

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

-----X

In the Matter of the Application of

WELLS FARGO BANK, NATIONAL
ASSOCIATION, U.S. BANK NATIONAL
ASSOCIATION, U.S. BANK TRUST COMPANY,
NATIONAL ASSOCIATION, THE BANK OF
NEW YORK MELLON, THE BANK OF NEW
YORK MELLON TRUST COMPANY, N.A.,
WILMINGTON TRUST, NATIONAL
ASSOCIATION, HSBC BANK USA, N.A., and
DEUTSCHE BANK NATIONAL TRUST
COMPANY (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 Distribution of a Settlement Payment.

-----X

STATE OF TEXAS)
) ss.:
COUNTY OF HARRIS)

DAVID M. SHEEREN, being duly sworn, deposes and says:

1. I am a Partner with the firm Gibbs & Bruns LLP, 1100 Louisiana, Suite 5300, Houston, Texas 77002, national counsel for the Institutional Investors¹ in this litigation. I am familiar with the proceedings in this case, and I have been admitted *pro hac vice* to represent the Institutional Investors in this matter, together with Kenneth E. Warner of Warner Partners, P.C.

2. I have personal knowledge of the facts stated in this affidavit, and they are all true and correct. I make this application in response to the objection filed by Wells Fargo (NYSCEF

¹ The Institutional Investors include the sixteen investors identified in Docket No. 135.

No. 988) (the “Objection”) to the Undisputed 37-Trust Proposed Final Judgment filed by the Institutional Investors on August 30, 2022, which was entered by the Court on August 31, 2022 (NYSCEF No. 984, Mot. Seq. 15).

Wells Fargo Agreed to the Proposed Judgment to Which It Now Objects

3. Like all other parties to this case, Wells Fargo consented to the filing of the Undisputed 37-Trust Proposed Final Judgment on an agreed basis. Thus, Wells Fargo now objects to a proposed judgment to which Wells Fargo already agreed.

4. The Institutional Investors first learned of any actual or potential objection by Wells Fargo to the Undisputed 37-Trust Proposed Final Judgment when it was publicly filed on September 14, 2022. In light of Wells Fargo’s prior agreement to the Undisputed 37-Trust Proposed Final Judgment, the Objection came as a complete surprise.

5. Wells Fargo’s agreement to the Undisputed 37-Trust Proposed Final Judgment followed four months of negotiations, from May 2022 to August 2022, concerning the form of the judgment for trusts that are no longer subject to appeals. Attached as **Exhibit 1** hereto is a true and correct copy of an e-mail string reflecting most of these exchanges among counsel. Through e-mails and calls, Wells Fargo actively participated in this process.²

6. Ultimately, in late August 2022, the parties, ***including Wells Fargo***, successfully negotiated a single proposed judgment to resolve all of the instructions sought by Petitioners in their December 2017 Petition for 37 settlement trusts, no longer subject to appeals, for which more than \$620 million remains in escrow.

² Wells Fargo’s Objection concedes that Wells Fargo participated in this process, stating: “As noted by the Institutional Investors, their motion followed extensive negotiations between the trustees and various classes of respondents aimed at identifying trusts as to which there were no remaining disputes ***Wells Fargo actively participated in these negotiations***” Objection at 5 (emphasis added).

7. On August 23, 2022, following that agreement, I sent the following e-mail to counsel for all parties, including Wells Fargo’s counsel, confirming that the Institutional Investors would submit the Undisputed 37-Trust Proposed Final Judgment to the Court “*on an agreed basis*” unless they “heard otherwise by 4:00 p.m. ET” on August 24, 2022 (*see Exhibit 1* at 3) (emphasis added):

All,

I have spoken with a number of you, and I am hopeful that we have now reached an agreed proposed final judgment for the bulk of the remaining trusts by making the following two changes: (i) striking Paragraph 15 in full, and (ii) removing the two trusts in which HBK, through its NIM trustee, asserted an interest (BSABS 06-EC2 and BSABS 06-HE3). If entered by Justice Crane, this will free up more than \$620 million across 37 undisputed trusts.

Unless we hear otherwise by 4:00pm ET tomorrow afternoon, we will submit the proposed judgment on an agreed basis.

Thank you,
David

8. Wells Fargo’s counsel did not respond to this August 23, 2022 e-mail (*i.e.*, the Institutional Investors did *not* “hear otherwise”), thereby confirming that Wells Fargo consented to the filing of the proposed judgment “*on an agreed basis.*”

9. As promised, on August 25, 2022, I wrote to the Court, reporting that “(i) the parties have now been able to resolve the below-referenced objection raised by Nover Ventures, LLC, and (ii) *all parties have reached an agreed proposed judgment for 37 undisputed trusts* (attached here),” and requesting the Court’s guidance on how to present the agreed judgment to the Court. *See Exhibit 2* at 3 (emphasis added). The Court directed the parties to proceed by Order to Show Cause, and the Institutional Investors did so on August 30, 2022. *Id.*

10. Wells Fargo’s counsel did not respond to my August 25, 2022 e-mail to the Court (either directly or to the Court), much less inform the parties or the Court that it intended to object

to the proposed judgment, again confirming our understanding that Wells Fargo consented to the Undisputed 37-Trust Proposed Final Judgment.

11. These were not the only instances in which Wells Fargo consented to the submission of the Undisputed 37-Trust Proposed Final Judgment on an agreed basis. For example, weeks before, on August 17, 2022, I sent an e-mail to counsel to all parties, informing them that the Institutional Investors intended to file an Affidavit with the Court stating that “*all parties except Nover consent to the 38 Undisputed Trust Proposed Final Judgment*” (see Exhibit 1 at p. 6-7) (emphasis added):

All,

In connection with the OSC that we expect to file on Friday (absent an agreement with Nover per the below), we intend to file an affidavit stating the following, which reflects our understanding of the current state of play. The referenced 38-trust proposed final judgment and exhibits thereto are attached (note: Jones Day is compiling a list of parties, which is the final loose end). The “Precedential Effect Provision” is defined to be the full paragraph 15 of the proposed judgment, to which Nover objects.

- I have conferred with counsel to all parties, and my understanding is that all parties except Nover consent to the 38 Undisputed Trust Proposed Final Judgment.
- I have conferred with counsel to Nover, and my understanding is that if the Precedential Effect Provision were struck from the 38 Undisputed Trust Proposed Final Judgment, Nover would likewise consent to its entry by the Court.

Thank you,
David

12. The 38-trust proposed judgment referenced in that August 17, 2022 e-mail was identical in all material respects to the 37-trust proposed judgment now at issue, except that (i) an unrelated provision was removed from it (to resolve Nover’s objection), and (ii) the list of trusts changed slightly (without impacting the current dispute over the 37-trust proposed judgment).

13. Wells Fargo’s counsel were included on this August 17 e-mail informing all parties that the Institutional Investors would soon file an Affidavit with the Court stating that all parties

except Nover consented to the proposed judgment, but Wells Fargo's counsel did not respond to it, once again confirming that Wells Fargo consented to the proposed judgment.

**Wells Fargo Never Sought Instructions on the Two Issues It Now Raises,
Instructions Are Unnecessary, and The Time To Request Them Has Long Passed**

14. The Petition in this matter, filed on December 15, 2017, almost five years ago, did not seek instruction on the two issues described in Wells Fargo's Objection. Wells Fargo concedes this point, because it requests permission to file a *new* Petition by September 30, 2022. Objection at 2. In effect, Wells Fargo asks to amend its pleading at the judgment-settling phase of the case.

15. The pleading stage of this Article 77 proceeding has long passed. More than two years after the Petition was filed, this Court provided the instructions requested by Petitioners in a lengthy Decision and Order dated February 13, 2020 (NYSCEF No. 843). That Decision was affirmed by the First Department, Appellate Division on August 19, 2021, and, on April 26, 2022, the New York Court of Appeals denied motions seeking discretionary leave to appeal to the Court of Appeals. Most recently, on September 15, 2022, the Court of Appeals denied a motion for re-argument of that denial. Until now, Wells Fargo never sought any clarification of this Court's Decision and Order, never sought to amend its Petition, and never sought any appeal.

16. As Wells Fargo notes in its Objection, Wells Fargo and the other Petitioners have already distributed approximately \$3.5 billion in settlement funds, *without* the newly requested instructions. *See* Objection at 5. In fact, none of the dozens of prior severance orders allowing these distributions to take place contained specific language addressing the two new issues Wells Fargo now seeks to introduce into this case.

17. Importantly, Wells Fargo has made very substantial distributions to many RMBS trusts whose governing agreements contain some of the *very same language* on which Wells Fargo

now requests judicial instructions. Wells Fargo's ability to make those distributions, without controversy, shows that Wells Fargo does not need these instructions.

18. For instance, in May 2019, pursuant to a severance order (NYSCEF No. 822), Wells Fargo distributed over \$19 million in settlement funds to the BALTA 2007-1 trust and \$25 million to the BALTA 2006-7 trust, each of which contain the "payment priority" language on which Wells Fargo now seeks instruction. Likewise, in May 2020, pursuant to a severance order (NYSCEF No. 822), Wells Fargo distributed over \$38 million in settlement funds to the BALTA 2006-6 trust and \$113 million to the BALTA 2006-4 trust, whose governing agreements also contain the "payment priority" language identified in Wells Fargo's Objection. Those distributions, which took place without incident, were made pursuant to severance orders that did *not* contain the additional instructions on write-up mechanics that Wells Fargo now seeks.

**Wells Fargo Failed to Raise These Two Issues Over
Nine Years of Settlement Approval Litigation**

19. Wells Fargo's request to file a new Petition on two alleged distribution issues comes almost nine years after the Institutional Investors offered the \$4.5 billion settlement to Wells Fargo and the other Petitioners, in November 2013. *See* Petition at 2.

20. Over the past nine years, Wells Fargo had every opportunity to seek the instructions described in its Objection, but it failed to do so. For example, Wells Fargo could have, but did not, raise these two alleged issues during any of the prior phases of this nine-year litigation process to approve the \$4.5 billion settlement the Institutional Investors presented to Wells Fargo in November 2013, including during the:

- approximately **9 months** in which Wells Fargo evaluated the settlement offer and revised the settlement agreement, including its distribution provisions (November 2013 to July 2014) (*see* Petition at 2);

- approximately **25 months** in which Wells Fargo sought an Order from this Court that its acceptance of the Settlement Agreement was reasonable and in good faith, leading the Court to find, in overruling an objection to the settlement distribution mechanics, that “*the Trustees persuasively argue [that] they have significant subject matter expertise in applying waterfall provisions in the Governing Agreements to distribute Trust funds to certificateholders*” (August 2014 to August 2016) (*see JPM I Decision*, Aug. 12, 2016, Index No. 652382/2014 (NYSCEF No. 594) at 33 (emphasis added));
- approximately **15 months** in which the parties waited for IRS approvals and appellate deadlines to pass (September 2016 to November 2017);
- approximately **27 months** in which Wells Fargo and the other Petitioners filed and litigated the instant Article 77 in this Court seeking judicial instructions on five new, alleged distribution issues, thereby delaying \$3.5 billion in settlement distributions (December 2017 to February 2020);
- approximately **18 months** in which certain parties pursued appeals of this Court’s February 2020 Decision to the First Department (March 2020 to August 2021);
- approximately **8 months** in which certain parties sought review with the Court of Appeals (September 2021 to April 2022);
- approximately **4 months** in which the parties worked extensively to settle judgments on the basis of the Decision of this Court and the First Department affirmance, including a 2-week extension that Wells Fargo requested and which the Institutional Investors granted (May 2022 to August 2022); or
- approximately **2 weeks** between the filing of the agreed 37-Trust Proposed Judgment and Wells Fargo’s Objection (late August 2022 to mid-September 2022).

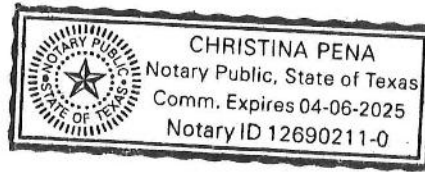
21. For the reasons set out herein, the Institutional Investors respectfully request that the Court enter the Undisputed 37-Trust Proposed Final Judgment.³

FURTHER AFFIANT SAYETH NOT.

DAVID M. SHEEREN

Sworn to before me this
20th day of September, 2022.

C. Q. Peña
Notary Public



³ In light of Wells Fargo’s Objection to a proposed judgment that it already agreed to, following nine years of settlement approval litigation, the Institutional Investors have requested that Wells Fargo disclose the outside counsel fees that Wells Fargo has deducted from the RMBS trusts to pay for its attorneys. In effect, it appears that Wells Fargo’s legal fees are being paid by the RMBS trusts and their investors, and not Wells Fargo itself. Wells Fargo has not yet disclosed the amount of its legal fees that Wells Fargo has deducted from the RMBS trusts since the \$4.5 billion settlement was offered to Wells Fargo in November 2013. The Institutional Investors reserve all rights to seek an Order from the Court requiring that Wells Fargo reimburse the RMBS trusts for some or all of these fees.