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

Honorable Marcy S. Friedman

Motion Sequence 010

CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO AMEND HBK'S ANSWER TO THE PETITION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutory Authorities

The Challenging Respondents, by and through their undersigned counsel, respectfully submit this memorandum of law, together with the Affidavit of David Sheeren ("Sheeren Aff.") and the exhibits thereto, in opposition to the motion of Respondent HBK Master Fund L.P. ("HBK") to amend its answer to the Petition in this Article 77 proceeding.

BACKGROUND

HBK filed its Answer to the Petition in this Article 77 proceeding on January 29, 2018. In that Answer, HBK asserted that it owns securities issued by a number of NIM trusts that hold certificates issued by 21 of the Subject Trusts at issue here. HBK did *not* claim that it held any direct interests in any of the Settlement Trusts.

Two days later, at a January 31, 2018 status conference in this matter, the Institutional Investors informed the Court that they and a number of other Respondents intended to file a motion asking the Court to rule that HBK and other Respondents who hold interests in Subject Trusts indirectly, *i.e.*, through other investment vehicles such as NIM trusts, lack standing to appear in this proceeding. On February 13, 2018, the Court issued an order setting a briefing schedule for that motion and requiring all Respondents to make disclosures about the nature of their holdings to facilitate standing challenges. As per the Court-ordered schedule, the Challenging Respondents filed a consolidated motion challenging the standing of HBK and several others on March 12, 2018, briefing was concluded on April 26, 2018, and the motion was argued on May 7, 2018.

Nine days after the argument, HBK filed the instant motion to amend its Answer to assert that it directly owns certificates in 17 of the 21 Subject Trusts for which it previously had claimed only an indirect interest through holdings in NIM trusts. In its supporting memorandum, HBK asserts (without evidentiary support) that, "[a]fter submission of the Standing Motion, HBK became aware that, in addition to its holdings in NIMS Trusts, HBK also directly held

certificates issued by certain of the HBK Trusts as to which HBK had previously appeared pursuant to its status as an investor in the NIMS Trusts. Additionally, HBK has purchased yet other certificates issued by certain other of the HBK Trusts." HBK Mem. at 2-3. HBK offers no information in its motion papers as to (i) how many of its newly-raised certificates were recently discovered, as opposed to recently purchased, (ii) why it was previously unaware of the purportedly recently-discovered certificates; (iii) the circumstances under which it acquired its newly-purchased certificates; or (iv) the size and value of its newly purchased or discovered holdings.

HBK's lack of disclosure on these topics, combined with the fact that its newly-raised certificates are all in mezzanine-level tranches that are relatively low in the waterfalls of their respective trusts, raises a significant concern that HBK is now seeking artificially to manufacture standing through worthless and possibly *de minimis* holdings in Subject Trusts as a means to circumvent the pending standing motion. Accordingly, counsel for the AIG Respondents asked HBK's to disclose the size of the positions, the dates they had been acquired, and the price HBK paid for them. *See* Sheeren Aff. Exh. A. HBK refused to provide the information unless the Challenging Respondents did the same (*see id.*), an obviously nonsensical position insofar as none of the Challenging Respondents is seeking to belatedly assert new interests in the Subject Trusts through a motion to amend.

In light of HBK's refusal to provide information, the Challenging Respondents undertook their own analysis by reviewing the most recent available monthly remittance reports for the Subject Trusts in which HBK belatedly asserts a direct interest. Those reports, the relevant pages of which are appended to the Sheeren Affidavit as Exhibit B, confirm that HBK is asserting positions in zero-balance certificates with minimal if any value in an apparent effort to

misleadingly manufacture standing. In almost every case, the monthly remittance reports make clear that HBK's certificates are very far out of the money and will not benefit from the settlement that underlies this case, either through a payment or through a write-up, even if the issues raised by the Petition are resolved as HBK seeks. This is due to the fact that the accumulated write down to all tranches of certificates that are senior to the newly-raised HBK certificates vastly exceeds the Allocable Share assigned to the Subject Trust. *See* Sheeren Aff. ¶¶ 3-11. Thus, under every possible payment methodology, neither payments nor write-ups pursuant to the Settlement Agreement have any chance of making it down to the waterfall level where HBK's newly-raised certificates reside. The table below summarizes the relevant data:

Trust	HBK's Most Senior Certificate	Certificate Balance of HBK Certificate	Accumulated Writedowns of More Senior Mezzanine Certificates	Trust and/or Loan Group Settlement Payment
BSABS 2005-EC1	M6	$0.00	$14,725,018	$11,563,029
BSABS 2005-HE11	M10	$0.00	$55,570,913	$12,997,803
BSABS 2005-HE2	M8	$0.00	$36,455,152	$4,845,770
BSABS 2006-HE1	1M6	$0.00	$16,373,276	$10,867,235
BSABS 2006-HE10	2M9	$0.00	$151,478,000	$30,737,977
BSABS 2006-HE5	M7	$0.00	$42,058,336	$10,300,322
BSABS 2006-HE6	2M8	$0.00	$36,148,348	$6,612,261
BSABS 2006-HE8	1M3	$0.00	$14,191,235	$5,211,733
BSABS 2006-PC1	M7	$0.00	$21,350,406	$9,306,338
BSABS 2007-FS1	M9	$0.00	$71,409,000	$12,844,090
BSABS 2007-HE1	2M8	$0.00	$105,627,067	$21,702,152
BSABS 2007-HE2	2M4	$0.00	$75,163,000	$22,175,524
BSABS 2007-HE3	M4	$0.00	$115,982,000	$37,889,852
BSABS 2007-HE5	M9	$0.00	$76,086,946	$20,972,412

ARGUMENT

I. THE PROPOSED AMENDMENT SHOULD BE REJECTED AS PATENTLY DEVOID OF MERIT.

CPLR 3025(b) provides that leave to amend pleadings "shall be freely given upon such terms as may be just including the granting of costs and continuances," CPLR 3025(b), and numerous courts have so held. It is equally well established, however, that a Court should not allow an amendment that is patently devoid of merit. *See Ingrami v. Rovner*, 45 A.D.3d 806, 808 (1st Dep't 2007) ("leave to amend should not be granted where the proposed amendment is totally without merit or palpably insufficient as a matter of law"). A court presented with a motion to amend "'should examine the sufficiency of the merits of the proposed amendment'" and where "'the proposed amendments are totally devoid of merit and are legally insufficient, leave to amend should be denied.'" *Heller v. Provenzano*, 303 A.D.2d 20, 25 (1st Dep't 2003) (quoting *Zabas v. Kard,* 194 A.D.2d 784, 784 (2d Dep't 1993); *see also Berry v. Clermont York Assoc. LLC.*, 2015 WL 9307944, at *8 (Sup. Ct. N.Y. Cty. Dec. 21, 2015) ("It is well settled that this court has discretion to deny leave to amend when the proposed amendment is palpably devoid of merit or would cause undue prejudice to defendant.").

The amendment proffered by HBK here would serve no purpose and is thus patently devoid of merit. HBK has already appeared in this proceeding with respect to all of the Subject Trusts covered by the proposed amendment. The only reason for the proposed amendment is to provide HBK a basis to maintain standing with respect to those Subject Trusts in order to circumvent a ruling by the Court that the NIM trust holdings that HBK currently relies on for standing are insufficient. If the Court issues that ruling, however, the proposed amendment will not aid HBK, because its newly-raised certificates are too far underwater to benefit from the settlement regardless of the manner in which the issues raised by the Petition are resolved. *See*

pp. 2-3, *supra*. The newly-raised certificates, therefore, do not qualify HBK as a "beneficiary" with standing under Article 77, because their deeply underwater status precludes any possibility that HBK will be "entitled to any part of" the assets of the relevant Subject Trusts. N.Y. Surr. Ct. Proc. Act § 103(8) (incorporated by reference in CPLR 7703). Moreover, HBK's out-of-the-money certificates do not give HBK any economic or other interest in this proceeding and so do not enable HBK to satisfy the basic injury in fact requirement of standing under New York law. *See Soc'y of Plastics Indus. Inc. v. Cty. Of Suffolk*, 77 N.Y.2d 761, 773 (1991); *see also Lederle Labs. Div. of American Cyanamid Co. v. Pub. Serv. Comm'n.*, 84 A.D.2d 900, 900 (3d Dep't 1981) (customer lacked standing to challenge change in rates because it "sustained no economic injury or imminent threat of economic injury sufficient to confer standing."); *Matter of Turner's Will,* 86 Misc.2d 132, 137 (Sur. 1976) (party lacked standing to challenge admission of will to probate "where the objectant's financial interest is the same under the will as it would be in the event of intestacy.").

Accordingly, HBK's proposed amendment would be futile and ineffectual, and the Court should on that basis deny HBK's motion.

II. THE PROPOSED AMENDMENT SHOULD BE REJECTED AS IMPROPER GAMESMANSHIP AND A CIRCUMVENTION OF THIS COURT'S PRIOR ORDERS.

The Court has inherent power to control its calendar and supervise the progress and conduct of litigation. *See, e.g.*, *Novaro v. Jomar Real Estate Corp.*, 156 A.D.2d 213, 214 (1st Dep't 1989). The Court should use that power in this case to preclude HBK from engaging in sharp and possibly misleading tactics to circumvent the pending motion challenging its standing.

Standing disputes have been ongoing since January, and the standing motions are now fully briefed and argued. Pursuant to the Court's February 13 Scheduling Order (Dkt. 194), all investors exchanged holdings affidavits on February 21. On the basis of those disclosures, and in accordance

with the Court's March 8 scheduling order (Dkt. 243), the Challenging Respondents filed their motion on March 12 challenging the standing of indirect holders like HBK. See Dkt. 251. The motion was argued on May 7. Not once during the argument did HBK mention its intention to end-run the standing challenge by purchasing out-of-the-money certificates. To the contrary, HBK represented to the Court that it "welcome[d] the ability, the opportunity to continue in this proceeding *by having the Trustee substitute in and take direction and indemnity* . . . ." May 7, 2018 Hearing Transcript 50:17-20 (emphasis added).

HBK filed the instant motion on May 16, nine days after oral argument. That timing raises two possibilities. The first is that at oral argument, HBK knew of and chose not to disclose its intention to evade standing challenges by purchasing out-of-the money certificates if HBK was not confident of a favorable ruling at the conclusion of the argument. If that is what occurred, HBK deliberately misled the Court and the Challenging Respondents, caused everyone to spend time and other resources litigating an issue HBK intended to render moot, and prejudiced the Challenging Respondents by depriving them of an opportunity to fully brief and argue the points made above—namely, that out-of-the-money certificates do not confer standing in this context.

The other possibility is that HBK was unnerved by the oral argument on the standing motion and afterwards decided to acquire out-of-the-money certificates in order to hedge against a loss. If this is what occurred, it would still be the case that HBK caused everyone to spend time and other resources litigating an issue HBK seeks to render moot, and deprived the Challenging Respondents of an opportunity to fully brief and argue the points made above. Moreover, while HBK did not mislead the Court and the parties at oral argument in this scenario, HBK's failure to disclose in its motion papers that its certificates will not benefit from the settlement, and its continuing refusal to disclose information about the size and cost of its new positions leaves open

the possibility that HBK is seeking to obtain standing by creating a misleading impression that it owns a substantial position in direct holdings that give it an actual economic interest in the outcome of this proceeding when, in fact, those holdings do no such thing and may, in fact, be of a *de minimis* amount.

In either case, HBK's proposed amendment amounts to gamesmanship that the Court should not countenance. The Court set an orderly schedule for standing issues to be resolved at the outset of the case so that the remaining parties could move quickly to resolve the merits of this proceeding. All of the Respondents, including HBK, consented to and participated in that process, but HBK alone is now attempting to create a heads-I-win-tails-you-lose scenario in which it either prevails on the standing motion or circumvents a loss on that motion with a belated ploy that threatens to make all of the time and effort expended thus far for naught. Judicial economy and fairness to the Challenging Respondents require that this ploy be rejected.

Moreover, the purpose of the Petition is to resolve the respective interests of those who held certificates in the Settlement Trusts as of the filing of the Petition. Permitting parties to appear based on later-acquired interests would in effect transform this proceeding—which is intended to resolve the pre-existing interests of beneficiaries of the Settlement Trusts—into a "litigation play," in which a party (or non-party) could at any time after an Article 77 proceeding is commenced, but prior to a judgment being entered, buy up certificates and in effect create "hold out" value for itself by threatening to veto the consensual resolution of Subject Trusts where no dispute truly exists. Neither this Court, nor the parties who have in good faith relied on HBK's representations as to what interests it holds, should have to now contort themselves to accommodate HBK's decision to buy out-of-the-money certificates because it apparently lacks faith in its own litigating position on standing.

III. IF HBK IS PERMITTED TO AMEND, IT SHOULD PAY FEES AND COSTS.

If the Court should determine that HBK's proposed amendment is not futile and will be allowed notwithstanding the above-described gamesmanship, the Challenging Respondents respectfully submit that leave to amend should be conditioned upon HBK's payment of the fees and costs incurred by the Challenging Respondents in briefing and arguing the motion to challenge HBK's standing and in briefing and arguing this motion to amend. *See* CPLR 3025(b) (permitting the Court to grant costs as a condition of granting leave to amend).

HBK knew not later than January 31, 2018 that the Challenging Respondents intended to challenge the standing of HBK and other Respondents who hold their interests indirectly. In fact, the evidence HBK submitted in opposition to the standing motion makes clear that HBK was aware of its potential standing problem even before the Challenging Respondents identified it for the court. *See* Affirmation of John M. Lundin in Opposition to Joint Motion to Limit Standing [undated], Exhibit 10 (Dkt. 315) (letter to trustee asking if it will appear in this proceeding on HBK's behalf).

Nonetheless, HBK makes no claim, much less a properly supported claim, that it could not have discovered and/or purchased the newly-raised certificates promptly upon being notified in late January 2018 that the Challenging Respondents intended to challenge their standing. If the newly-raised certificates do, in fact, confer standing (which they do not), raising them at that earlier time would have obviated the need to file a standing motion against HBK and the need for this motion as well. Instead, HBK made a conscious decision to seek standing on the basis of its existing holdings and, only now, faced with losing the standing motion, belatedly seeks to hedge that bet. In such circumstances, it is appropriate that HBK bear the costs of its strategic decisions, not its adversaries. *See Bernstein v. Spatola*, 122 A.D.2d 97, 100 (1st Dep't 1986) (requiring amending party to pay costs and fees incurred by adversary in moving for summary

judgment where timely assertion of material in amendment would have prevented motion from being made).

CONCLUSION

For the reasons set forth above, HBK's motion to amend should be denied and, if it is granted, HBK should be required to pay costs.

SCHINDLER COHEN & HOCHMAN LLP

/s/ Jonathan L. Hochman
JONATHAN L. HOCHMAN
ANNA VINOGRADOV
100 Wall Street, 15th Floor
New York, NY 10005
Tel.: (212) 277 6330
Fax: (212) 277 6333
Email: jhochman@schlaw.com
avinogradov@schlaw.com

Co-Counsel for Tilden Park

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ Philip Bentley
PHILIP BENTLEY
ANDREW POLLACK
1177 Avenue of the Americas
New York, New York 10036
Tel.: (212) 715-9100
Fax: (212) 715-8000
Email: pbentley@kramerlevin.com
apollack@kramerlevin.com

WARNER PARTNERS, P.C.

/s/ Kenneth E. Warner
KENNETH E. WARNER
950 Third Avenue, 32nd Floor
New York, NY 10022
Tel.: (212) 593-8000
Fax: (212) 593 9058
Email: kwarner@warnerpc.com

Co-Counsel for the Institutional Investors

GIBBS & BRUNS, LLP

/s/ Kathy D. Patrick
Kathy D. Patrick *(pro hac vice)*
David M. Sheeren *(pro hac vice)*
1100 Louisiana, Suite 5300
Tel.: (713) 650-8805
Fax: 713.750.0903
Email: kpatrick@gibbsbruns.com
dsheeren@gibbsbruns.com

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ Kevin S. Reed
KEVIN S. REED
51 Madison Avenue
New York, NY 10010
Tel.: (212) 849-7000
Fax.: (212) 849-7100
Email: kevinreed@quinnemanuel.com

Counsel for the AIG Parties

PERRY, JOHNSON, ANDERSON, MILLER & MOSKOWITZ LLP

/s/ *Isaac M. Gradman*
ISAAC M. GRADMAN, *pro hac vice*
KRISTIN A. MATTISKE-NICHOLLS, *pro hac vice*
E. PAGE ALLINSON, *pro hac vice*
438 First Street, 4th Floor
Santa Rosa, CA 95401
Tel.: (707) 525-8800
Fax: (707) 545-8242
Email: gradman@perrylaw.net
nicholls@perrylaw.net
allinson@perrylaw.net

Co-Counsel for DW Partners LP

DOGRAMACI KUSHNER LLP

/s/ Amiad Kushner
AMIAD KUSHNER
1120 Avenue of the Americas, 4th Fl.
New York, NY 10036
Tel.: (212) 309-7580
Fax: (646) 568-3727
Email: akushner@dklitigation.com

PATTERSON BELKNAP WEBB & TYLER LLP

/s/ Peter W. Tomlinson
PETER W. TOMLINSON
DANIEL A. FRIEDMAN
1133 Avenue of the Americas
New York, NY 10036-6710
Tel.: (212) 336-2000
Fax: (212) 336-2222
Email: pwtomlinson@pbwt.com
dfriedman@pbwt.com

Counsel for the Olifant Funds

BECKER, GLYNN, MUFFLY, CHASSIN AND HOSINSKI LLP

/s/ Robin L. Alperstein
ROBIN L. ALPERSTEIN
299 Park Avenue
New York, NY 10171
Tel.: (212) 888-3033
Fax: (212) 888-0255
Email: ralperstein@beckerglynn.com

Counsel for Ellington Management Group L.L.C.