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

In the matter of the application of U.S. BANK NATIONAL ASSOCIATION, et al., Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	Index No. 651625/2018 Friedman, J. **Initial Statement of the Institutional Investors Concerning the Petition**

In accordance with the Order to Show Cause entered on April 18, 2018 (Dkt. No. 35), the Institutional Investors respectfully submit that (i) the Petition should be dismissed pursuant to C.P.L.R. 3211(a)(2) and 3211(a)(7), (ii) the Trustees should reimburse the trusts for the costs of the proceeding, and (iii) the settlement and governing agreements should be enforced as written.[1]

In the context of equitable trust instructional proceedings such as those under Article 77,[2] it is well established that courts "will not advise the trustee as to his [or her] powers where they are clearly fixed by the trust instrument"; instead, such proceedings are only properly brought "in cases of real difficulty where there is an honest doubt after a careful reading of the instrument and the procurement of legal advice from counsel."[3] The policy behind this rule is simple: "[C]ourts do not hold themselves out to act as lawyers for timid trustees who seek court protection for every

[1] The Institutional Investors hold over $6 billion of certificates (by unpaid principal balance) in 186 trusts. *See* Ex. A. In the event the Court declines to dismiss the case, the Institutional Investors' substantive positions on the "issues" raised in the Petition are summarized below.

[2] Bogert, THE LAW OF TRUSTS AND TRUSTEES, § 559; *Matter of Lipin*, 9 Misc.2d 708, 710 (Sup. Ct. N.Y. Cnty. 1957), *aff'd* 6 A.D.2d 1011 (1st Dep't 1958) (explaining that predecessor to CPLR Article 77 is equitable in nature).

[3] Bogert, *supra* note 2, § 559; *see also* RESTATEMENT (THIRD OF TRUSTS) § 71, cmt. d ("Because of concern regarding burdens on the judicial system and unwarranted costs and delays in trust administration, a trustee . . . normally is not entitled to instructions with respect to the administration of a trust unless there is some reasonable doubt about the extent of the trustee's powers or duties or about proper interpretation of the trust provisions.").

move they make or who wish to save the trust the expense of procuring the assistance of a lawyer."[4] A trustee cannot recoup the costs of such proceedings without "reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust."[5]

Here, the Trustees' duties are clearly fixed by the trust instruments and settlement agreement, so judicial instructions are inappropriate.[6] The answer to each of the three "issues" raised in the Petition is plain from the face of their own contracts: (1) the settlement agreement requires Pay First, and the trust instruments do not require otherwise[7]; (2) the trust instruments provide that the level of overcollateralization in the deals cannot be affected by the settlement payment[8]; and (3) the Petition admits, at Paragraph 57, that the zero-balance provision in the trust instruments precludes distributions to zero-balance certificates. The Trustees have not pointed to any *bona fide* disagreements among investors as to any of these issues, nor have they explained why the Court should expend *its* scarce resources *instructing* the Trustees to do what their contracts already require them to do. The Court has discretion to decline to entertain a request for judicial instructions; the Institutional Investors respectfully submit it should do so here.

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[4] Bogert, *supra* note 2, § 559; *see also City Bank Farmers' Trust Co. v Smith*, 263 N.Y. 292, 295-296, 189 N.E. 222, 223-224 (1934) (explaining that judicial instructions "are not to provide a substitute for the usual legal advisers").

[5] RESTATEMENT (THIRD OF TRUSTS) § 71, cmt. e ("Expenses incurred by a trustee in applying to the court for instructions are payable from the trust estate unless the application for instructions was plainly unwarranted, there being no reasonable uncertainty about the powers or duties of the trustee or about the relevant law or proper interpretation of the trust. In such a case it is normally improper for a trustee to incur the expenses of making the application.") (citing *Ferguson v. Rippel*, 23 N.J. Sup. 132, 92 A.2d 647 (1952) (trustee not entitled to costs where meaning of trust provision was clear, despite having brought the instruction proceeding in good faith)); *Baxter's Ex'rs v. Baxter*, 43 N.J.Eq. 82 (Ch. 1887); Bogert, *supra* note 2, § 559 (award of costs rests in discretion of the court, which will consider whether the trustee's application was "reasonable and of benefit to the trust estate").

[6] The same applies to the non-Trustee Paying Agents, who are payed a fixed fee to administer payments to investors.

[7] The last sentence of Section 3.06(b) of the settlement agreement (governing the certificate write-up) provides that the write-up "shall not affect the distribution" of the settlement payment, which necessarily precludes the Write Up First methodology, under which the certificate write-up would "affect the distribution" of the settlement payment.

[8] The definition of overcollateralization accounts for both the pay down *and* subsequent write-up of the certificate balances. Overcollateralization Amount is typically defined as follows: "With respect to any Distribution Date, the amount, if any, by which (x) the Aggregate Loan Balance for such Distribution Date determined as of the last day of the related Collection Period exceeds (y) the aggregate Class Principal Amount of the Offered Certificates, in each case after giving effect to distributions on such Distribution Date." (emphasis added).

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