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

In the matter of the application of U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, NATIONAL ASSOCIATION, WILMINGTON TRUST, NATIONAL ASSOCIATION, WILMINGTON TRUST COMPANY, and CITIBANK, N.A., (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. 651625/2018 IAS Part 60 Honorable Marcy S. Friedman Motion Seq. 4

MEMORANDUM IN OPPOSITION TO CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION TO LIMIT STANDING TO CERTIFICATEHOLDERS IN THE SETTLEMENT TRUSTS

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PRELIMINARY STATEMENT

The Challenging Holders'[1] motion to limit the "standing" of Nover Ventures, LLC ("Nover"), as with their virtually identical motion in the JPM Article 77 proceeding, is little more than a misguided attempt to preclude interested persons from putting forth persuasive arguments contrary to their interpretation of the Settlement Trusts' governing agreements (the "Governing Agreements"). The Consolidated Memorandum of Law is so riddled with contradictions, inconsistencies, and misstatements of the law, that, were the Court to apply the standard sought therein, ***none*** of the investors—Challenging Holders included—would be entitled to participate in this proceeding. Such an absurd result cannot prevail.

Moreover, Nover's participation in this proceeding serves the additional interests of: (i) avoiding uncertainty about the uniformity and finality of judgment; (ii) avoiding delay in the proceedings and distribution of Settlement Funds; and (iii) preventing a rash of other investors from intervening and/or pursuing other legal avenues that could further delay the distribution of the Settlement Funds. This is the last of the Article 77 proceedings relating to global RMBS settlements and the deadline for appearances has passed.

For these reasons, and as set forth in more detail below, the Court should deny the Challenging Holders' Standing Motion.

STATEMENT OF FACTS

On April 4, 2018, U.S. Bank National Association, Wells Fargo Bank, National Association, Wilmington Trust, National Association, Wilmington Trust Company, and Citibank, N.A. (collectively, the "Trustees") filed a petition initiating this Article 77 proceeding

[1] The Challenging Holders are Tilden Park, the Institutional Investors, and the AIG Parties. *See* Consolidated Memorandum of Law in Support of the Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts (the "Consolidated Memorandum of Law") (Dkt. No. 92) at 1.

for judicial instructions concerning the administration and distribution of the nearly $2.4 billion allowed claim set by the Bankruptcy Court on March 8, 2018. Petition (Dkt. No. 1) at ¶ 26; Memorandum of Law in Support of Petition (Dkt. No. 14) at 3 ("Certificateholders and other interested parties—the direct economic beneficiaries of the Settlement Payment—may have competing views concerning how the issues should be resolved.").

In petitioning the Court, the Trustees sought "[a] single Article 77 proceeding in this Court [as] the most appropriate forum to facilitate and provide a resolution" to the issues raised because "[i]t will permit ***all interested parties*** to appear and be heard in an orderly and efficient process, and will result in a uniform, final judgment." Petition (Dkt. No. 1) at ¶ 63 (emphasis added).

Thereafter, on April 20, 2018, the Court entered an Order to Show Cause initiating this proceeding, requiring, in pertinent part:

- "Certificateholders and ***any other person claiming an interest*** in any of the Subject Settlement Trusts (each, an 'Interested Person,' and all such persons collectively, 'Interested Persons') show cause . . . why an order and judgment should not be entered . . . resolving the questions presented by the Petition[.]" Order to Show Cause (Dkt. No. 37) at ¶ 1 (emphasis added).

- "[A]ny ***interested person*** who wishes to be heard on the merits of the questions presented by the Petition may appear by counsel or (subject to the limitations imposed by CPLR 321(a)) in person at the Final Hearing and present such evidence or argument as may be proper and relevant; provided, however, that, except for good cause shown, no interested person shall be heard . . . by the Court unless such interested person serves an answer to the Petition, together with any supporting papers (a "Submission"), on or before May 30, 2018." *Id.* at ¶ 7 (emphasis added).

On May 30, 2018, Nover filed its Answer in this proceeding identifying an interest in seventy-five of the Settlement Trusts, more than any party other than the Institutional Investors. *See* Submission Pursuant to Order to Show Cause (Dkt. No. 73) ("Answer"). The following week, on June 6, 2018, Nover provided the Trustees and all other respondents with an affidavit

containing verified information about its holdings. As that affidavit evidences, Nover asserts an interest in Settlement Trusts in which it is the record owner of the certificates (the "Nover Certificate Holdings") and Settlement Trusts in which it has an interest through its CDO holdings (the "Nover CDO Holdings"). Nover's standing to participate in this Article 77 proceeding for those Settlement Trusts included in the Nover Certificate Holdings is not challenged.

The Trustees who initiated this proceeding do not challenge or otherwise object to Nover's full participation.

ARGUMENT

I. Under The Standard They Argue For, The Challenging Holders Lack "Standing" To Participate In This Article 77 Proceeding.

The Challenging Holders seek to exclude Nover's participation in this proceeding with respect to the Nover CDO Holdings. It is axiomatic that to challenge Nover's participation with respect to a particular Settlement Trust, the Challenging Holder must have asserted an interest in that trust. But no single Challenging Holder has standing to challenge Nover's interest in each and every one of these Settlement Trusts because no Challenging Holder has asserted an interest in each and every of the Settlement Trusts owned through the Nover CDO Holdings. *See* Chart of Outstanding Issues for Each Trust submitted pursuant to Order to Show Cause ("Consolidated Issues Chart") (Dkt. No. 83). The Challenging Holders cannot circumvent the standing requirements merely by filing a "consolidated" motion that combines more than 20 distinct entities under a single name. The Challenging Holders' motion, therefore, is improper insofar as it purports to challenge Nover's right to participate in Settlement Trusts that the Challenging Holders, themselves, do not have an interest.

Further, the Challenging Holders' motion is fatally flawed because the Challenging Holders, themselves, do not have "ownership interests in the assets" and therefore are not

entitled to participate in this proceeding under the very standard they assert in the Consolidated Memorandum of Law. Consolidated Memorandum of Law at 3. All of the REMIC Settlement Trusts ***are themselves*** multi-tiered Re-REMIC trusts in which the interests in the securitized mortgage loans pass through one or more trusts.[2] Because these interests are similar in both language and structure to the CDOs that the Challenging Holders contend precludes Nover's participation—*i.e.*, interests in securities as opposed to the mortgage loans—under their theory, certificate holders would likewise be precluded from participating in this proceeding.

Lehman XS Trust, Certificates Series 2006-7 ("LXS 2006-7"), one of the Settlement Trusts in which the Institutional Investors have asserted an interest, serves as a good example of a multi-tier Re-REMIC structure.[3] As the LXS 2006-7 Trust Agreement demonstrates, the trust does not issue certificates backed directly by mortgage loans. Rather, it issues certificates backed exclusively by securities—*i.e.*, REMIC certificates—that are, in turn, backed exclusively by other REMIC securities. *See, e.g.*, LXS 2006-7 Trust Agreement, Schiefelbein Aff., ¶ 3, Exh. B.

In LXS 2006-7, the mortgage loans were assigned to Pooling REMIC I. *See id.* at Preliminary Statement ("Pooling REMIC I shall hold the assets of the Trust Fund, other than any Excluded Trust Assets . . . ."). Pursuant to the Trust Agreement, Pooling REMIC I then issued several uncertificated interests, designating each such interest a "REMIC regular interest." *Id.* The REMIC regular interests were, in turn, assigned to a second trust, "Lower-Tier REMIC I," which in turn issued its own uncertificated interests designated as "REMIC regular interests." *Id.*

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[2] An illustration demonstrating the similarities between RMBS certificates and CDO holdings is attached to the Affirmation of David I. Schiefelbein ("Schiefelbein Aff."), ¶ 2, Exh. A.

[3] Nover uses LXS 2006-7 because it is a straightforward representation of a multi-tiered Re-REMIC Trust Agreement. Nover can provide other examples should the Court request.

In much the same way, the REMIC regular interests were then assigned from the Lower-Tier REMIC I to the Middle-Tier REMIC I, and then from the Middle-Tier REMIC I to the Upper-Tier REMIC I. The Upper-Tier REMIC I ultimately issued the Offered Certificates. *Id.*

In sum, the multi-tiered RMBS structure outlined above and prevalent throughout the Settlement Trusts is virtually identical to the CDO structure about which the Challenging Holders complain. Just like CDOs, multi-tiered RMBS are backed by other securities and pledge the expected revenue of those securities to investors. Therefore, it follows that if certificate holders of CDOs lack sufficient interest to participate in this Article 77 proceeding by reason of their interests in "securities", so do the certificate holders with interests in multi-tiered RMBS. Because such an absurd result would undermine the very purpose of this Article 77 proceeding, it should be rejected.

II. Nover's CDO Holdings Permit Its Participation In This Article 77 Proceeding.

A. Article 77 Governs the Right to Participate Herein.

Article 77 of the New York Civil Practice Law and Rules ("CPLR") authorizes a special proceeding "to determine a matter relating to any express trust . . . ." CPLR § 7701. Permissible uses of Article 77 are "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust," including, by way of example, instruction as to whether a future course of conduct is proper, or what is meant by trust document provisions. *See, e.g., Greene v. Greene (In re Greene)*, 88 A.D.2d 547, 548 (1st Dep't 1982); *Gilbert v. Gilbert (In re Gilbert)*, 39 N.Y.2d 663, 666 (1976) (interpreting addendum to trust). As the Trustees noted in their Petition, a "single Article 77 proceeding in this Court is the most appropriate forum to facilitate and provide a resolution [as it] will permit all interested parties to appear and be heard in an orderly and efficient process, and will result in a uniform, final judgment." Petition (Dkt. No. 1) at ¶ 63. Although the Challenging Holders cite a variety of

authority under other legal standards—such as whether a member of the public has the right to challenge a governmental action—such "authority" is irrelevant and inapplicable.[4] The only standard against which Nover's right to appear should be measured is Article 77. Nover has the right to participate herein because it is a beneficiary and "person interested" in the Settlement Trusts.

1. Nover is a "Beneficiary" Under Article 77.

Pursuant to the Surrogate's Court Procedure Act ("SCPA") that governs the joinder and representation of persons interested in Article 77 proceedings, "persons interested in estates"—be it in interests in income or principal—must be notified of the proceeding. SCPA § 315; *see* CPLR § 7703. "Any person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person" is an interested person for purposes of the SCPA. SCPA § 103(39) (definition of "Person interested"). Beneficiary, in turn, is defined by the SCPA as "[a]ny person entitled to any part or all of an estate." *Id*. at § 103(8) (definition of "Beneficiary"). From the language of SCPA § 315, and the definitions of "Person interested" and "Beneficiary," the Challenging Holders summarily assert that certificate holders of the

[4] *See, e.g.*, *Matter of Bank v. Allen*, 58 Misc. 2d 150 (Sup. Ct. Albany Cnty. 1968) (no standing to sue to review a governmental authority's granting a license to a competitor because of the economic effect of additional competition), *aff'd*, 35 A.D.2d 245 (3d Dep't 1970); *Calvary Hosp., Inc. v. Tweedy*, Index No. 18049/2005, 2007 WL 1953412 (Sup. Ct. Queens Cnty. June 18, 2007) (representative of water bill customers cannot initiate Article 78 proceeding to recover overpayments because the aggrieved parties are those who challenged their water bills); *Grunewald v. Metro. Museum of Art*, 125 A.D.3d 438, 438-39 (1st Dep't 2015) (members of the public do not have standing to sue under a museum's lease with the city); *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311 (1st Dep't 2011) (articulating the standard for standing to challenge a governmental action); *Sanchez v. Blustein, Shapiro, Rich & Barone LLP*, No. 13-CV-8886, 2014 WL 7339193 (S.D.N.Y. Dec. 23, 2014) (standing of an LLC member to bring a claim relating to LLC assets where statute expressly provides that the member has no property interest in the LLC assets); *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761 (1991) (when a member of the public seeks to challenge a plastics law, it must demonstrate an injury that is different from that of the public at large).

Settlement Trust(s) are the only "beneficiaries." Consolidated Memorandum of Law at 8-9. They are wrong.

Nover is a beneficiary because, through its CDO Holdings, it stands to potentially derive a financial benefit from the Settlement Trusts. Though the Challenging Holders concede this financial interest, they argue that financial benefit, alone, is insufficient to warrant participation. *See* Consolidated Memorandum of Law at 2. That is not so, and the Governing Agreements do not support that interpretation.

a) *Under the Granting Clauses, CDO Note Holders are Entitled to the Proceeds of the RMBS Trusts.*

The Challenging Holders' assertion that the granting clauses in RMBS Governing Agreements convey *sole* beneficiary status on the certificate holders of those trusts is incorrect.[5] Under the language of the granting clauses in both RMBS Governing Agreements and CDO indenture agreements, the granting clauses convey beneficiary status on *both* the certificate holders of those trusts and those whose interests in the certificates is held through investment vehicles, such as CDOs. The "typical" CDO granting clause is materially identical to that found in RMBS Governing Agreements.

Granting clauses in the RMBS Governing Agreements are fairly uniform and substantively identical to the Governing Agreements that Challenging Holders cite with approval in their Consolidated Memorandum of Law. *See, e.g.*, Lehman Mortgage Trust Series 2007-2 Trust Agreement, Affidavit of David M. Sheeren ("Sheeren Aff."), ¶ 3, Exh. B (Dkt. No. 96)

[5] Tellingly, the Challenging Holders do not cite a single surrogate's court or Article 77 case applying the "intended beneficiary" standard they argue is applicable.

("LMT 2007-2 Trust Agreement")[6]. Under these granting clauses, a depositor, concurrently with the execution and delivery of the Governing Agreement, conveys all right, title and interest in that trust fund to a trustee "for the benefit and use of the Holders of the Certificates[.]" *Id.* at § 2.01. Thus, while a trust fund is conveyed for the benefit of certificate holders, it is also expressly conveyed for their "use." The granting clauses of Governing Agreements therefore, not only permit a certificate holder to use its interest in a trust fund, but in fact contemplate that a certificate holder may assign its interest in trust proceeds to another.

In the case of a CDO, the RMBS certificate holder has "used" its right, title and interest in trust proceeds when it assignts its right, title and interest in trust proceeds to the CDO, much in the same manner that REMIC I assigns its rights to REMIC II. It therefore logically follows that CDO investors are beneficiaries who may appear in this proceeding.

The "granting clauses" in CDO indentures likewise support this conclusion. The Challenging Holders cite, and Nover agrees, that the Triaxx Prime CDO 2006-1 Indenture is "typical" of a CDO indenture and illustrative for purposes of adjudicating the motion. The "typical" CDO granting clause, as evidenced by the indentures at issue in *Triaxx*, provides:

> The Issuer hereby Grants to the Trustee, ***for the benefit and security of*** the ***Secured Parties***, all of its right, title and interest in, to and under, in each case, whether now owned or existing, or hereafter acquired or arising, all accounts, general intangibles, chattel paper, instruments, securities, investment property and any and all other property (other than Excepted Property) of any type or nature owned by it . . . .

Triaxx Prime CDO 2006-1 Indenture, Sheeren Aff., ¶ 2, Exh. A (Dkt. No. 95) ("Triaxx Indenture") at 1 (emphasis added).

[6] Mr. Sheeren's Affidavit attaches the Trust Agreement for LMT 2007-2, but references it as being LMT 2007-4. Sheeren Aff., ¶ 3.

"Secured Parties" in a CDO include the note holders. *Id.* Moreover, "Grant" is broadly defined to convey ***all rights***, including those to receive principal and interest collected on the mortgage loans in an RMBS trust:

> grant, bargain, sell, warrant, alienate, remise, demise, release, convey, assign, transfer, mortgage, pledge, grant and create a security interest in and right of set-off against, deposit, set over and confirm. ***A Grant of the Pledged Securities, or of any other instrument, shall include all rights,*** powers and options (but none of the obligations) of the granting party thereunder, ***including the immediate continuing right to claim for, collect, receive and receipt for principal, interest and fee payments in respect of the Pledged Securities*** or such other instruments, and all other Cash payable thereunder, ...

Triaxx Indenture at p. 22 (emphasis added).

Thus, the Secured Parties, *i.e.*, CDO note holders such as Nover, are beneficiaries entitled to participate herein because, pursuant to the CDO governing agreements, they have a clear legal pecuniary interest in the mortgage loans underlying the RMBS trusts.

b) *The No Action Clause is Not Determinative.*

The Challenging Holders also argue that a CDO holder may not participate in an Article 77 proceeding because of the "no action" clause. The "no action" clause in the "typical" CDO indenture, cited by the Challenging Holders, provides, in relevant part:

> **Section 5.8 Limitation on Suits**
>
> No Holder of any Senior Note shall have any right to institute any Proceedings, judicial or otherwise, with respect to this Indenture, or for the appointment of a receiver or trustee, or for any other remedy hereunder, unless:
>
> (a) such Holder has previously given to the Trustee written notice of an Indenture Event of Default;
>
> (b) except as otherwise provided in Section 5.9 hereof, the Holders of at least 25% of the then Aggregate Outstanding Amount of the Notes of the Controlling Class shall have made written

> request to the Trustee to institute Proceedings in respect of such Event of Default in its own name as Trustee hereunder;
>
> (c) such Holder or Holders have offered to the Trustee indemnity satisfactory to it against the costs, expenses and liabilities to be incurred in compliance with such request;
>
> (d) the Trustee for 30 days after its receipt of such notice, request and offer of indemnity has failed to institute any such Proceeding; and
>
> (e) no direction inconsistent with such written request has been given to the Trustee during such 30-day period by a Majority of the Controlling Class . . . .

Triaxx Indenture at p. 84. The Challenging Holders then proceed to cite multiple cases to support their assertion that CDO note holders cannot initiate an action. Consolidated Memorandum of Law at 9-10.

While Nover does not dispute that CDO note holders may not initiate an action—that analysis is entirely irrelevant here. Nover did not initiate this proceeding, the Trustees did. Nover seeks only to be heard regarding the issues set forth in the Order to Show Cause because such issues may bear on the funds Nover receives in the future. In short, the "no action" clause is wholly inapplicable because this action has already been initiated.

Moreover, if Nover were prohibited from appearing because of the "no action" clause, so too would be the Challenging Holders. The Trust Agreements governing the RMBS certificates for unchallenged "direct" holdings each contain similar "no action" language:

> No Certificateholder, solely by virtue of its status as Certificateholder, shall have any right by virtue or by availing of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of Certificates evidencing not less than 25% of the Class Principal Amount (or Class Notional Amount) of Certificates of each Class shall have made written request upon the Trustee to

> institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the cost, expenses and liabilities to be incurred therein or thereby, and the Trustee, for sixty days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding and no direction inconsistent with such written request has been given such Trustee during such sixty-day period by such Certificateholders; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Agreement, except in the manner herein provided and for the benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

LMT 2007-2 Trust Agreement at § 8.01(b). Therefore, if a "no action" clause limits standing to appear in this proceeding, ***none*** of the investors who have already appeared has standing because "no action" clauses apply equally to certificate holders in RMBS trusts. *See, e.g.*, *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684 (1st Dep't 2012) (applying no action clause to preclude RMBS certificate holder suit). Such a result would defy logic.

Likewise the Challenging Holders' reference to the "Controlling Class" provision is not compelling. Consolidated Memorandum of Law at 6. This permissive clause ensures only that a group of holders has the right to direct the Trustee in stated circumstances. It does not restrict or otherwise preclude another holder's right to be heard. Indeed, it is beyond dispute that this clause does nothing to prohibit the Trustee from pursuing litigation at the direction of a minority of the Controlling Class, or even a lesser class, should it so desire.

Finally, participation in an Article 77 proceeding is not dependent on a party's ability to initiate an action. New York law recognizes that the requirements for standing to initiate a proceeding are not the same as the requirements to participate or intervene. Indeed, New York law *does not* require that all participants in an Article 77 proceeding meet the requirements for standing to maintain an action. *See Matter of New York City Health & Hosps. Corp. v. City of New York,* 85 Misc.2d 501, 503 (Sup. Ct. N.Y. Cnty. 1976) ("It must be emphasized that the test for intervention in this proceeding is that provided in CPLR 7802 (subd [d]) . . . Thus, the arguments made by respondent with respect to standing to commence a proceeding, or for intervention pursuant to CPLR 1013 in an action, are beside the point."), *aff'd*, 56 A.D.2d 535 (1st Dep't 1977).

2. Nover is an "Interested Person".

Nover is an "interested person" under Article 77 and the Court's Order to Show Cause. "The expression, 'persons interested,' where it is used in connection with an estate or fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof[.]" *See Matter of Clemens*, 174 Misc. 1052, 1058 (Surr. Ct. Ontario Cnty. 1940) (construing Surrogate's Court Act § 314(10), the predecessor provision to SCPA § 103(39), to include every person entitled absolutely or contingently to share in the estate or proceeds thereof, or in the fund, whether devisee, assignee, grantee or otherwise, except as creditor). Put simply, the only relevant question is whether Nover is "entitled, either absolutely or contingently, to share in the estate or the proceeds thereof[.]" *Id.* The Challenging Holders have already conceded this is the case. Consolidated Memorandum of Law at 4 ("'A CDO issuer is an investment vehicle that . . . sells pieces of the expected revenue to investors[.]'") (quoting *House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, No. 13 CIV. 519 RJS, 2014 WL

1383703, at *1 (S.D.N.Y. Mar. 31, 2014)). Nover is an interested person under Article 77 and the SCPA, and should be heard in this proceeding.

Nover likewise meets the "interested person" standard that has already been articulated by the Trustees and the Court in both this and other proceedings relating to global RMBS settlements. For example, in the Petition initiating this proceeding, the Trustees sought "to provide Certificateholders in the Subject Settlement Trusts and ***other interested parties*** in the Subject Settlement Trusts an opportunity to express their views." Petition (Dkt. No. 1) at ¶ 15 (emphasis added). The only reasonable interpretation of the phrase "*and other interested parties*" being included after "Certificateholders in the Subject Settlement Trusts," is that certificate holders are ***not*** the only interested parties. The Court further included the Trustees' proposed language in the Order to Show Cause, requiring that "Certificateholders and ***any other person claiming an interest*** in any of the Subject Settlement Trusts (each, an 'Interested Person' and all such persons collectively, 'Interested Persons') show cause[.]" Order to Show Cause (Dkt. No. 37) at ¶ 1 (emphasis added). A plain reading of the Order to Show Cause, therefore, makes clear that "Interested Persons" are not limited to certificate holders in the Settlement Trusts.

B. Nover's Participation in this Article 77 Proceeding is in the Interest of Finality.

The Challenging Holders' Consolidated Memorandum of Law disregards that Article 77 only provides for who ***must*** be noticed, and does not address who may join, or the Court's wide latitude in achieving an efficient resolution of the issues presented. *See* CPLR § 7703. New York courts "must be ever mindful of [their] obligation to expedite the administration of estates and avoid unnecessary expenses including that of fees to be paid . . . . The court has an obligation to seek to insure finality of its decrees and to avoid a possible later attack[.]" *Matter*

of Sanders, 123 Misc.2d 424, 425 (Surr. Ct. Nassau Cnty. 1984) (citation omitted). Courts in New York are given wide latitude to consider and address the rights of interested persons and should err on the side of inclusion because an "interested person" may later seek relief from a judgment or order under CPLR § 5015. Under CPLR § 5015, an "interested person" who may seek relief from a judgment or Order is anyone who may demonstrate "some legitimate interest . . . will be served and that judicial assistance will avoid injustice[.]" *Lane v. Lane*, 175 A.D.2d 103, 105 (2d Dep't 1991); *Nachman v. Nachman*, 274 A.D.2d 313, 315 (1st Dep't 2000) (same). Because Nover has demonstrated it has a legitimate interest that will be served, its participation is warranted.

The "legitimate interest" standard is appropriate, particularly considering the First Department has held that parties who are "only remotely interested" may participate in an Article 77 proceeding:

> The provisions of the statute (Civ. Prac. Act § 1311, now CPLR 7703) are permissive and do not preclude the joining as parties to an accounting proceeding of all contingent remaindermen including those who are only remotely interested and who, under the terms of the statute, are not necessary parties. A contingent remainderman, though not a necessary party, may very well be a proper party to the proceeding.

Matter of Cowles, 22 A.D.2d 365, 370 (1st Dep't 1965), *aff'd*, 17 N.Y.2d 567 (1966). And another New York court has held that parties who "may be indirectly affected" may intervene in an action.

> For the purposes of these motions, it is not necessary to determine whether movants were intended to be beneficiaries of this trust, or whether they are entitled to intervene as a matter of law. It will only be necessary to consider whether, under the discretionary powers of this court, movants may and should be permitted to intervene herein.
>
> . . .

> [I]t would appear from the papers and briefs that movants may be 'indirectly affected by the litigation in a substantial manner.' In view of the foregoing, . . . it would be a permissible exercise of discretion to permit intervention by movant independent oil companies.

Matter of Petroleum Research Fund, 3 Misc.2d 790, 792-94 (Sup. Ct. N.Y. Cnty. 1956), *modified sub nom*, *In re The Petroleum Research Fund*, 3 A.D.2d 1 (1st Dep't 1956).

Under this liberal standard, and in light of the Petition seeking all interested parties to appear and be heard for purposes of an orderly and efficient process, that will result in a uniform, final judgment in a single Article 77 proceeding, Nover should be permitted to participate.

C. The Arguments Regarding "Direct Injury-in-Fact" Are Irrelevant and Have No Bearing on a Person's Right to Participate in an Article 77 Proceeding.

The Challenging Holders also assert that Nover cannot participate because it has not established a "direct injury-in-fact." This argument is unavailing and undermined by the Challenging Holders' own case authority establishing that a direct injury-in-fact is required only for a party seeking to ***initiate*** an action. Consolidated Memorandum of Law at 11-13. Insofar as Nover did not initiate this proceeding, and no one disputes that the Trustees have properly done so, whether Nover suffered a direct injury-in-fact is beside the point.

Notably, the Challenging Holders continue to cite two cases that are directly on point and do not weigh in their favor. In the first of those cases, the court allowed objecting investors with an indirect interest (*i.e.* creditors of creditors) to fully participate in an Article 74 proceeding.[7]

[7] In addition to being inapplicable because they relate solely to standing to initiate an action, most of Challenging Holders' cited authorities are otherwise entirely inapplicable to the matter at bar. *See, e.g.*, *Matter of Bank v. Allen*, 58 Misc. 2d 150 (Sup. Ct. Albany Cnty. 1968) (no standing to sue to review a governmental authority's granting a license to a competitor because of the economic effect of additional competition), *aff'd*, 35 A.D.2d 245 (3d Dep't 1970); *Calvary Hosp., Inc. v. Tweedy*, Index No. 18049/2005, 2007 WL 1953412 (Sup. Ct. Queens Cnty. June 18, 2007) (representative of water bill customers cannot initiate Article 78 proceeding to recover overpayments because the aggrieved parties are those who challenged their water bills); *Grunewald v. Metro. Museum of Art*, 125 A.D.3d 438, 438-39

See Consolidated Memorandum of Law at 12 (citing *In re Rehabilitation of Fin. Guar. Ins. Co.*, Index No. 401265/2012, 2013 WL 4405157 (Sup. Ct. N.Y. Cnty. Aug. 16, 2013) ("*FGIC*")). Although the objecting investors were "no more than mere creditors of certain FGIC's creditors" whose "consent [wa]s simply not required to consummate" the proposed settlement, the court permitted them to actively participate and raise objections. *Id.* at *3. Indeed, almost the entire opinion is devoted to evaluating the investors' objections. *See id.* *FGIC* therefore supports Nover's participation.

A second case, *One William St. Capital Mgmt., L.P. v. Educ. Loan Trust IV*, Index No. 652274/2012, 2015 WL 4501194 (Sup. Ct. N.Y. Cnty. July 18, 2015), cited in the Challenging Holders' submission, is likewise not in their favor. Consolidated Memorandum of Law at 12. Here, the holder's notes were subject to a repurchase agreement. As a "repo seller," the court found that the repurchase agreement constituted a sale of the notes and a transfer of ownership, rather than a loan transaction. *Id.* at *9. Because the claimant did not have legal title to the notes, it could not assert a claim for breach of the indenture. *Id.* at *14. To be clear, if the Court rules that indirect holdings are sufficient to permit participation in an Article 77 proceeding, Nover will not seek to exclude holders with certificates subject to repurchase agreements. *See, e.g.*, *Springwell Navigation Corp. v. Sanluis Corp., S.A.,* Index. No. 600743/2005, 2006 WL 3742803 (Sup. Ct. N.Y. Cnty. Dec. 19, 2006) (finding standing despite the fact that interest was subject to a repurchase agreement). But if Challenging Holders' standard is to be enforced, it

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(1st Dep't 2015) (members of the public do not have standing to sue under a museum's lease with the city); *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311 (1st Dep't 2011) (articulating the standard for standing to challenge a governmental action); *Sanchez v. Blustein, Shapiro, Rich & Barone LLP*, No. 13-CV-8886, 2014 WL 7339193 (S.D.N.Y. Dec. 23, 2014) (standing of an LLC member to bring a claim relating to LLC assets where statute expressly provides that the member has no property interest in the LLC assets); *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761 (1991) (when a member of the public seeks to challenge a plastics law, it must demonstrate an injury that is different from that of the public at large).

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.

Notwithstanding that direct injury-in-fact is not required to participate in an Article 77 proceeding, Nover has demonstrated a direct injury-in-fact. As a CDO note holder, Nover is, unequivocally, entitled to RMBS certificates' principal and interest payments, and its pecuniary interests are directly affected by both the treatment of the Settlement Payment and by write-ups of certificate principal balances. Indeed, how trust funds are distributed, as well as which certificates are entitled to be written up now and in the future, directly affect the funds that Nover will receive. Thus, even under the Challenging Holders' improper standard, Nover must be allowed to participate.

III. Alternatively The Court Should Grant Nover Leave To Move To Intervene.

Finally, should the Court determine that Nover is not permitted to participate in this proceeding under an Article 77 and SCPA analysis, Nover respectfully requests leave of Court to move to intervene under CPLR §§ 1012(a)(2) and 1013, or for additional time to ensure that Nover is not unfairly prejudiced because there is "no one appearing in the proceeding who would properly represent [its] interest" in the trust proceeds. *See, e.g.*, *Matter of Cowles*, 22 A.D.2d at 371 ("[I]nasmuch as their mother does not object to the accounting as filed by the trustee, if we drop them as parties, there would be no one appearing in the proceeding who would properly represent their interest[.]").

Courts have consistently held that "[w]hether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings." *Wells Fargo Bank, N.A. v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010) (citations omitted); *Matter of*

Bernstein v. Feiner, 43 A.D.3d 1161, 1162 (2d Dep't 2007) ("As a general matter, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings[.]" (internal quotation marks omitted)). Nover's interests in Settlement Trusts by virtue of its CDO holdings are "real and substantial" and meet the requirements for intervention. *See generally Matter of Petroleum Research Fund*, 3 Misc.2d at 794 ("[I]t would appear from the papers and briefs [in this Article 77 proceeding] that movants may be '*indirectly affected* by the litigation in a substantial manner.' In view of the foregoing, . . . it would be a permissible exercise of discretion to permit intervention by movant independent oil companies." (emphasis added)).

Further, the Challenging Holders have not shown, and cannot show, that Nover's participation will delay the proceeding or prejudice the rights of any other party. *See* CPLR § 1013 ("In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."). Upon receiving notice of this proceeding, Nover promptly sought to protect its interest in accordance with the Court's orders and instructions. Indeed, the Challenging Holders implicitly concede that Nover is entitled to make substantive arguments addressing the questions raised in the Petition because its right to participate on the basis of the Nover Certificate Holdings is unchallenged. As such, Nover's participation in this proceeding prejudices no one.

On the other hand, Nover will be severely and unfairly prejudiced if it is excluded from making arguments with respect to Settlement Trusts from which it receives cash flows via the Nover CDO holdings. If the Challenging Holders' motion to limit Nover's standing are granted, Nover's interests in the administration and distribution of the Settlement Payment will be decided without Nover having an opportunity to be heard. Therefore, in this equitable

proceeding, the equities favor Nover's participation or intervention. *See Rainbow Shop Patchogue Corp. v. Roosevelt Nassau Operating Corp.*, 60 Misc.2d 896, 899-900 (Sup. Ct. Kings Cnty. Cnty. 1969) ("'The general rule in equity is that all persons interested in the subject-matter of the action should be joined', and 'that a court of equity, in the absence of all parties necessary for a complete determination of the controversy tendered by the action will not assume jurisdiction.'") (citations omitted), *aff'd*, 34 A.D.2d 667 (2d Dep't 1970).

CONCLUSION

For the foregoing reasons, Nover Ventures, LLC respectfully requests that the Court deny the Challenging Holders' Consolidated Memorandum of Law.

Dated: July 13, 2018
New York, New York

Respectfully submitted,

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