

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

Hon. Marcy S. Friedman

**MEMORANDUM OF
RESPONDENT
D. E. SHAW REFRACTION
PORTFOLIOS, L.L.C.
WITH RESPECT TO
STANDING**

Respondent D. E. Shaw Refraction Portfolios, L.L.C. (“DESRP”)

respectfully submits this Memorandum pursuant to the Court’s February 28, 2018 Order scheduling briefing on issues pertaining to standing of the various respondents to be heard with respect to the Settlement Trusts.¹

DESRP joins in the position of the Institutional Investors,² as expressed to the Court when standing has been discussed in the conferences held to date, that respondents who claim their interest in this proceeding through *indirect* holdings (*i.e.*,

¹ Capitalized terms not otherwise defined in this Memorandum are used with the same meanings as defined in the Petition.

² The term “Institutional Investors” refers to the investors identified in the Brief Statement of Certain Institutional Investors Concerning the Petition, dated January 29, 2018, Docket No. 136.

though CDOs, Re-REMICs, and/or NIM trusts (“Intervening Entities”)) as a matter of law lack standing to be heard in this proceeding.

The basis for DESRP’s position is that the governing agreements for such Intervening Entities generally include “granting clauses” pursuant to which all right, title and interest in the collateral of such Intervening Entities – in this case, the certificates in the RMBS that are the subject of the settlement – is granted to a trustee or other administrative party. In such circumstances, a holder in the Intervening Entity lacks standing with respect to the underlying collateral. *See, e.g., CRAFT EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 139 A.D.3d 638 (1st Dep’t 2016).

It is DESRP’s further position that any respondent that is asserting its position through an Intervening Entity should disclose the governing agreement(s) of the applicable Intervening Entities sufficiently in advance of the hearing on standing to allow review of those agreements as relates to standing.

Finally, the Petition presents the Court with discrete questions as to specific securitizations. DESRP further submits that a respondent lacks standing if it would not be entitled to a distribution of any portion of the Settlement Payment under any resolution of the discrete questions presented to the Court. This Article 77 proceeding is “For Judicial Instructions ... on the Administration and Distribution of a Settlement Payment.” If a respondent has no possible entitlement to any portion of the Settlement Payment, it should not be heard.

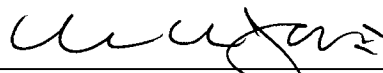
DESRP asserts the foregoing positions with respect to its four holdings at issue in this proceeding: SACO 2005-9, GPMF 2005-AR2, SAMI 2006-AR7 and SAMI 2007-AR1. Based on the disclosures made by the parties to date, DESRP believes that

there are parties claiming indirect standing through Intervening Entities, and/or parties with no possible interest in the resolution of the questions before the Court, with respect to one or more of the positions DESRP holds.

Dated: March 12, 2018

Respectfully submitted,

MILLER & WRUBEL P.C.



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