April 9, 2018

**VIA E-FILING AND HAND DELIVERY**

The Honorable Marcy S. Friedman
New York Supreme Court,
Commercial Division, Part 60
60 Centre Street, Courtroom 248
New York, NY 10007

RE: *In re application of Wells Fargo Bank, National Association, et. al.*, Index No. 657387/2017 (the "Article 77 Proceeding").

Dear Justice Friedman:

Pursuant to leave of Court on April 3, 2018, certain Interested Persons in the Article 77 Proceeding submit further information regarding Nover Ventures, LLC's ("Nover's") request that Interested Persons exchange supplemental affidavits clarifying whether their direct holdings are subject to repurchase (also referred to herein as "repo") agreements.

**Nover's Position:**

Nover respectfully requests that the Court require the Interested Persons to exchange a supplemental affirmation clarifying that, in their respective February 21, 2018 affidavits (the "Affidavits"), the Interested Persons did not aver to having a direct ownership in a Settlement Trust where their only interest(s) are subject to repurchase agreements. A number of Interested Persons have argued that those investors with "indirect" holdings in the Settlement Trusts[1] do not have standing to participate in this matter. Nover does not agree and seeks the additional information only so that, should the Court determine "indirect" interests do not confer standing, the Court may apply a consistent standard for all Interested Persons. As is more fully described below, a certificateholder whose only holdings in a Settlement Trust are subject to a repurchase

[1] As listed at Petition Ex. A, ECF Doc. No. 2.

agreement (i.e., that such party has sold its certificate, but has a right to repurchase such securities at a time in the future) is properly categorized as an "indirect" holder.

At the outset of this action, the Court entered a scheduling order that required Interested Persons to submit affidavits identifying the nature of an owner's interest in certificates in Settlement Trusts in addition to other information. The February 13, 2018 Scheduling Order, ECF Doc. No. 194, required Interested Parties to submit affidavits that:

> (i) describe the nature of the interest held; (ii) state whether it is a direct holding of a certificate and specify the relevant class, by either CUSIP number or Bloomberg ID, for each certificate held; and (iii) state whether the interest, if not a direct holding of a certificate, is synthetic in nature or held through a CDO, a credit default swap, a securities lending portfolio, a re-REMIC, a NIM trust, or any other form of interest that is not a direct holding of a certificate in one of the trusts listed in Exhibit A of the Petition (the "Trusts"), and . . . specify the form in which any such interest is held.

Scheduling Order at 1-2. The Scheduling Order requires the further disclosure sought herein because disclosing whether the only certificate ownership is through a repo agreement is necessary to fully and accurately "describe the nature of the interest held" and to address the arguments challenging standing raised for the first time on March 12, 2018. *See* Consolidated Memorandum of Law in Support of Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts, ECF Doc. No. 251 (March 12, 2018) ("Standing Motion"). Specifically, March 12, 2018[2] was the first time that those challenging standing argued that "a party that has assigned away its rights under a contract lacks standing to sue for breach of that contract." *See* Dkt. No. 251 at 13,15.

Nover, in turn, considered this argument in comparison to the Affidavits previously submitted. None of the Affidavits reference repo agreements, despite their prevalence in the RMBS marketplace. After due consideration, it became clear that the language of the affidavits

[2] Really, March 13, 2018 given that the Standing Motion was filed at approximately 10:26 p.m.

leaves open the possibility that certificates alleged to be "directly owned" may, in fact, be subject to repo agreements. Less than two weeks after learning of the Standing Movants' arguments, on March 27, 2018, Nover requested this supplemental disclosure, advising the Interested Persons' counsel:

> We are concerned that the alleged ownership in the investments are held through financing arrangements like repo. If there is a financing transaction, then the holding is, in fact, indirect. We would like clarity regarding this issue. Therefore, we request that the parties submit a further affirmation indicating that they are or are not the record owner of the CUSIP as reflected on the account of the custodian as of the date of their prior affirmation.

*See* March 27, 2018 email from G. Klein to Article 77 Interested Persons Counsel, attached as Exhibit A. Accordingly, Nover's request is both timely and appropriate.

Nor can there be any doubt that an Interested Party whose only interest in a Settlement Trust is subject to repurchase agreements is properly classified as possessing "indirect" holdings. Residential mortgage-backed securities are commonly traded as part of repo agreements.[3] *See Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 746 (3d Cir. 1989). "Repo [] transactions involve the transfer of securities from one party to another in exchange for cash, with the simultaneous agreement between the parties that the second party will return the securities to the first party at a specified time in exchange for slightly more cash." *Resolution Trust Corp. v. Aetna Cas. & Sur. Co. of Ill.*, 25 F.3d 570, 572 (7th Cir. 1994) (parentheticals omitted). A repo agreement consists of "two separate but related transactions: (1) a sale by a party (the 'repo seller') of securities in exchange for cash and (2) an agreement by the repo seller to repurchase the same or equivalent securities for a specified price at a future date." *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F. Supp. 2d 275, 298 (S.D.N.Y. 1998).

[3] "The mobility of repo securities is what makes them a key tool of the funding markets, enabling dealers to continuously convert their securities inventory to cash to use to finance the purchase of yet additional securities and thereby make markets." *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F. Supp. 2d 275, 302 (S.D.N.Y. 1998).

"Critical to the usefulness, flexibility, and liquidity of the repo market is the transfer of ownership of the repo securities to the repo buyer and the repo buyer's ability to sell, transfer, or pledge the securities purchased in a repo transaction during its term." *Id.* at 302. "[R]epo 'lenders' take title to the securities received and can trade, sell or pledge them." *S.E.C. v. Drysdale Sec. Corp.*, 785 F.2d 38, 41 (2d Cir. 1986). "In contexts such as commercial law and the antifraud provisions of the federal securities law, repos generally are viewed as purchases and sales." *Granite Partners*, 17 F. Supp. 2d at 298. Thus, while a certificate is subject to a repo transaction, ***the certificateholder does not have voting rights to that certificate***. *See, e.g.*, https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/icma-ercc-publications/frequently-asked-questions-on-repo/23-who-can-exercise-the-voting-rights-and-decide-on-corporate-actions-attached-to-equity-and-corporate-bonds-being-used-as-collateral-in-a-repo/ (last accessed April 8, 2018).

A "repo seller" has sold its interest to another entity, but retained the right to repurchase that interest at a later time. A repo seller, therefore, does not have ownership or the right to vote those certificates' interests. This category of "ownership" would be considered "indirect" under the standard proposed by those challenging standing. *See* Standing Motion at 13 ("a party that has assigned away its rights under a contract lacks standing to sue for breach of that contract" (internal quotation marks omitted)); *id.* at 15 ("New York Courts consistently decline to allow entities with a contingent or remote interest to participate in Article 77 proceedings[.]").

Conversely, a "repo buyer" controls record ownership and voting rights. Although a repo buyer is required to transfer ownership and attendant voting rights to another at a particular date, oftentimes even on demand, because the repo buyer is the entity that is entitled to vote for that certificate, it is "direct" under the standard articulated by those challenging standing.

To the extent that any Interested Person has voluntarily limited its interest in a Settlement Trust by entering into a repo agreement, the Court and other parties are entitled to know.

Frankly, Nover was surprised by the refusal to exchange such a short supplemental affidavit, particularly in light of the fact that investors previously asserted that it is "essential" to understand the nature of the other parties' interests to assess standing. *See* Joint Letter to the Court, ECF Doc. No. 192, at 5 (Feb. 12, 2018) ("It is, therefore, essential that the parties understand the nature and class of each others' interests if they are to have an ability to assess and, where necessary, challenge standing.")

In sum, Nover contends that all Interested Persons who have appeared in this proceeding have the right to and should be heard. However, if the Court is going to limit standing, it would be prejudicial to apply that standard unevenly. Nover thus is entitled to information so that it can apprise the Court of a fair and even standard and, for that reason, respectfully requests the Court order that the Interested Persons exchange supplemental affidavits stating whether all of their "direct" holdings in the Settlement Trusts, disclosed in their respective Affidavits were, or are, subject to a repo agreement or other type of financing arrangement and, if so, identifying same.

Nover does not seek this information for purposes of delay, but so that justice may be achieved. Given that Nover's response to the Standing Motion is due April 12, 2018, should the Court order the relief requested herein, Nover requests leave for a short, supplemental submission following receipt of the additional affidavits or a brief adjournment of the April 12, 2018 deadline, preferably without adjournment of the standing hearing on May 7, 2018.

**Joinder in Nover's Position:**

HBK Master Fund L.P. has joined in Nover's position.

**Institutional Investors' Position:**

The Institutional Investors[4] submit this response to Nover's request that all parties submit supplemental sworn affirmations stating whether any of their directly held certificates are subject to a short-term financing transaction known as a repurchase agreement or "repo."[5]

The Court should deny Nover's belated discovery request for two reasons. First, the request is untimely. Second, the requested affirmations are irrelevant to the Court's consideration of the pending standing motion because Nover has not challenged any other party's standing, and it admits it does not intend to newly challenge any other party's standing on the basis of the requested supplemental affirmations.

Nover's request for supplemental affirmations is untimely.

Nover litigated the disclosures that would be required before the Court entered the February 13 Scheduling Order (Dkt. 194) and never mentioned any need or basis for discovery of repo financings. After the Court entered the February 13 Scheduling Order, the Institutional Investors submitted sixteen sworn affidavits confirming they owned the certificates at issue in their appearance.

On March 8, the Court set the schedule for briefing on standing issues. *See* Dkt. 243. On March 12, Tilden Park, the Institutional Investors, AIG, DW Partners LP, and the Olifant Funds submitted a joint motion challenging the standing of indirect holders like Nover in this proceeding, and arguing that only certificateholders in the trusts had standing to appear. *See* Dkt. 251. Nover did not file a brief challenging any other party's standing. Nover's response to the joint brief challenging its standing is due on April 12.

---

[4] The following parties also join this submission: AIG, DW Partners, and Olifant Funds.

[5] Under a typical repo financing, a party holding a security would temporarily transfer such instrument to a lender in exchange for short-term financing—even overnight financing. Typically, such financing is subject to early termination at the option of the borrower (i.e. at the option of the holder of the security being temporarily transferred to the lender during the term of the financing).

On March 27, Nover first requested the supplemental affirmations at issue here, despite having received all parties' detailed holdings affidavits five weeks earlier (on February 21), and having received the joint brief challenging Nover's standing two weeks earlier (on March 12). Nover has offered no justification for its delay in requesting the supplemental affirmations at this point, just before its April 12 standing response comes due.

Having previously argued that the February 13 Scheduling Order went too far, Nover now argues it did not go far enough. The time to raise that objection, however, has long passed. The parties already litigated the scope of the holdings disclosures that would be exchanged, and the Court overruled Nover's objections to the February 13 Schedule Order. Further, if Nover had objections to the form of the holdings affidavits it received on February 21, it should have raised them shortly after it received them—not five weeks later.

Nover's requested supplemental affirmations are irrelevant to the pending standing motion.

Nover has not challenged any respondent's standing to appear in this proceeding, and when the parties spoke with the Court on April 3rd, Nover stated that it did not intend to raise a belated standing challenge on the basis of the supplemental affirmations it seeks. Asked to explain the need for the supplemental affirmations when it did not intend to use them to seek any relief, Nover's only response was that they might expose "hypocrisy" on the part of some of the parties who had challenged Nover's standing.

Putting aside the fact that Nover has not articulated any basis to believe the supplemental affirmations will expose any "hypocrisy," the question is ultimately an irrelevant one. The Respondents challenging Nover's standing have put forward a clear basis for doing so: Nover does not own interests in numerous Trusts on which it seeks to appear here and, as a consequence, it lacks standing as a matter of law. The "hypocrisy" Nover hopes to find would not be a rebuttal to that argument, and it would not be a basis for the Court to grant Nover

standing that it does not otherwise have. Accordingly, it would be a waste of the other Respondents' time to prepare the supplemental affirmations and a waste of the Court's time to read them. For this reason, too, Nover's application should be denied.

In sum, the Institutional Investors respectfully submit that Nover's request for all parties to "redo" their holdings affirmations should be denied.

Respectfully submitted,

MCKOOL SMITH, P.C.

By: /s/ Gayle R. Klein
Gayle R. Klein
Robert W. Scheef
David I. Schiefelbein

One Bryant Park, 47th Floor
New York, New York 10036
gklein@mckoolsmith.com
rscheef@mckoolsmith.com
dschiefelbein@mckoolsmith.com
(t) (212) 402-9400
(f) (212) 402-9444

*Attorneys for Nover Ventures, LLC*

WARNER PARTNERS, P.C.

By: /s/ Kenneth E. Warner
Kenneth E. Warner

950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS LLP
Kathy D. Patrick (pro hac vice forthcoming)
David M. Sheeren (pro hac vice forthcoming)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

*Attorneys for The Institutional Investors*

cc: Counsel of Record for All Parties (via ECF)

# EXHIBIT A

**Subject:** FW: [EXTERNAL] JPM Art. 77 ProceedingDiscovery Regarding Standing

**From:** Gayle R. Klein
**Sent:** Tuesday, March 27, 2018 8:55 PM
**To:** John M. Lundin
**Cc:** Friedman, Daniel (x2378); Bentley, Philip; David Schiefelbein; David Sheeren; Charles R. Jacob; brian.fraser@akerman.com; KPATRICK@GIBBSBRUNS.COM; kevinreed@quinnemanuel.com; ralperstein@beckerglynn.com; Nicholls@perrylaw.net; hoffner@hoffnerpllc.com; akushner@dklitigation.com; jordangoldstein@quinnemanuel.com; Docketing; glee@rossbizlaw.com; pmau@rossbizlaw.com; Lee.Gayer@ropesgray.com; avinogradov@schlaw.com; kwarner@warnerpartnerslaw.com; dhawthorne@axinn.com; Kerrin T. Klein; Joshua.Sturm@ropesgray.com; Denise Lopez; mghose@beckerglynn.com; Erik S. Groothuis; hhill@beckerglynn.com; phillip.spinella@akerman.com; Seth D. Allen; Tomlinson, Peter W. (x2977); Dockets; Mayer, Thomas Moers; jhochman@schlaw.com; Elizabeth M. Quinn; saltreuter@beckerglynn.com; Ricardo, Henry J. (x2340); paul.lang@ropesgray.com; courtalert@ropesgray.com; Pollack, Andrew; fgilman@axinn.com; Allinson@perrylaw.net; CHoupt@mayerbrown.com; Stephen.Mertz@FaegreBD.com; Matthew.Enriquez@FaegreBD.com; krademacher@morganlewis.com; Alexander.Lorenzo@alston.com; JAncone@mayerbrown.com; robert.schnell@faegrebd.com; Michael.Doty@FaegreBD.com; MIngber@mayerbrown.com; kkollmeyer@jonesday.com; nyadava@JonesDay.com; John McFerrin-Clancy; Niall D. O'Murchadha; kwarner@warnerpc.com; MWargin@mayerbrown.com; dmargolis@ellington.com; Mauricio.Espana@dechert.com; Shapiro, Alexander (x2935)
**Subject:** Re: [EXTERNAL] JPM Art. 77 ProceedingDiscovery Regarding Standing

We disagree that the court has ordered indentures to be produced. We are amenable to a meet and confer on Friday morning or Monday morning.

Separately, the parties' affirmations do not make clear that the record owner of the CUSIP, as reflected on the account of the custodian, is the party who has appeared in this action (or their asset manager). We are concerned that the alleged ownership in the investments are held through financing arrangements like repo. If there is a financing transaction, then the holding is, in fact, indirect. We would like clarity regarding this issue. Therefore, we request that the parties submit a further affirmation indicating that they are or are not the record owner of the CUSIP as reflected on the account of the custodian as of the date of their prior affirmation.

Gayle Klein