do not hold certificates issued by these trusts. While they claim to have standing by virtue of their holdings in CDOs, Re-REMICs and NIMS trusts, as detailed above (at pp. 4-9). the documents governing such vehicles typically provide that (i) only the trustees of those vehicles own the trust certificates that reside in those structures, and (ii) only those trustees are empowered to enforce the rights granted by the assets they hold – indeed, holders of certificates in those vehicles, such as the Challenged Respondents, are expressly prohibited from enforcing such rights.[8]

Courts that have interpreted typical "granting clauses" in CDO indentures and similar documents have roundly rejected attempts by investors and/or issuers to bring suits and otherwise assert rights attendant to the underlying assets in those structures – including, for example, underlying RMBS certificates held by the CDOs – on the grounds that they own no rights to assert. For example, several courts have rejected attempts by a CDO issuer to pursue contractual claims relating to RMBS certificates forming the corpus of the CDO trusts. In *Triaxx Prime CDO 2006-*

[8] Having admitted that they do not hold certificates issued by the Settlement Trusts, the Challenged Respondents bear the burden of establishing any alternate basis for standing that they may assert — e.g., that the documents governing the CDOs, Re-REMICs and NIMS trusts in which they hold certificates contain provisions that (contrary to standard practice) give certificate holders ownership of assets held by these vehicles so as to make them beneficiaries.

1, the court interpreted the granting clause excerpted above to be "broad enough to include the transfer [to the Trustee] of the right to bring contract claims relating to any instruments and securities [held by the CDO] … including the Collateral Debt Securities." 2017 WL 1103033 at *3 (quoting *Banque Arabe et Internaitionale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 151 (2d Cir. 1995) (assignment "clearly transferred the assignor's rights and interests" in the agreement, so it also transferred "any claims grounded in contract relating to that agreement"). Similarly, the First Department, in a comparable context involving Credit Default Swaps (CDS), explained a CDS investor lacked standing to sue because it had "granted nonparty HSBC Bank USA, as trustee, all of [the investor's] rights under the swap agreements, including the right to bring actions and proceedings." *CRAFT EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 139 A.D.3d 638, 639 (1st Dep't 2016). Courts have reached the same conclusions for re-REMICs. In *NCUA Bd. v. U.S. Bank*, 2016 U.S. Dist. LEXIS 23568, at *25-32 (S.D.N.Y. Feb. 25, 2016), the court found that a granting clause in a re-REMIC transferred all trust claims to the Indenture Trustee and holders of certificates in the re-REMIC could not sue on the RMBS trusts comprising the re-REMIC.

Two other courts in the Southern District have reached the same conclusion interpreting identical language in CDO indentures. *See Phoenix Light SF Ltd. v. U.S. Bank Nat'l. Ass'n.*, 2015 WL 2359358, at *2 (S.D.N.Y. May 18, 2015) (granting clause barred CDO issuer's claim because "a full assignment of this type [in the granting clause] divests plaintiffs of any rights they otherwise may have had to commence litigation on their own behalf.") and *House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2014 WL 1383703, at *16 (reaching the same result because, "a party that has assigned away its rights under a contract lacks standing to sue for breach of that contract"). As the court explained in *House of Europe Funding I, Ltd.*, it is the entity that ***owns*** the CDO's

assets that is "injured by actions that adversely affect the underlying assets." 2014 WL 1383703, at *11 (emphasis added). Here, by virtue of the "granting clause," the owner of the assets is the CDO Trustee—not the CDO Issuer and not the CDO investors.

The Challenged Respondents, therefore, cannot claim any "entitle[ment] to any part or all of a [Settlement Trust's] estate," N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney), as is required for beneficiary status under the SCPA and Article 77. Any such entitlement is held by the trustees of the various structures the Challenged Respondents have invested in, which as owners of certificates issued by the Settlement Trusts had notice of this proceeding and standing to appear here, but elected not to do so. That election is binding on the Challenged Respondents, who have no standing of their own.[9]

B. Courts Have Repeatedly Denied Standing to Parties Injured Indirectly.

In addition to Article 77's specific requirements that mandate that only direct certificate holders be granted standing, holders merely alleging an indirect interest also fail to satisfy the basic requirement of standing under New York law: "[t]he existence of an injury in fact – an actual legal stake in the matter being adjudicated." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772–73 (N.Y. 1991).

New York courts applying that standard have repeatedly denied standing to parties injured indirectly. For example, in *Calvary Hosp., Inc. v. Tweedy*, 2007 WL 1953412 (N.Y. Sup. Ct. Jun. 18, 2007), the New York Supreme Court held that the petitioner's indirect interest in refunds owed by the New York City Water Board to other entities did not permit the petitioner to sue for those refunds. In that case, several companies had hired the petitioner to review their bills from the New

[9] It also bears noting that affording standing to persons in the position of the Challenged Respondents – *i.e.*, those with only an indirect interest in an RMBS trust by virtue of an investment in another structure that owns certificates issued by the trust – would create a host of practical problems, such as increasing by multiples the number of persons who could appear in proceedings such as this one.

York City Water Board and seek refunds for overcharges in exchange for a fee of 50% of the savings from any successful claims. *Id.* The court held that the petitioner's "potential compensation by its clients . . . does not constitute an injury in fact – an actual legal stake in the matter being adjudicated." *Id.* *See also Grunewald v. Metro. Museum of Art*, 125 A.D.3d 438, 439 (1st Dep't 2015) (party "lacks standing to sue" when the "benefit to" it from a contract "is incidental and not direct"); *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 320 (1st Dep't 2011) (an "incidental benefit is insufficient to confer standing"); *Bank v. Allen*, 58 Misc.2d 150 (N.Y. Sup. Ct. 1968), (potential economic harm from grant of license to a competitor was not injury in fact sufficient for standing to challenge the license), *aff'd*, 35 A.D.2d 245 (3d Dep't 1970).

Likewise, New York courts consistently decline to allow entities with a contingent or remote interest to participate in Article 77 proceedings and other similar actions. In *One William St. Capital Mgt., LP v. Education Loan Trust IV*, 2015 N.Y. Misc. LEXIS 2639 (N.Y. Sup. Ct. 2015), a party, OWS, who sold notes but retained the right to repurchase them did not have standing to appear in an Article 77 proceeding regarding the payment on those notes. Even though the intent was for OWS "to receive the ultimate benefit of any income paid" on the notes, that benefit did not derive from the "Indenture pursuant to which the Notes were issued." *Id.* at *12. Because OWS did "not have legal title to the Notes," it could not make use of an Article 77 proceeding "despite its interest in the market value of the Notes." *Id.* at *14. Similarly, in *Matter of Financial Guar. Ins. Co.*, 2013 WL 4405157 (N.Y. Sup. Ct. Aug. 16, 2013), two groups sought to object to a rehabilitation plan in a special proceeding brought under New York Insurance Law Article 74. The objectors were not FGIC policyholders. Because the objectors were "no more than mere creditors of certain FGIC's creditors, . . . their consent [wa]s simply not required to consummate" the settlement. *Id.*; *see also In re Malasky*, 290 A.D.2d 631, 632 (3d Dep't 2002

(heirs with remainder interest in trust corpus do not have standing to participate in accounting of trust interest while sole beneficiary alive); *Matter of Mary XX*, 52 A.D.3d 983, 985 (3d Dep't 2008) (same); *Matter of Citibank, N.A.*, 2016 N.Y. Misc. LEXIS 4308, at *3-4 (Surrogate's Ct. N.Y. Cnty. Nov. 21, 2016) (heirs with remainder interest in trust corpus do not have standing to challenge trust's distributions to sole trust beneficiary).

Federal courts – which have the same injury in fact requirement as New York law, *see, e.g. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) – have also specifically held that an injury that is "derivative of an injury to a third party" is inadequate for standing. *See, e.g., Sanchez v. Blustein, Shapiro, Rich & Barone LLP*, No. 13-CV-8886 CS, 2014 WL 7339193, at *6 (S.D.N.Y. Dec. 23, 2014) (quoting *Excimer Assocs. v. LCA Vision, Inc.,* 292 F.3d 134, 140 (2d Cir. 2002)). In *Sanchez*, a plaintiff was found to lack standing to challenge a lien on condominium units where he did not own the units but rather had an ownership interest in an LLC that owned them. 2014 WL 7339193, at *6. Because he did not directly own the property at issue, his injury was "indirect" and insufficient for standing. *Id.*

The Challenged Respondents cannot establish a direct injury related to the Settlement Trusts in which they do not own certificates. To the extent they are injured by a decision by the Court in respect of those Settlement Trusts, such injury will take the form of a lessened return on an investment in a totally separate financial structure. Under the cases cited above, such an injury would be indirect, incidental and attenuated, and insufficient to ground standing for the Challenged Respondents in this proceeding.

CONCLUSION

WHEREFORE the Challenging Respondents respectfully requests that the Court limit standing in this proceeding to those parties that hold certificates in the Settlement Trusts and hold that the Challenged Respondents do not have standing to appear in connection with Settlement Trusts in which they do not hold certificates.

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