AXINN

DONALD W. HAWTHORNE
(212) 261-5665
DHAWTHORNE@AXINN.COM

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VIA E-FILING AND HAND DELIVERY

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:

This submission is made on behalf of the below signed participants in the Article 77 Proceeding further to Your Honor's request that the participants advise how long it would take for their respective trustees (i.e. those of the relevant NIMs, CDOs, and/or Re-REMIC trusts) to appear in this proceeding in a representative capacity. The participants' positions are set forth below.

The Institutional Investors

First and foremost, the Institutional Investors maintain their position that the involvement of any trustees in the proceeding at this late date is untimely and will prejudice the interests of certificateholders who appeared timely. The Institutional Investors respectfully request that, in the event the Court rules that the indirect holders lack standing but nevertheless permits their trustees to appear in this proceeding, the Court set a firm deadline of three weeks from today for those arrangements to be finalized.[1]

The Institutional Investors respectfully submit that without such a firm deadline, the negotiation of directions and indemnities would likely take months to finalize, given the large number of trusts and the difficulty of the issues to be negotiated. Several steps are involved. ***First***, an investor must verify that it holds the requisite percentage interests in the CDO, NIM, or Re-Remic trust (typically 25% or 50%), which can cause delay to the extent that third parties such as

[1] The AIG Respondents, Tilden Park, Ellington Management Group L.L.C., DW Partners LP, and the Olifant Funds join in the position set forth herein.

custodian banks or the Depository Trust Company are involved. ***Second***, the specific language of the direction must be negotiated; the details would be complicated here, because, among other reasons, the indirect holders and the trustees must agree on the precise actions the trustees are being directed to take in this proceeding, and how much control, if any, the holders would be able to exercise over the litigation. ***Third***, the scope of the indemnity must be negotiated, which is perhaps the most difficult aspect of this process. Trustees typically insist on receipt of indemnities protecting the trustees from *any* risk of incurring costs, expenses, or liabilities in complying with an investor direction. The trustee may also require a significant cash deposit to cover the anticipated costs of the litigation.[2] All aspects of this indemnity would be carefully negotiated by each side. A letter from a NIM trustee to HBK nicely illustrates these requirements:

> *For most of the NIM Trusts, HBK does not appear to have the requisite 'more than 50%' of voting rights needed to provide a direction. Even where HBK appears to have sufficient voting rights, it has not provided an indemnity satisfactory to the Indenture Trustee against the costs, expenses, and liabilities that might be incurred in compliance with its purported direction, as expressly required by the [NIM] Indentures. In addition, there are no funds available in the NIM Trusts to finance an appearance by the Indenture Trustee in the Article 77 Proceeding or other related activities, and the Indenture Trustee is not obligated to finance any such activities on its own.*[3]

Of course, each trustee's requirements will depend on the language of the indenture. However, just as the indirect holders knew that their indentures contained broad Granting Clauses and No Action Clauses preventing them from unilaterally exercising rights attendant to the underlying RMBS certificates, they also knew that in order to direct their trustees to take action on their behalf, they would need to comply with their indentures, even if that would require significant financial commitments. The Institutional Investors respectfully submit that this process, even if it has already begun (as in the case of HBK), could reasonably be expected to take months to conclude, without a firm, three-week deadline being set by the Court.

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[2] As Nover alluded to in a recent letter to the Court, some trustees insist that an investor pay for two sets of lawyers—one set as general trustee counsel, and another set to actually prosecute the litigation. *See* May 14, 2018 Nover Letter (Dkt. 376) ("Nover is informed that, in addition to the burden and expense of negotiating a direction and indemnity, Nover also may be required to pay for separate counsel to appear on behalf of the trustee for each CDO.")

[3] *See* Jan. 25, 2018 letter from HBK's trustee to HBK (attached as Ex. 11 to Lundin Aff. (Dkt. 316)).

HBK's Position

Prior to the filing of the joint motion to limit standing to direct certificateholders in the settlement trusts (the "Standing Motion"), and again just after the Standing Motion was filed, HBK discussed with U.S. Bank, the NIM Trustee, having U.S. Bank appear in this action to represent the interests of NIM certificateholders. U.S. Bank's consistent position was that HBK, not U.S. Bank, was the interested party here, and thus that U.S. Bank would not appear. However, U.S. Bank ultimately agreed that it would move to substitute for HBK, and participate in this proceeding at HBK's direction, if the Court required it to do so. However, HBK and U.S. Bank also agree that they should not be forced to enter into a direction and indemnity (D&I) agreement until the Court decides whether that is necessary to preserve HBK's ability to have its position heard in this proceeding.

Shortly after the May 7, 2018, oral argument on the Standing Motion, Plaintiffs again reached out to U.S. Bank's counsel and asked that the parties begin the process of negotiating a D&I agreement for U.S. Bank's potential substitution in this action for HBK. U.S. Bank's counsel told HBK to communicate directly with U.S. Bank. HBK communicated with U.S. Bank, which provided HBK with a model D&I agreement but said that negotiation of the agreement would have to await U.S. Bank's engagement of separate outside counsel. Last week we were told that such counsel finally had been engaged. Since that engagement, HBK has spoken to that counsel and provided U.S. Bank's separate counsel with its comments on the model D&I agreement.

There do not appear to be any major conceptual differences between the parties regarding the D&I agreement, thus the parties will merely have to negotiate the details of the D&I agreement. HBK estimates that it will be able to agree to terms with U.S. Bank on a D&I agreement, and thus be able to move to have U.S. Bank substitute as a party for HBK in this proceeding, in approximately three to five weeks from the date of this letter, should the Court require U.S. Bank to substitute for HBK. U.S. Bank's separate counsel have told us that they agree that this is a reasonable estimate of how long this process will take.

The Court should reject the Institutional Investors' request for an arbitrary deadline of three weeks for HBK's "arrangements to be finalized." The Institutional Investors ask the Court to deny HBK the right to have its positions heard in this proceeding, which could cost HBK millions of dollars, if these negotiations take three weeks and one day, or five weeks, or more, without any explanation of how the Institutional Investors selected this arbitrary amount of time or of how they would be prejudiced should this process take longer than three weeks. Moreover, to the extent that by "finalized" the Institutional Investors mean that the Court should require a signed D&I and substitution to take place before this deadline, this would require HBK and U.S. Bank to finalize an agreement that neither HBK nor U.S. Bank believes is necessary, and which would necessarily include the placement of a substantial sum of money into an indemnity account for an entirely hypothetical substitution, before the Court rules that HBK itself does not have standing. The Court should give not any weight to the Institutional Investors' self-interested claim that it will take **months** to finalize a D&I agreement and arrange for substitution, which is based not on any knowledge of the actual status of HBK's negotiations with U.S. Bank's separate counsel, but rather on the Institutional Investors' interest in overstating the time it will take so as to convince the Court to deny HBK the right to appear in this action at all. If the Court were at all concerned with the potential for a delay of months, the proper course would be to set a reasonable deadline, not the Institutional Investors' arbitrary three-week deadline, for the completion of negotiation of the D&I, but to provide that the D&I does not have to be signed or the motion for substitution made until after the Court decides the Standing Motion, not to require HBK and U.S. Bank to enter into a D&I agreement for a hypothetical substitution that neither party believes is necessary and that the Court has not ruled is necessary to preserve HBK's ability to have its position heard in this proceeding.

Poetic and Prophet's Position

Poetic and Prophet ("P&P") are in the process of negotiating a direction and indemnity agreement ("D&I") with U.S. Bank as Indenture Trustee for their NIM Trust holdings. As set forth in P&P's opposition to the Standing Motion, U.S. Bank has said that it will appear in this proceeding on behalf of those NIM Trusts, at P&P's direction, subject to the negotiation of an

appropriate D&I, in the event that the Court rules that it is necessary for it do so. Last week, U.S. Bank engaged separate counsel (Perkins Coie) to represent it in those negotiations, and provided us with a model D&I. Based on our discussions so far with U.S. Bank and its new counsel, we anticipate that it may take another three to five weeks to finalize the terms of the D&I, and we are currently working toward that goal. U.S. Bank's counsel have told us that they agree that this is a reasonable estimate.

With respect to Challenging Respondents' arbitrary request for a "three week deadline," P&P join in HBK's response.

Nover Ventures, LLC:

Consistent with its representations to the Court in its May 14 submission, Nover has begun making arrangements to have two CDO trustees, U.S. Bank and The Bank of New York Mellon, appear in this proceeding. Nover has had communications with counsel for both U.S. Bank and The Bank of New York Mellon. Prior to appearing in this proceeding, each of the trustees will require a direction and indemnity. Such an agreement will require significant negotiation regarding multiple items, including without limitation negotiation regarding which counsel may appear in this proceeding on behalf of the trustees for the CDOs and whether Nover or the CDOs will be required to pay for such counsel. Holders, such as Nover, already bear considerable expense participating in this proceeding and would like sufficient opportunity to seek to avoid paying for three different attorneys to assert the same arguments. Given that Nover, U.S. Bank, and The Bank of New York Mellon are already participants in this proceeding and are thereby cognizant of the need to move swiftly, we understand that each believe that the direction and indemnity agreements can be finalized within 3-4 weeks. However, if the trustees will require additional counsel, such new counsel may require additional time to get up to speed before they can actively participate in merits briefing.

Respectfully submitted,

AXINN, VELTROP & HARKRIDER LLP

By: /s/ Felix Gilman
Donald W. Hawthorne
Felix J. Gilman
114 W 47th Street
New York, NY 10036
Tel: 212.728.2200
Fax: 212.728.2201
dhawthorne@axinn.com
fgilman@axinn.com

Attorneys for Respondents Poetic Holdings VI LLC, Poetic Holdings VII LLC and affiliates and Prophet Mortgage Opportunities LP

GIBBS & BRUNS LLP

By: /s/ David M. Sheeren
Kathy D. Patrick
David M. Sheeren
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for The Institutional Investors

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

SCHLAM STONE & DOLAN LLP

By: /s/ John M. Lundin
John M. Lundin
Niall D. 0 Murchadha
Seth D. Allen

26 Broadway, 18th Floor
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
E-mail: jlundin@schlamstone.com
nomurchadha@schlamstone.com
sallen@schlamstone.com

-and

John J.D. McFerrin-Clancy

17 State Street, 40th Floor
New York, New York 10004
Telephone: (646) 771-7377
E-mail: jmc@mcferrin-clancy.com

Attorneys for Respondent HBK Master Fund L.P.

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