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

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

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Respondents Tilden Park Capital Management LP and affiliates, together with their advisory clients (collectively, "Tilden Park"), AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, Goldman Sachs Asset Management L.P., Invesco Advisers, Inc., Kore Advisors, L.P., The Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, The TCW Group, Inc., Thrivent Financial for Lutherans, Voya Investment Management LLC, and Western Asset Management Company (collectively, with the other parties listed after Tilden Park, the "Institutional Investors"), American General Life Insurance Company, American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., The United States Life Insurance Company in the City of New York, The Variable Annuity Life Insurance Company (collectively, with the other parties listed after the Institutional Investors, "the AIG Parties" and, together with all of the aforementioned parties, the "Challenging Respondents"), respectfully submit this Memorandum of Law in Support of their joint motion to limit standing to participate in this proceeding to certificate holders in the Settlement Trusts.[1]

PRELIMINARY STATEMENT

CPLR Article 77 ("Article 77") limits standing to appear in proceedings thereunder to persons with a direct economic interest in the proceeding's outcome. More particularly, under Article 77 and the Surrogate's Court Procedure Act ("SCPA"), referenced therein, standing to appear in an Article 77 proceeding is limited to "persons interested" in the trust that is the subject of the proceeding, and "persons interested" is defined to mean those entitled to share as

[1] The Challenging Respondents acknowledge that a Certificate Insurer in a trust has standing to enforce the terms of a trust instrument. Accordingly, they do not challenge the standing of Ambac Assurance Corporation to appear in this proceeding.

beneficiaries. *See* N.Y. C.P.L.R. 7703 (McKinney); N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney).

As applied here, these principles mean that standing to appear in this Article 77 proceeding with respect to any particular Settlement Trust[2] is limited to persons holding certificates issued by that Settlement Trust. The Settlement Trusts' Governing Agreements clearly state that the only beneficiaries of those Trusts are their certificate holders. Other persons, including holders of indirect interests in the Settlement Trusts, are not beneficiaries and consequently lack standing. General standing principles, as set forth by the state and federal courts of New York, mandate the same conclusion, as courts consistently deny standing to parties with only an indirect interest in the matter under consideration.

One Respondent here, Nover Ventures, LLC ("Nover"), is not a certificate holder in all the Settlement Trusts with respect to which it has purported to appear. Nover claims an interest in Settlement Trusts in which it does not own certificates but merely owns interests in CDOs that allegedly own certificates in those Settlement Trusts. As detailed below, however, the fact that Nover invested in CDOs that own certificates issued by some of the Settlement Trusts does not make Nover the owner of those certificates. Nover has neither rights nor obligations under the Governing Agreements, and whatever indirect economic interest it has does not make Nover a "beneficiary" of the Settlement Trusts. Accordingly, Nover lacks standing to appear with respect to those Trusts in this proceeding.

[2] Capitalized terms used in this Answer and not defined herein have the meanings given to such terms in the Petition for Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment (the "Petition"), dated April 4, 2018, filed by U.S. Bank National Association, Wells Fargo Bank, National Association, Wilmington Trust, Wilmington Trust Company, and Citibank, N.A. (collectively, the "Trustees" or "Petitioners").

STATEMENT OF FACTS

The Trustees commenced this proceeding under CPLR Article 77 to obtain judicial instructions regarding the distribution of each Trust's Allocable Share of a $2.38 billion allowed claim (for Covered Loans) and a $12 million allowed claim (for Transferor Loans) against various affiliates of Lehman Brothers Holdings Inc. The Petition raises two issues relating to the distribution of settlement proceeds to certificate holders: (1) the order of operations (i.e., the Write-Up First Method or the Pay First Method); and (2) whether to apply the Zero Distribution Provision for certain trusts. Seven respondents have filed answers to the Petition. On June 15, 2018, pursuant to the Court's Scheduling Order dated April 18, 2018, the parties exchanged information concerning the nature of their interests in the Settlement Trusts.

The June 15 disclosures revealed that Nover does not hold certificates in all of the Settlement Trusts in which it has claimed an interest. Instead, some of Nover's interests in the Settlement Trusts are held indirectly, through interests in CDOs that in turn own certificates issued by certain Settlement Trusts. The table appended to this brief as Exhibit A, which will be filed under seal with the Court, contains a list of Nover's CDO holdings and the related Settlement Trusts. As detailed below, the holdings listed on Exhibit A are insufficient to give Nover standing to appear in this proceeding with respect to the Settlement Trusts to which they relate. Exhibit A thus describes the scope of the relief sought through this motion.

THE NATURE OF NOVER'S CHALLENGED INTERESTS

Investors in CDOs do not have ownership interests in the assets owned by the CDOs. Instead, the CDO's assets are owned by the CDO's ***trustee***. As explained by the court in *In re Citigroup Inc. Securities Litigation*, 753 F. Supp. 2d 206, 215 (S.D.N.Y. 2010):

> [C]ollateralized debt obligations ('CDOs') are a form of asset-backed security. An underwriter creates a CDO by purchasing a pool of assets and transferring those assets to a special purpose entity. The entity then issues debt securities whose

> interest payments are backed by the income stream generated by the entity's assets. Although RMBS and CDOs are similar in many ways, RMBS securitizations purchase mortgages and issue securities backed by those mortgages, whereas many CDOs purchase *other securities*—RMBS, for example—and issue securities backed by those.

(emphasis in original). *Accord House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2014 WL 1383703 at *1 (S.D.N.Y. Mar. 31, 2014) ("A CDO issuer is an investment vehicle that bundles a variety of revenue-generating assets (the 'collateral' or 'underlying assets') and then sells pieces of the expected revenue to investors in the form of debt and equity securities (the CDO securities).").

A CDO is typically governed by an indenture, entered into between the CDO Issuer and the Trustee of the CDO indenture, which transfers "the CDO Issuers' property to the CDO Indenture Trustee and provide[s] to the CDO Indenture Trustee certain rights and duties." *Triaxx Prime CDO 2006-1, Ltd. v. Bank of New York Mellon*, 2017 WL 1103033 at *1 (S.D.N.Y. Mar. 21, 2017). The court in *Triaxx Prime CDO* 2006-1 cited a typical CDO "granting clause," which states as follows:

> The [CDO] Issuer hereby Grants to the [CDO] 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 . . . of any type or nature owned by it, including . . . the Collateral Debt Securities ...[3]

The term "Grant" in this Triaxx Prime CDO 2006-1 granting clause is defined broadly as follows:

> "Grant" means to 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

[3] *See* Affidavit of David M. Sheeren, filed herewith, at Ex. A (Triaxx Prime CDO 2006-1 Indenture) at p. 1 (emphasis added)

> instruments, and all other Cash payable thereunder, to give and receive notices and other communications, to make waivers or other agreements, ***to exercise all rights and options, to bring Proceedings in the name of the granting party or otherwise, and generally to do and receive anything that the granting party is or may be entitled to do or receive thereunder or with respect thereto***.[4]

The "Collateral Debt Securities" in which the CDO Trustee holds all "***right, title and interest***" may include certificates in RMBS trusts. In *Triaxx Prime CDO 2006-1*, for example, the court explained that "the CDO Issuer[] purchased certificates issued by 53 RMBS trusts, which formed the corpus of the [] CDOs." 2017 WL 1103033 at *1. Thus, under the granting clause, the CDO's ***Trustee*** —not the CDO's ***investors***—owns all of the "right, title, and interest in" the underlying RMBS certificates which "form[] the corpus" of that CDO trust.

Further, the broad definition of the term "Grant" makes clear that the CDO Trustee's "right, title, and interest" in the RMBS certificates includes (i) all rights to payments on the RMBS certificates; and (ii) "***all rights . . . generally to do and receive anything that the granting party is or may be entitled to do or receive***" with respect to the underlying RMBS certificates.[5] This broad Granting Clause makes clear that the CDO ***Trustee***, not the CDO investors, has the exclusive right to take any action with respect to the underlying RMBS certificates, including a decision to appear in an Article 77 Proceeding that might impact the payments to such RMBS certificates.

Typical CDO indentures also contain "no action" provisions, akin to those found in RMBS PSAs, which prohibit CDO investors from instituting suits or pursuing remedies on behalf of the CDO *unless*, among other conditions, (a) they hold a certain threshold of the outstanding notes (generally 25%), and (b) have previously demanded the CDO trustee pursue such remedy for the

[4] Sheeren Aff., Ex. A., at p. 22 (emphasis added).

[5] Sheeren Aff., Ex. A., at p. 22.

CDO. For example, Secion 5.8 of the Triaxx PRIME 2006-1 CDO Indenture, previously relied on by Nover as a representative CDO indenture, provides that:

> 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;[6]

Typical CDO indentures also frequently include provisions that permit a majority of the controlling class of CDO investors to direct the CDO trustee to exercise any right, remedy or power conferred on the Trustee, so long as such investors provide an indemnity satisfactory to the CDO trustee. For example, Section 5.13 of the representative Triaxx CDO provides:

> Notwithstanding any other provision of this Indenture (but subject to the proviso in the definition of "Outstanding" in Section 1.1 hereof), ***a Majority of the Controlling Class shall have the right to direct the Trustee in the conduct of any proceedings for any remedy available to the Trustee for exercising any trust, right, remedy or power conferred on the Trustee***; provided that: (a) such direction shall not conflict with any rule of law or with this Indenture; (b) the Trustee may take any other action deemed proper by the Trustee that is not inconsistent with such direction; provided that, subject to Section 6.1 hereof, the Trustee need not take any action that it determines might involve it in liability (unless the Trustee has received satisfactory indemnity against such liability as set forth below); (c) ***the Trustee shall have been provided with indemnity satisfactory to it*** . . .[7]

Individually and collectively, these CDO provisions make clear that all rights attendant to the RMBS certificates owned by a CDO are held exclusively by the CDO trustees. CDO investors

[6] Sheeren Aff., Ex. A., at p. 84.

[7] Sheeren Aff., Ex. A., at p. 85 (emphasis added).

have the ability to direct the CDO trustees to exercise such rights, so long as they meet the contractual requirements, including the provision of an indemnity satisfactory to the CDO trustee.

ARGUMENT

I. A RESPONDENT MUST HOLD A CERTIFICATE ISSUED BY A SETTLEMENT TRUST TO HAVE STANDING.

A. A Respondent That Does Not Hold a Certificate Issued by a Settlement Trust Fails to Satisfy Article 77 Standing Requirements Because it is Not a Trust Beneficiary.

i. Article 77 Limits Standing to Beneficiaries.

Under Article 77, standing is limited to beneficiaries of the Settlement Trusts.[8] Article 77 provides that the "joinder and representation [in an Article 77 proceeding] of persons interested in express trusts" shall be governed by "[t]he provisions as to joinder and representation of persons interested in estates as provided in the surrogate's court procedure act." N.Y. C.P.L.R. 7703 (McKinney). The SCPA defines "Person interested" as "[a]ny person entitled or allegedly ***entitled to share as beneficiary*** in the estate or the trustee in bankruptcy or receiver of such person." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney) (emphasis added).[9] The definition further states that "[a] creditor shall not be deemed a person interested." *Id.* Thus, only beneficiaries of the trust(s) at issue in an Article 77 proceeding would qualify as "persons interested" who may take part in the proceeding.

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[8] The Court has power to enforce standing requirements in special proceedings like this one. *See, e.g.*, *Friends World Coll. v. Nicklin*, 249 A.D.2d 393, 394 (2d Dep't 1998) (affirming trial court that struck answer of respondent who lacked standing in special proceeding); CPLR § 7701 (Article 77 proceedings are "special proceeding[s]").

[9] Because Article 77 incorporates the SCPA's "provisions as to joinder and representations of persons interested in estates," the SCPA's definition of "Person interested" should be read as: "[a]ny person entitled or allegedly entitled to share as beneficiary in the [trust] estate . . . ." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney). Similarly, the SCPA's definition of "Beneficiary" should be read as: "[a]ny person entitled to any part or all of a[] [trust] estate." *Id.*

ii. The Only Beneficiaries of the Settlement Trusts are their Certificate Holders.

The same section of the SCPA that defines "Person interested" in a trust defines a "Beneficiary" as "[a]ny person entitled to any part or all of an estate." N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney). Further, the Restatement (Third) of Trusts, widely cited by New York courts,[10] makes clear that only those *intended* to receive a benefit are beneficiaries: "[a] person is a beneficiary of a trust if the settlor manifests an intention to give the person a beneficial interest; a person who merely benefits incidentally from the performance of the trust is not a beneficiary." Restatement (Third) of Trusts § 48 (2003) (emphasis added).

Here, the Governing Agreements themselves reflect that certificateholders were the only intended beneficiaries under those contracts. *See Gary Friedrich Enterprises, LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 313 (2d Cir. 2013) (under New York law, "the best evidence of intent is the contract itself"). The Governing Agreements typically provide that the Certificates "eviden[ce] ***all of the beneficial ownership interest*** in a trust fund" and have "undivided beneficial ownership interest[s] in the Trust Fund." *See*, *e.g.*, LMT 2007-4 Trust Agreement (Sheeren Aff., Ex. B), at pp. 3, 46. The Governing Agreements also typically provide that the Trustees are to act for the benefit of the certificate holders. *See, e.g.*, *id.* at § 2.01 (p. 45) ("The Trustee declares that . . . it . . . has received and shall hold the Trust Fund, as trustee, in trust, *for the benefit and use of the Holders of the Certificates* and for the purposes and subject to the terms and conditions set

[10] *See, e.g.*, *Matter of Wood*, 177 A.D.2d 161, 166 (App Div. 2nd Dep't 1992) ("The Court of Appeals has recently cited the Restatement as an authority in trust administration. We adopt the quoted portion of the Restatement as an authoritative declaration of the duty of a trustee upon termination of a trust with a single remainderman.") (citations omitted). The Restatement of Trusts has been cited and relied upon in RMBS-related Article 77 proceedings. *See Matter of Bank of N.Y. Mellon*, 127 A.D.3d 120, 126 (1st Dep't 2015); *Matter of Bank of N.Y. Mellon*, 2014 WL 1057187 (N.Y. Sup. Ct. Jan. 31, 2014).

forth in this Agreement") (emphasis added). Thus, the Governing Agreements make clear that only certificate holders are beneficiaries of the Settlement Trusts.

iii. Nover is Not a Beneficiary With Respect to Trusts Held by CDOs.

Nover does not qualify as a beneficiary of the Settlement Trusts identified in Exhibit A because, as it has admitted, it does not hold certificates issued by those trusts. While it claims to have standing by virtue of its CDO holdings, as detailed above (at pp. 2-5), CDO indentures typically provide that (i) only the CDO trustees hold any right, title, or interest in such certificates, and (ii) only the CDO trustees are empowered to exercise any rights attendant to such certificates. Indeed, holders of CDO certificates, such as Nover, are expressly prohibited from enforcing such rights unless they comply with the requirements of the indenture, including by holding a requisite threshold of CDO notes, and by providing an indemnity satisfactory to the CDO trustee.

Courts that have interpreted typical "granting clauses" in CDO indentures and similar documents have roundly rejected attempts by investors and/or issuers to bring suits and otherwise assert rights attendant to the underlying assets in those structures – including, for example, underlying RMBS certificates held by the CDOs – on the grounds that they own no rights to assert. For example, several courts have rejected attempts by a CDO issuer to pursue contractual claims relating to RMBS certificates forming the corpus of the CDO trusts.

In *Triaxx Prime CDO 2006-1*, the court interpreted the granting clause excerpted above to be "broad enough to include the transfer [to the Trustee] of the right to bring contract claims relating to any instruments and securities [held by the CDO] … including the Collateral Debt Securities." 2017 WL 1103033 at *3 (quoting *Banque Arabe et Internaitionale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 151 (2d Cir. 1995) (assignment "clearly transferred the assignor's rights and interests" in the agreement, so it also transferred "any claims grounded in contract relating to that agreement")).

Similarly, the First Department, in a comparable context involving Credit Default Swaps (CDS), explained that a CDS investor lacked standing to sue because it had "granted nonparty HSBC Bank USA, as trustee, all of [the investor's] rights under the swap agreements, including the right to bring actions and proceedings." *CRAFT EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 139 A.D.3d 638, 639 (1st Dep't 2016).

Two other courts in the Southern District have reached the same conclusion interpreting identical language in CDO indentures. *See Phoenix Light SF Ltd. v. U.S. Bank Nat'l. Ass'n.*, 2015 WL 2359358, at *2 (S.D.N.Y. May 18, 2015) (granting clause barred CDO issuer's claim because "a full assignment of this type [in the granting clause] divests plaintiffs of any rights they otherwise may have had to commence litigation on their own behalf.") and *House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, 2014 WL 1383703, at *16 (reaching the same result because, "a party that has assigned away its rights under a contract lacks standing to sue for breach of that contract"). As the court explained in *House of Europe Funding I, Ltd.*, it is the entity that ***owns*** the CDO's assets that is "injured by actions that adversely affect the underlying assets." 2014 WL 1383703, at *11 (emphasis added). Here, by virtue of the "granting clause," the owner of the assets is the CDO Trustee—not the CDO Issuer and not the CDO investors.

Nover, therefore, cannot claim any "entitle[ment] to any part or all of a [Settlement Trust's] estate," N.Y. Surr. Ct. Proc. Act Law § 103 (McKinney), as is required for beneficiary status under the SCPA and Article 77. Any such entitlement is held by the CDO trustees, which as owners of certificates issued by the Settlement Trusts had notice of this proceeding and standing to appear here, but elected not to do so. That election is binding on Nover, who has no standing of its own.[11]

[11] It also bears noting that permitting persons in the position of Nover – i.e., those with only an indirect interest in an RMBS trust by virtue of an investment in another structure that owns certificates issued by the trust – would create a host of practical problems. Such a rule would increase by multiples the number of persons who could

B. Courts Have Repeatedly Denied Standing to Parties Injured Indirectly.

In addition to Article 77's specific requirements that mandate that only direct certificate holders be granted standing, holders merely alleging an indirect interest also fail to satisfy the basic requirement of standing under New York law: "[t]he existence of an injury in fact – an actual legal stake in the matter being adjudicated." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772–73 (N.Y. 1991).

New York courts applying that standard have repeatedly denied standing to parties injured indirectly. For example, in *Calvary Hosp., Inc. v. Tweedy*, 2007 WL 1953412 (N.Y. Sup. Ct. Jun. 18, 2007), the New York Supreme Court held that the petitioner's indirect interest in refunds owed by the New York City Water Board to other entities did not permit the petitioner to sue for those refunds. In that case, several companies had hired the petitioner to review their bills from the New York City Water Board and seek refunds for overcharges in exchange for a fee of 50% of the savings from any successful claims. *Id.* The court held that the petitioner's "potential compensation by its clients . . . does not constitute an injury in fact – an actual legal stake in the matter being adjudicated." *Id. See also Grunewald v. Metro. Museum of Art*, 125 A.D.3d 438, 439 (1st Dep't 2015) (party "lacks standing to sue" when the "benefit to" it from a contract "is incidental and not direct"); *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 320 (1st Dep't 2011) (an "incidental benefit is insufficient to confer standing"); *Bank v. Allen*, 58 Misc. 2d 150 (N.Y. Sup. Ct. 1968) (potential economic harm from grant of license to a competitor was not injury in fact sufficient for standing to challenge the license), *aff'd*, 35 A.D.2d 245 (3d Dep't 1970).

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appear in proceedings such as this one and potentially would vastly expand the number of persons to whom RMBS trustees owe duties and bear potential liability.

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. Similarly, in *Matter of Financial Guar. Ins. Co.*, 2013 WL 4405157 (N.Y. Sup. Ct. Aug. 16, 2013), two groups sought to object to a rehabilitation plan in a special proceeding brought under New York Insurance Law Article 74. The objectors were not FGIC policyholders. Because the objectors were "no more than mere creditors of certain FGIC's creditors, . . . their consent [wa]s simply not required to consummate" the settlement. *Id.*; *see also In re Malasky*, 290 A.D.2d 631, 632 (3d Dep't 2002) (heirs with remainder interest in trust corpus do not have standing to participate in accounting of trust interest while sole beneficiary alive); *Matter of Mary XX*, 52 A.D.3d 983, 985 (3d Dep't 2008) (same); *Matter of Citibank, N.A.*, 2016 N.Y. Misc. LEXIS 4308, at *3-4 (Surrogate's Ct. N.Y. Cnty. Nov. 21, 2016) (heirs with remainder interest in trust corpus do not have standing to challenge trust's distributions to sole trust beneficiary).

Federal courts – which have the same injury-in-fact requirement as New York law, *see, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) – have also specifically held that an injury that is "derivative of an injury to a third party" is inadequate for standing. *See, e.g., Sanchez v. Blustein, Shapiro, Rich & Barone LLP*, No. 13-CV-8886 CS, 2014 WL 7339193, at *6 (S.D.N.Y.

Dec. 23, 2014) (quoting *Excimer Assocs. v. LCA Vision, Inc.,* 292 F.3d 134, 140 (2d Cir. 2002)). In *Sanchez*, a plaintiff was found to lack standing to challenge a lien on condominium units where he did not own the units but rather had an ownership interest in an LLC that owned them. 2014 WL 7339193, at *6. Because he did not directly own the property at issue, his injury was "indirect" and insufficient for standing. *Id.*

Nover cannot establish a direct injury related to the Settlement Trusts in which it does not own certificates. To the extent it is injured by a decision by the Court in respect of those Settlement Trusts, such injury will, at most, take the form of a lessened return on an investment in a totally separate financial structure. Under the cases cited above, such an injury would be indirect, incidental and attenuated, and insufficient to ground standing for Nover in this proceeding.

CONCLUSION

WHEREFORE the Challenging Respondents respectfully request that the Court limit standing in this proceeding to those parties that hold certificates in the Settlement Trusts and hold that Nover does not have standing to appear in connection with Settlement Trusts in which it does not hold certificates.

New York, New York
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