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BY NYSCEF AND HAND DELIVERY
Honorable Marcy Friedman
Commercial Division, N.Y. Supreme Court, New York County
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 given on April 3 and April 20, 2018, Respondent HBK Master Fund L.P. ("HBK"), joined by Respondents Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (the "Olifant Funds"), respectfully requests that the Court order the use of the Commercial Division Model Stipulation and Order for the Production and Exchange of Confidential Information (*see* Exhibit A) in this proceeding and deem the information previously exchanged pursuant to the February 13, 2018 Scheduling Order as Confidential Information under that order.

This dispute is not over whether there should be a protective order, but rather over the scope of that order, including whether evidence already exchanged, or to be exchanged, may be designated as "attorneys' eyes only" or, worse, "outside counsel eyes only."

"Under New York law, there is a broad presumption that the public is entitled to access judicial proceedings and court records." *See Mosallem v. Berenson*, 76 A.D.3d 345, 348, 905 N.Y.S.2d 575, 578 (1st Dep't 2010); *see also Matter of Hofmann*, 284 A.D.2d 92, 93–94, 727 N.Y.S.2d 84 (2001) ("Confidentiality is clearly the exception, not the rule."); *Gillespie v. Charter Commc'ns*, 133 F. Supp. 3d 1195, 1201 – 1202 (E.D. Mo. 2015) ("[A]n

'attorneys' eyes only' designation is a drastic remedy given its impact on the party entitled to the information.") (internal quotations omitted). Here, Nover seeks not only to prevent the public from viewing evidence, but to **prevent the Respondents themselves from seeing evidence**, by designating it as "outside counsel eyes only"—meaning that no employee of any Respondent, including in-house counsel, may review this information.

As the party seeking to include provisions for attorneys' or outside counsel's eyes only in the protective order and to designate documents as outside counsel eyes only, Nover bears the burden of showing the propriety of such a designation. *See American Stock Transfer & Trust Co., LLC v. Alliance Advisors, LLC*, Index No. 104249/2011, 2014 WL 477364, at *1 (Sup. Ct. N.Y. Cty. Feb. 3, 2014) ("With respect to plaintiffs' contention that the confidentiality agreement should have a provision for 'attorneys' eyes only' . . . plaintiffs have failed to carry [their] burden . . . .").

To the extent that Nover attempts to shift this burden to HBK because the Court's February 13 Scheduling Order allowed the parties to produce this information on an "outside counsel eyes only basis," that argument is meritless. At the beginning of this proceeding, the Respondents agreed to produce party affidavits setting forth their respective holdings. While Nover wanted this information to be exchanged on outside-counsel eyes only basis, HBK objected on the grounds that "[i]t is important that there be a mechanism for the exchange of holdings information so people can discuss settlement," among other reasons. (Ex. B.) HBK agreed not to press its objections to the proposed order that became the February 13 Scheduling Order (Dkt. No. 194) to avoid delaying this

proceeding, but HBK reserved its right to have the Court resolve the issue themselves. (*See id*.) HBK's attempt to be accommodating does not relieve Nover of its burden at law.

Nover does not even approach the stringent requirements for the extraordinary relief that it seeks. A designation of "outside counsel eyes only," is proper **only** where the information is a trade secret and where the parties are direct business competitors such that allowing even an attorney of the opposing party to view the documents would create competitive harm. *See SNI/SI Networks LLC v. DIRECTV*, LLC, 132 A.D.3d 616, 617, 18 N.Y.S.3d 342 (1st Dep't 2015) ("As to plaintiff's request to designate the sought information for 'outside counsel eyes only,' the parties are not business competitors, and plaintiff's claim that permitting an in-house counsel of defendant to view the information 'would visit needless competitive harm on [plaintiff]' is conclusory."). As now-Justice Andrea Masley noted regarding the draft New York City Bar Association's model confidentiality order for Commercial Division cases: "[a]s for 'Attorneys' Eyes Only,' the Committee decided not to include the option for such protection primarily out of a concern that it would be invoked far more than necessary." (*See* Ex. A.) The Committee apparently did not consider the possibility of a "outside counsel eyes only" designation.

To the extent Respondents compete in purchasing 10-year old RMBS, their holdings are not so secret as to warrant such a designation. Moreover, an outside counsel only designation significantly interferes with counsel's ability to represent their client. For example, any settlement in this proceeding will require the parties to agree as to the distribution of the Settlement Funds on a trust-by-trust basis, but Nover does not want

trust-by-trust holdings information disclosed to Respondents. To be sure, the **general** nature of Nover's holdings are not secret at all because, based on the positions Nover (and the other Respondents), any person with an understanding of RMBS trusts can intuit **generally** what each Respondent holds based on the positions taken in this action. However, if a Respondent does not know **exactly** what an opponent's holding are, settlement will be difficult to reach because Respondents cannot accurately calculate the settlement value for a trust.

Indeed, Nover cannot even meet the lower burden of designating these documents as attorneys' eyes only. New York courts have broadly agreed that an attorneys' eyes only designation is only appropriate if the documents sought constitute a "trade secret," the release of which would harm the producing party. *See, e.g.*, *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 326, 814 N.Y.S.2d 110 (1st Dep't 2006). Nover cannot show that the identity of its holdings in the Settlement Trusts are confidential trade secrets. This is not the type of information, such as a secret formula or patent, that is a trade secret under New York law. Nor can Nover show how it will be harmed by a confidential designation—its conclusory statement that disclosure "would reveal Nover's confidential financial and proprietary information, including the scope of its holdings, thereby threatening its competitive standing in the marketplace," (Dkt. No 347 ¶ 9), is insufficient to meet Nover's burden, particularly where Respondents already can intuit **generally** what Nover holds based on the positions it has taken.

These facts put this case on all fours with *Gryphon*, *supra*, where the First Department reversed an order designating documents "Attorney's Eyes Only," holding that "[r]ecords and/or documents should not be sealed simply to enable one of the parties to retain an advantage over the other party when such sealing prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action against them." *Id*. at 326. In *Gryphon*, the documents sought to be marked "Attorneys' Eyes Only" stated the amount that the plaintiffs had paid for notes guaranteed by the defendants, the production of which plaintiffs argued would prejudice them in settlement negotiations. *Id.* at 325. Defendants argued that this restriction would "interfere with their counsel's ability to consult with [defendants]," particularly given that defendants were not competitors of the plaintiffs in business. *Id*. The First Department held that the designation, and thus the sealing of these documents, was inappropriate in these circumstances. *Id.*; *see also Tradewell, Inc. v. Am. Sensors Elecs., Inc*., No. 96 CIV. 2474 DAB, 1997 WL 79867, at *1 (S.D.N.Y. Feb. 25, 1997) (denying attorneys' eyes only where "precluding defendant's counsel from showing this information to defendant is likely to interfere with counsel's ability to represent their client.").

Respectfully Submitted,

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