

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

PRESENT: MARCY S. FRIEDMAN Justice

PART 60

In the matter of the application of WELLS FARGO BANK, NATIONAL ASSOCIATION, et al. Petitioners,

INDEX NO. 657387/2017

ORDER

For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.

The following papers, numbered 1 to were read: Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s); Answering Affidavits — Exhibits No (s); Replying Affidavits No (s).

By conference call on May 10, 2018, the court heard argument on the record on two disputes: 1) the application of Nover Ventures, LLC (Nover) and HBK Master Fund L.P. (HBK), by letter dated April 9, 2018, to require Interested Persons to exchange supplemental affidavits clarifying whether their holdings are subject to repurchase or "repo" agreements (referred to as "Repo Disclosure"); and 2) the application of HBK and Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (Olifant Funds), by letter dated April 26, 2018, for entry of a confidentiality order that would not include an "attorneys' eyes only" or "outside attorneys' eyes only" designation, and would modify the court's February 13, 2018 Scheduling Order to allow information produced subject to an "outside attorneys' eyes only" designation to be shared with the attorneys' clients.

Repo Disclosure

Nover filed a Notice of Appearance in this proceeding, dated January 29, 2018, and was present at the January 31, 2018 initial status conference. Following the conference, Nover participated in the negotiation of a proposed scheduling order, intended to provide for, among other things, discovery required to assess standing. On February 5, 2018, all parties except Nover submitted an agreed proposed scheduling order, and Nover submitted a competing version of the proposed scheduling order. On February 12, 2018, the parties submitted a joint letter addressing disputes between Nover and the remaining parties with respect to the scheduling order. On February 9 and February 13, 2018 the court heard the parties on the record. Nover took the position that very limited discovery was required for standing purposes, and objected to disclosure to the parties of the nature of the interests it held in the trusts. None of the parties' submissions raised arguments concerning Repo Disclosure. The court issued the February 13, 2018 Scheduling Order, which specified the disclosure to be made concerning the parties' holdings in the trusts and made directives on other issues. The February 13, 2018 Scheduling Order did not address Repo Disclosure.

On March 9, 2018, the court held a conference call on the record to address a request by the Institutional Investors for additional discovery in support of their motion challenging standing of investors holding indirect interests in the trusts. This request was for the governing agreements of entities through which such investors claimed their interests. (See March 9, 2018 transcript at 4.) Nover did not seek Repo Disclosure on the March 9 conference call. Consistent with a deadline agreed to by the parties, and as ordered by the court, opening briefs challenging standing were filed on March 12, 2018.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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Nover first made its request for Repo Disclosure to opposing counsel on March 27, 2018, By conference call on April 3, 2018, Nover brought the request to the court. In the parties' joint letter dated April 9, 2018, HBK joined in Nover's position.

The court holds that the request for Repo Disclosure is untimely, given that Nover failed to request discovery related to standing until after the deadline for the filing of standing motions had passed. Moreover, Nover has represented that it will not in fact challenge the standing of any party on the basis that it holds interests subject to repo agreements. No other party has indicated that it intends to challenge standing on this basis. Under these circumstances, the court declines to order the requested discovery.

Outside Attorneys' Eyes Only Designation

As noted above, the letter application seeks entry of a confidentiality order that would not include an "attorneys' eyes only" or "outside attorneys' eyes only" designation, and would remove the "outside attorneys' eyes only" designation from information already exchanged pursuant to the February 13, 2018 Scheduling Order. HBK and Olifant Funds have made no showing that the removal of this designation is necessary for any purpose other than the facilitation of settlement negotiations. (See HBK and Olifant Funds letter dated April 26, 2018, and Nover response dated May 3, 2018.) The court is not persuaded by applicants' conclusory assertions that the information is not confidential or proprietary information that could be used by other parties to this proceeding for their competitive advantage.

Moreover, to the extent that, during the May 10, 2018 hearing on the application, Olifant Funds argued that the designation should be lifted for purposes relevant to standing challenges, the issue is moot. The application was first made by conference call on April 3, 2018, after the standing motion was filed and briefing had begun. No party argued that lifting of the designation was necessary to challenge standing, and the standing motion is now fully submitted.

The application will accordingly be denied. The court recognizes, however, that prior to the court's issuance of the February 13, 2018 Scheduling Order, HBK sought to preserve the right to object to the "outside attorneys' eyes only" designation. (See February 5, 2018 letter, submitting agreed proposed scheduling order.) The parties' confidentiality order may therefore provide that in the event a party claims that lifting the "outside attorneys' eyes only" designation is necessary to adequately represent a client at a later stage of the litigation, such relief may be sought upon a detailed showing as to the basis therefor.

It is accordingly hereby ORDERED that Nover's and HBK's application for Repo Disclosure is denied; and it is further

ORDERED that the application of HBK and the Olifant Funds for entry of a confidentiality order that would not include an "attorneys' eyes only" or "outside attorneys' eyes only" designation, and would remove the "outside attorneys' eyes only" designation from information already exchanged, is denied without prejudice.

Dated: 5-22-18

Marcy S. Friedman, J.S.C.
MARCY S. FRIEDMAN, JSC

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate:.....Motion is: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
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