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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 60

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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,

INDEX NUMBER:
651625/18

Petitioners,

(Telephone
Conference)

For Judicial Instructions under CPLR Article 77,
On the Distribution of a Settlement Payment.

- - - - - X

60 Centre Street
New York, New York
August 21, 2018

BEFORE:

HONORABLE MARCY S. FREIDMAN, Justice

APPEARANCES:

GIBBS & BRUNS, LLP
Attorney for the Institutional Investors
1100 Louisiana Street - Suite 5300
Houston, Texas 77002
BY: KATHY PATRICK, ESQ.,
DAVID SHEEREN, ESQ.,

APPEARANCES CONTINUED:

Monica S. Horvath - Senior Court Reporter

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McKOOL SMITH, PC
Attorneys for Nover Ventures, LLC
One Bryant Park - 47th Floor
New York, New York 10036
BY: GAYLE KLEIN, ESQ.,

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SENIOR COURT REPORTER

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2 THE COURT: On the record.

3 Good morning. This is Judge Friedman.

4 Let me ask those who are going to be speaking,
5 to state their names and to identify their clients
6 without full court appearances.

7 And I will ask you to send us a list of all
8 counsel who are on the phone today.

9 MS. PATRICK: Good morning, Your Honor.

10 Kathy Patrick and David Sheeren, for the
11 Institutional Investors.

12 And, Mr. Sheeren, will be arguing for our
13 client this morning.

14 THE COURT: Thank you.

15 MS. KLEIN: Good morning, Your Honor.

16 This is Gayle Klein from McKool Smith on behalf
17 of Nover Ventures LLC.

18 THE COURT: Thank you.

19 Is there anyone else who will be arguing?

20 (Whereupon, there was no response.)

21 I'm not hearing anything.

22 As discussed on a prior telephone call, we will
23 hear argument first from Nover and then we will have the
24 reply by the Institutional Investors.

25 Miss Klein.

26 MS. KLEIN: Thank you, Your Honor.

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2 As the Court correctly noted in its decision in
3 the JPMorgan case, this is an issue of first impression,
4 where the Court is called upon to apply an Article 77
5 proceeding to apply traditional legal precept to novel
6 and untemplated structure.

7 Given that there has been full argument on
8 these issues in the JPMorgan matter, we appreciate the
9 opportunity to provide brief argument and we will rely
10 on our papers and use this argument simply to highlight
11 three distinct points that reflect on this novel and
12 complicated nature of these issues.

13 The first point is that each of these RMBS
14 trusts themselves are what are called "multitiered,
15 T-I-E-R-E-D re-REMIC, R-E-R-E-M-I-C trusts." That means
16 that these RMBS trusts are themselves essentially trusts
17 within trusts.

18 Exhibit A to our Memorandum of Law, which is
19 NYSCEF Doc. 110, echoes this point with respect to one
20 of the subject LXS 2006-2.

21 THE COURT: Excuse me.

22 Miss Klein, we are having a little trouble
23 hearing you. You are fading out at times.

24 MS. KLEIN: Is this better, Your Honor?

25 (Whereupon, counsel speaks louder.)

26 THE COURT: Possibly.

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2 The reporter did not get the last sentence, so
3 if you could repeat that I would appreciate it.

4 MS. KLEIN: Sure.

5 First, the first point is that each of these
6 RMBS trusts themselves are multitiered re-REMIC trusts,
7 R-E-R-E-M-I-C trusts. That means that they are
8 essentially trusts within trusts.

9 Exhibit A to our Memorandum of Law, NYSCEF
10 Doc. 110 illustrates this point with respect to one of
11 the subject trusts which is LXS-2006-2.

12 The mortgage loans are first pooled into the
13 pooling REMIC 1. And pooling REMIC 1, has a trustee.
14 Those regular interests are then pooled into a lower
15 tier REMIC 1, and that lower tier REMIC, also has a
16 trustee. Those interests are essentially reassigned
17 until finally you get to the upper tier REMIC 1, which
18 then issues certificates of which persons who have
19 appeared in this proceeding hold certificates.

20 At every interval, those REMIC's have a trustee
21 who holds a certificate for the use and benefit of the
22 certificate holder and those trustees can speak on
23 behalf of those certificate holders. This is very
24 similar to the CDO structure.

25 And, interestingly enough, those certificate
26 holders too have the same no action clause as is had in

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the CDO trust. Therefore, the only thing that those certificate holders in the underlying RMBS have is an interest in the class of certificate they hold which may or may not receive an interest in the settlement payment.

We understand that it is the suggestion of the challenging respondents -- I'm sorry -- with respect to the position of the challenging respondents, it would be the trustee of the upper tier REMIC 1, who has the right to appear in this case and not the underlying RMBS certificate holders. That cannot stand, Your Honor, and, therefore, what we are asking for is the Court to apply the same type of analysis to the CDO trust, because it is the exact same type of language that appears in the CDO, as does appear in the RMBS trust with respect to the rights of the certificate holders.

To require us to have another layer by requiring direction indemnification of the CDO trustee is simply another added burden and expense for Your Honor to hear and receive the same information that it otherwise could.

Secondly, and importantly, Your Honor, the trustees of the Settlement Trust, do not object to our participation as a holder of interest in CDO that may be entitled to settlement funds. That is presumably because

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2 the trustees have a dispassionate interest in your
3 getting the decision right and more information is
4 better.

5 As Your Honor noted, certificate holders in the
6 CDO trust may have conflicting views. But that is
7 exactly the same with respect to an underlying RMBS
8 trust. Direct certificate holders also have conflicting
9 views here too.

10 For example, the Institutional Investors,
11 Olifant, and Nover, all have an interest in the same
12 2006 BN -- as in Nancy -- C3 trust. And that is
13 apparent on NYSCEF Doc. No. 83 that shows who has
14 appeared and what their positions are.

15 Nover's interest in the fund is direct and it
16 is aligned with the Olifant fund, so you will hear from
17 that trust why the Institutional Investors claim that
18 you should apply the pay first with no temporary
19 re-collateralization. And, opposingly, Nover and
20 Olifant, claim that we would prefer a write up first
21 interpretation.

22 Given these types of conflicts, it is important
23 for Your Honor in all things to have input from those
24 who have an interest in the settlement payment proceeds
25 because they have an interest in Your Honor's issuing
26 the governing documents correctly. And without multiple

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voices, Your Honor is left to consider these governing documents without full input when we contend that the Institutional Investor's interpretation is not correct.

Having only one hold to participate does not absolve the Court from getting it right, so we believe it is important for the Court to have full information.

Moreover, given that the parties will try to have consolidated briefing on certain issues, it is a distinction without a difference because you have Nover's participation with respect to certain trusts, where it will be asserting the same type of argument, but you won't be able to consider those arguments with respect to trusts where no one has appeared.

Finally, Your Honor, we urge the Court to rule that if it is going to apply truly consistent as it did in the JPMorgan Article 77 proceeding that it also rule that those who have holdings that are subject to Repurchase Agreements only may not participate in this proceeding.

As is clear from the Institutional Investors and challenging holder's briefing under the case of One William Street Capital Management versus Education Loan Trust 4, those who have Repurchase Agreement holdings and are always subject to Repurchase Agreements have the exact same type of indirect interests that the

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2 Institutional Investors, and other challenging holders
3 assert is improper and therefore to have an inconsistent
4 standard applied across different holders is patently
5 unfair.

6 And, with that, Your Honor, we will conclude
7 our argument for the day. And we again appreciate the
8 opportunity to re-urge certain issues in this case.

9 THE COURT: Thank you.

10 We will hear now from the Institutional
11 Investors.

12 MR. SHEEREN: Thank you, Your Honor.

13 David Sheeren, for the Institutional Investors.

14 Your Honor, the issues just argued and the
15 briefs themselves are identical to what the Court heard
16 in the JPMorgan proceeding. The Court's August 7th
17 decision resolves these issues.

18 If the Court has any particular questions, we
19 would certainly be willing to answer them, but we will
20 leave it at that, Your Honor.

21 THE COURT: Bear with me for just a moment. I am
22 going to take a very short recess.

23 (Whereupon, there was a brief recess.)

24 (Whereupon, the proceeding resumes.)

25 THE COURT: Back on the record.

26 Counsel, I would like to ask you to call back,

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if possible, at 11:30. At which time, I would give you a decision on the record.

Is it possible for counsel to call at that time?

MS. KLEIN: Yes, Your Honor.

THE COURT: Miss Klein?

MS. KLEIN: Yes, Your Honor.

THE COURT: Okay, we will speak to you then.

Thank you very much.

I will close the record for this session.

(Whereupon, the matter was recalled.)

THE COURT: Back on the record.

Good morning again.

Do we have Miss Patrick, Mr. Sheeren and Miss Klein on the phone?

MS. PATRICK: We are here, Your Honor.

Kathy Patrick.

MS. COHEN: Yes.

This is Gayle Klein.

THE COURT: Thank you.

I am now going to give you a decision on the standing motion.

I will give the reporter the paragraphs for this decision and spellings after I have put the decision on the record.

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Tilden Park Capital Management LP, and affiliates, various institutional investors, and "AIG parties", hereafter, the Challenging Respondents, move for summary judgment against Nover Ventures LLC, hereafter, Nover, on the ground that it lacks standing to appear in this Article 77 proceeding to the extent that it asserts interests in Settlement Trusts based on its ownership interest in Collateralized Debt Obligations (CDO's).

The arguments on standing that are made in the briefing of this motion are virtually identical to those made in a standing motion in an Article 77 proceeding brought by Wells Fargo Bank NA and other trustees with respect to a settlement by JPMorgan Chase & Co., hereafter, the JPMorgan proceeding, Index Number 657387/17. That motion was decided by decision of this Court dated August 7, 2018, 2018 West Law 3743897. Hereafter, the Standing Decision.

For the reasons set forth in that decision, the Court holds that Nover lacks standing to participate in this proceeding based on its CDO holdings. Nover's standing is not challenged with respect to the Settlement Trusts in which it holds certificates.

In holding that Nover lacks standing based on its CDO holdings, Nover argues that this case differs

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from the JPMorgan proceeding because information about Repo holdings has been exchanged. It further argues that if it is found not to have status as a "Person Interested", based on its CDO holdings then Repo holders should also be found to lack standing because both types of holdings are indirect. The Court rejects this contention. The information about the Repo holdings has not been provided to the Court. More important, Nover fails to make any showing that a Repo holder's interest is akin to that of a holder of interests in CDO's or that the determination as to the nature of a Repo holder's interest would not turn on the terms of the particular Repurchase Agreements. See decision to same effect dated August 7, 2018, Index Number 657387/17. NYSCEF Doc. No. 475 determining a motion by Nover in the JPMorgan proceeding for discovery on Repo holdings.

The Court further notes that on this motion, Nover emphasizes an argument which it made in the JPMorgan proceeding and which the Court did not specifically address in the standing decision, that Nover's interest in the CDO structure is similar to certificate holder's interests in the multitiered REMIC Settlement Trusts. The Court holds that this contention is without merit as the certificate holders in Settlement Trusts have direct interests in those trusts

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2 and as held in the standing decision are beneficiaries
3 of those trusts.

4 On this motion, Nover further asserts that the
5 challenging respondent's lack and interest in every
6 Settlement Trust in which Nover asserts standing based
7 on its CDO holdings. In reply the challenging
8 respondents represent that they have direct holdings in
9 all of the Settlement Trusts that are the subject of the
10 standing objection. In any event, it is not disputed
11 that the challenging respondent had holdings in various
12 Settlement Trusts in which Nover asserts an interest
13 based on its CDO holdings and that the issue of the
14 sufficiency of the CDO holdings to confer "Person
15 Interested" status on Nover was therefore squarely
16 raised. The Court's holding as to such status must be
17 applied consistently across the trusts in which Nover
18 seeks to appear.

19 Finally, the Court appreciates Nover's point
20 that in determining the distribution questions presented
21 in this proceeding, the Court benefits from hearing the
22 differing positions of investors. The Court has every
23 interest in "getting it right", but the Court has
24 concluded after careful consideration that Nover does
25 not have an interest based on its CDO holdings that
26 affords it standing to assert its position.

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2 This concludes the Court's decision on the
3 motion. It is hereby ordered that the motions of the
4 challenging respondents for summary judgment is granted
5 to the following extent: Nover Ventures LLC is
6 dismissed as a respondent with respect to any Settlement
7 Trust in which it does not hold certificates. If Nover
8 wishes to have trustees of the trusts in which it has
9 CDO holdings substitute for it it may do so consistent
10 with the procedures for substitution which have been
11 established in the JPMorgan proceeding.

12 The Court requests that the challenging
13 respondents promptly obtain a transcript of today's
14 proceedings, E-file it and file two hard copies with the
15 Clerk of Part 60. The parties are reminded that I
16 reserve the right to correct errors in the transcript.
17 Therefore, if it is needed for any further purpose, they
18 should be sure they have a copy as so ordered by the
19 Court and not merely as signed by the court reporter.

20 I am going to close the record for today's
21 proceedings. And I will leave the call while you
22 arrange to get the court reporter's information, if you
23 haven't already done so. And then I will return and we
24 will have an off the record discussion about clerical
25 issues and scheduling for this proceeding. If a further
26 record is needed after we have that discussion, the

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court reporter will be available.

The record is closed.

* * *

THE ABOVE IS CERTIFIED TO BE
A TRUE AND ACCURATE TRANSCRIPT
OF THE PROCEEDING RECORDED BY ME

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