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

In the matter of the application of WELLS FARGO BANK, NATIONAL ASSOCIATION, et al., Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	Index No. 657387/2017 IAS Part 60 Justice Marcy Friedman **MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' ORDER TO SHOW CAUSE**

Nover Ventures, LLC ("Nover") respectfully submits this Memorandum of Law in support of its Order to Show Cause, requesting that the Court: (a) grant Nover's request for reargument of the Court's May 22, 2018 Order; and (b) grant such other and further relief as the Court deems just and proper. Reargument is appropriate here because it appears from the May 22 Order that the Court misapprehended: (i) the scope of the Challenging Holders' standing motion; and (ii) the potential import and effect that requiring the disclosure of repurchase agreements may have on the Interested Persons' ability to participate in this proceeding. While it was, and remains, Nover's contention that all parties who have appeared herein should be permitted to participate in this proceeding (*see* Motion Seq. 5), Nover also specifically requested that, in the alternative, if the Court determines that participation is limited to those with "direct" holdings, the Court enforce the May 22 Order evenly and preclude those whose positions are subject to repurchase agreements from participating in this proceeding on the basis that such interests are "indirect."

Statement of Facts

On February 5, 2018, the Institutional Investors submitted their proposed Agreed Scheduling Order in which they requested that the parties make certain disclosures that would

permit them (and other Interested Persons) to challenge the right of other Interested Persons to appear on the ground that their interests were not a "direct holding of a certificate." ([Proposed] Agreed Scheduling Order, Affirmation of David I. Schiefelbein ("Schiefelbein Aff.") ¶ 2, Exh. A ("Proposed Form of Order") at 2.) After hearing argument, on February 13, 2018, the Court entered the Institutional Investors' Proposed Form of Order in substantially the same form. (February 13, 2018 Scheduling Order, Schiefelbein Aff. ¶ 3, Exh. B (the "Scheduling Order").) Pursuant to the Scheduling Order, by no later than February 21, 2018, the investor parties were required to exchange information, verified through affidavit, concerning the nature of interests held in the trusts. (Scheduling Order at 1-2.) Thereafter, on March 12, 2018, relying on information set forth in the February 21, 2018 affidavits, the Challenging Holders[1] filed a motion seeking to exclude from this Article 77 proceeding, those respondents who do not hold certificates issued by the Settlement Trust. (Consolidated Memorandum of Law in Support of Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts, Schiefelbein Aff. ¶ 5, Exh. C (the "Standing Motion").)

In their Standing Motion, the Challenging Holders for the first time articulated their contention that Interested Persons with "indirect" and/or "derivative" holdings include those who sold their holdings but retained the subsequent right to repurchase them. (Standing Motion at 15.) The Challenging Holders specifically argued that a note holder "who sold notes but retained the right to repurchase them did not have standing to appear in an Article 77 proceeding regarding the payment on those notes." (*Id.*) The Challenging Holders explained this is because such holdings represent "a contingent or remote interest." (*Id.*)

[1] The Challenging Holders are Tilden Park, the Institutional Investors, AIG, DW Partners, and the Olifant Funds. (Standing Motion at 1.)

Shortly after the Challenging Holders' first articulation of their position, Nover referred back to, and reviewed, the February 21 holdings affidavits exchanged pursuant to the Scheduling Order. The Scheduling Order expressly contemplated that each Interested Person specify the "form of interest" for any holding "that is not a direct holding of a certificate in one of the trusts listed in Exhibit A of the Petition[.]" (Scheduling Order at 2.) Despite this requirement, and despite the Challenging Holders' contention that holdings subject to repurchase agreements are indirect, none of the affidavits that Nover received had disclosed whether the holdings were subject to repurchase agreements. (Schiefelbein Aff. at ¶ 4.)

After further consideration, and with more than two weeks before responsive briefing was due, on March 27, 2018 Nover requested that the participants in this Article 77 proceeding agree to "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." (March 27, 2018 e-mail from Gayle R. Klein to the Article 77 participants, Schiefelbein Aff. ¶ 8, Exh. D.) On April 9, 2018, Nover and the Institutional Investors jointly submitted to the Court a letter advising of their respective positions regarding the propriety of exchanging supplemental holdings affidavits addressing repurchase agreements. (Joint submission to Court addressing Nover's request for a supplemental affirmation regarding repurchase agreements, Schiefelbein Aff. ¶ 9, Exh. E ("Repo Agreement Joint Submission").)

Thereafter, on April 12, 2018, Nover submitted its opposition to the Standing Motion. (Memorandum in Opposition to Consolidated Memorandum of Law in Support of Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts, Schiefelbein Aff. ¶ 10, Exh. F ("Standing Opposition").) In its brief, Nover unequivocally asserted that, "if Challenging Holders' standard is to be enforced, it should be enforced evenly, and those holders who are also

'repo sellers' should be found not to have standing under Challenging Holders' own argument and case authority." (*Id.* at 18.)

Eight days later, on April 20, 2018, this Court entered an Order to Show Cause in a separate Article 77 proceeding—*In the matter of the application of U.S. Bank National Association. et al. for Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment*, Index No. 651625/2018—which related to a global settlement in which Lehman Brothers Holdings, Inc. was the seller, sponsor, and/or depositor for certain residential mortgage backed securities (the "Lehman Article 77 Proceeding"). (Order to Show Cause, Schiefelbein Aff. ¶ 14, Exh. I ("Lehman Article 77 Order to Show Cause").) In the Lehman Article 77 Order to Show Cause, the Court directed the parties to make disclosures substantially similar to those required in this proceeding, but expressly required that participants "state whether the interest, if not a direct holding of a certificate, takes the form of a ***repurchase agreement (repo)***. . ." (*Id.* at ¶ 8 (emphasis added).)[2]

By Order dated May 22, 2018, this Court denied Nover's request that participants in this Article 77 proceeding produce supplemental affidavits that clarify whether their holdings were subject to repurchase agreements. (May 22, 2018 Order, Schiefelbein Aff., ¶ 12, Exh. H ("May 22 Order").) Nover, hereby, seeks reargument of that Order. Nover makes this request so that if the Court rules that Interested Persons do not have the right to appear with respect to certain types of indirect interests, that ruling is applied consistently—not only in this action, but across all Article 77 proceedings relating to global RMBS settlements. Notably, because the disclosure required by the Lehman Article 77 Order to Show Cause is inconsistent with the disclosure requirements in this action, there exists the potential for inconsistent rulings on the legal standard

[2] Challenges to the right to participate in the Lehman Article 77 Proceeding, including challenges based on the repurchase disclosure, are required to be made by June 29, 2018. (*Id.* at ¶ 12.)

governing appearances in Article 77 proceedings. The granting of reargument will not inject delay into this proceeding, nor will it unfairly prejudice any Interested Person.

Argument

A CPLR 2221 motion for leave to reargue is appropriate when it is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion . . . ." CPLR 2221(d)(2). Here, Nover seeks reargument on the basis that the Court misapprehended three critical points:

- The "standing" of respondents with holdings subject to repurchase agreements ***was timely raised (by the Challenging Holders)***;
- If the Court rules that those with "indirect" interests may not participate in this Article 77 proceeding, Nover ***did and does*** challenge the right of Interested Persons whose holdings were subject to repurchase agreements to participate in this proceeding; and
- Nover's request for supplemental affidavits ***was timely*** made.

In light of these misapprehensions, the Court should grant reargument under CPLR 2221. *See, e.g.*, *Bundhoo v. Wendy's*, 152 A.D.3d 734, 737 (2d Dep't 2017) (holding that, on reargument, motion to compel should have been granted).

As an initial matter, it is beyond dispute that the Challenging Holders, themselves, disputed the right of those whose holdings are "indirect" to participate. Specifically included within that challenge were those whose holdings are subject to repurchase agreements:

> Likewise, New York courts consistently decline to allow entities with a contingent or remote interest to participate in Article 77 proceedings and other similar actions. In *One William St. Capital Mgt., LP v. Education Loan Trust IV*, 2015 N.Y. Misc. LEXIS 2639 (N.Y. Sup. Ct. 2015), a party, OWS, who sold notes but retained the right to repurchase them did not have standing to appear in an Article 77 proceeding regarding the payment on those notes. Even though the intent was for OWS "to receive the ultimate benefit of any income paid" on the notes, that benefit did not derive from the "Indenture pursuant to which the Notes were issued." *Id.* at *12. Because OWS did "not have legal title to the

> Notes," it could not make use of an Article 77 proceeding "despite its interest in the market value of the Notes." *Id.* at *14.

(Standing Motion at 15.)

This same position, that the holdings of Interested Persons subject to repurchase agreements are "indirect," was taken in the Lehman Article 77 proceeding. (*See* Lehman Article 77 Order to Show Cause at 7 ("[A]ny interested person who claims to be an investor in a Subject Settlement Trust shall exchange information, verified through affidavit . . . . Such information shall: . . . (iv) state whether the interest, ***if not a direct holding of a certificate, takes the form of a repurchase agreement (repo)***[.]") (emphasis added).) As a result, should this Court determine that those with "indirect" holdings are not entitled to participate in this JPM Article 77 proceeding, then those whose holdings are subject to repurchase agreements must likewise be precluded from participating in the Lehman Article 77 Proceeding.

However, absent an Order requiring that all Interested Persons supplement their February 21, 2018 holdings affidavits, clarifying whether the indirect holdings are subject to repurchase, there is insufficient information to ensure that all indirect holders are treated equally. As set forth in the Repo Agreement Joint Submission, it is illogical and unjust for ***some*** parties with indirect interests to be permitted to participate, while others with indirect interests are precluded. (Repo Agreement Joint Submission at 5.) Within this JPM Article 77 proceeding, those with indirect holdings subject to repurchase agreements would potentially be permitted to participate, while those with indirect holdings through CDOs, Re-Remics, or NIM trusts would be precluded.[3]

[3] Your Honor has given Interested Persons with indirect holdings in the Settlement Trusts an opportunity to direct the Trustees of their respective CDOs, Re-Remics, or NIM trusts. The deadline to do so is July 3. Nover has no objection to those with holdings subject to repurchase agreements likewise being given an opportunity to terminate the repurchase agreement by a date certain such that their holdings are no longer encumbered.

Moreover, in light of the disclosures required by the Lehman Article 77 Order to Show Cause, there is a significant risk that the Article 77 participation standard would be inconsistently applied across Article 77 proceedings. *See Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 519 (1985) (Noting the importance of consistent results "to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice. . .); *In re Petroleum Research Fund*, 3 Misc. 2d 790, 791 (Sup. Ct. N.Y. Cty. 1956) (applying uniform rule for granting intervention in proceeding where "[a]ll of the movants are apparently similarly situated"), *modified*, 3 A.D.2d 1 (1st Dep't 1956). Specifically, the May 22 Order creates a significant risk that Interested Persons with holdings subject to repurchase agreements in this JPM Article 77 proceeding ***will be permitted*** to participate, whereas similarly situated respondents in the Lehman Article 77 Proceeding ***would be precluded***.

Nover has never wavered in this concern. As it articulated in the Standing Opposition, "if Challenging Holders' standard is to be enforced, it should be enforced evenly, and those holders who are also 'repo sellers' should be found not to have standing under Challenging Holders' own argument and case authority." (Standing Opposition at 18.) It has always been Nover's position that the right to participate in this Article 77 proceeding should not be limited to those with "direct" interests. (*See id.*) Indeed, Nover only seeks the supplemental repurchase affirmation, and only intends to exclude those with holdings subject to repurchase agreements, ***if the Court grants the Challenging Holders' motion to limit standing and preclude all entities whose only interests are held indirectly.*** Put simply, if the Court agrees with the Challenging Holders that only "direct" certificateholders in the settlement trusts may be heard in this proceeding, the fair and equitable implementation of this standard requires that ***all*** parties with "indirect" interests, as defined by the Challenging Holders' motion, be excluded. *See id.*; *S.E.C.*

v. Drysdale Sec. Corp., 785 F.2d 38, 43 (2d Cir. 1986) (holding that repo is a transfer of securities); *cf. In re Petroleum Research Fund*, 3 Misc. 2d 791, 794 (applying uniform rule to parties similarly situated).

It is notable that the Challenging Holders do not dispute the reasonableness or appropriateness of such discovery, but rather fight the disclosure on the basis that the request is too late. (*See* Tr. of Tel. Hrg. on May 10, 2018, Schiefelbein Aff. ¶ 11, Exh. G at 7 ("MR. SHEEREN: . . . we would have had no general objection to disclosing the detail that Nover now requests, [had] this request been made back in February[.]").) Although the Court held that Nover's request was untimely, (May 22 Order at 2), Nover maintains that it made its request for the supplemental affirmation at the earliest practicable time. Nover requested this information shortly after the Challenging Holders first articulated on March 12, 2018 that those with holdings subject to repurchase agreements lack standing to participate in Article 77 proceedings. (Standing Motion at 15.) Curiously, the Challenging Holders never previewed this argument when negotiating the prospective content of the holdings affidavits. (*See* Schiefelbein Aff., ¶ 6.) Nor did their clients' holdings affidavits identify repurchase encumbrances notwithstanding: (i) their apparent intent to make this argument all along; and (ii) the express language of the Scheduling Order requiring that the affidavits "describe the nature of the interest held." (Schiefelbein Aff., ¶ 4.)

In sum, the Challenging Holders are arguing from both sides of their mouth—seeking the exclusion of parties holding certain types of "indirect" interests, while allowing other indirect holders to be heard. It was not until after the Challenging Holders' affidavits and the filing of their Standing Motion, that Nover could have reasonably appreciated this tack, and the need to pursue expressly the disclosure of holdings subject to repurchase agreements.

Conclusion

Nover respectfully requests that the Court grant reargument and 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 repurchase agreement or other type of financing arrangement and, if so, identifying the same.

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New York, New York

Respectfully submitted,

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