SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK 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.	Index No. 657387/2017 (Friedman, J.) **Motion Sequence No. 005**

HBK'S MEMORANDUM IN OPPOSITION TO JOINT MOTION TO LIMIT PARTICIPATION

SCHLAM STONE & DOLAN LLP
John M. Lundin
Niall D. Ó Murchadha
Seth D. Allen
Alexandra M.C. Douglas
Lee J. Rubin
26 Broadway, 18th Floor
New York, New York 10004

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004

Attorneys for Respondent HBK Master Fund L.P.

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Respondent HBK Master Fund L.P. ("HBK"), by its undersigned counsel, submits this memorandum of law, together with the Affirmation of John M. Lundin and the exhibits attached thereto ("Lundin Affirm."), in opposition to the joint motion to limit participation in this proceeding to certificateholders in the settlement trusts identified in the Petition (the "Joint Motion" by the "Movants").

PRELIMINARY STATEMENT

The Joint Motion must be denied because HBK is an interested person under CPLR Article 77 and thus has standing to appear in this Article 77 proceeding.

First, HBK has a clear and substantial interest in the outcome of this proceeding. HBK is a noteholder in 20 NIM trusts (the "NIM Trusts"), which own Class C (or economically equivalent) certificates ("Class C certificates") from 21 of the settlement trusts in this proceeding (the "Underlying Settlement Trusts"),[1] and one of the principal legal questions presented in this proceeding is how funds obtained by the Underlying Settlement Trusts should be distributed to certificateholders, including Class C certificateholders. HBK has alleged in its Answer that, if the pay-first method is used and the retired class provisions in the applicable PSAs are enforced, the Class C certificateholders will benefit, and any funds flowing to the Class C certificateholders will benefit HBK via the pass-through NIM Trusts. However, if another method, such as writingup first and ignoring the PSA's retired class provisions, is used, funds likely will not flow to the Class C certificateholders and thence to HBK.

This payment stream is neither contingent nor remote. HBK is not a "creditor" of the NIM Trusts in the sense that the NIM Trusts are independent entities with the discretionary

[1] Lundin Affirm. ¶ 2. A NIM trust is a structured finance vehicle that securitizes certificates generally representing rights to excess interest, overcollateralization, prepayment penalties, and other miscellaneous cashflows of the underlying asset-backed securitization. (*Id.*)

power to determine how their assets are distributed. Rather, the NIM Trusts are pass-through entities and distributions by the NIM Trusts are governed by mandatory provisions in their establishing agreements. The share of any payments via the Class C certificates through the NIM Trusts to HBK can therefore be calculated with precision. In short, if this Court adopts HBK's position on the contested legal issues, HBK will likely realize funds via the Class C certificates, but if this Court rejects HBK's position, it likely will not.

Second, Movants' arguments are contrary to the positions taken by the trustee of the NIM Trusts, which is notably the same entity—U.S. Bank—represented by the same counsel—Nina Yadava, Esq., of Jones Day—as one of the RMBS trustees that commenced this proceeding. When HBK received notice of this proceeding—which was posted on the NIMs websites by U.S. Bank as trustee of the NIM Trusts (the "NIM Trustee")—HBK approached U.S. Bank as NIM Trustee and requested that it appear in this proceeding. But U.S. Bank took the position that the NIM Trustee was not an interested person based upon the same straightforward analysis put forth herein by HBK; U.S. Bank's counsel informed HBK that "it is HBK and other Noteholders—and not the [NIM] Trustee—that may be directly impacted by the outcome of the Article 77 Proceeding." After Movants filed the Joint Motion, U.S. Bank confirmed HBK's understanding of the NIM Trusts' structure—i.e. that the collateral is held "for the exclusive use and benefit of [the] noteholders"—and that payments to the Class C certificates will flow through to HBK and other NIM noteholders. [2] U.S. Bank has taken the further step of agreeing that if the Court determines otherwise, then U.S. Bank, as the NIM Trustee, will agree to take direction in this proceeding from HBK and move to substitute itself for HBK as a petitioner so HBK can advance its arguments through U.S. Bank. U.S. Bank therefore

[2] Lundin Affirm. Ex. 12.

recognizes that the substantive financial interest lies not with the pass-through NIM Trusts, but with NIM Trust beneficiaries such as HBK.

Third, Movants' standing-to-sue argument is a red herring. The simple answer is that CPLR Article 77 grants standing to interested persons and as HBK shows here, it is an interested person under Article 77. That is the beginning and end of any standing analysis. Realizing this, Movants mostly ignore the question of standing under Article 77 and instead rely upon an incorrect and unsupported legal premise—that "interested person" status in this Article 77 proceeding is limited solely to parties who would have standing to **commence** an action for breach of the Underlying Settlement Trusts' PSAs. But this proceeding was commenced not by HBK, but by rather by U.S. Bank and the other Petitioners, who as trustees certainly had standing to commence it. Under Article 77, the right to **appear** in an Article 77 proceeding as an interested person is substantially broader that the right to **commence** an action or even the right to intervene in an already-filed action. Even a very remote or contingent stake in the outcome is sufficient to support interested person status. Indeed, the First Department has recognized parties with far more attenuated or contingent claims as proper interested persons to an Article 77 proceeding.

Movants' secondary argument regarding the NIM indenture no-action clauses fails for the very same reason; their plain language bars commencement of actions or proceedings under the NIM indenture, not appearances as an interested person in a pre-existing Article 77 proceeding. Indeed, if Movants' argument about the no-action clauses were taken seriously, they too would lack standing, because the agreements that govern their own certificates also include no-action clauses, with which they presumably have not complied. Nor does it appear from their pleadings

that Movants have received permission to appear in this proceeding from Cede & Co., the record holder of the RMBS certificates Movants own.

Fourth, this Court should be aware of the real motive behind the Joint Motion. The indirect holders such as HBK are the only parties representing the interests of the Underlying Settlement Trusts' Class C certificates, and if Movants have their way, there will be no-one to speak for the holders of these certificates. Because their financial interests are at odds with those of the Class C certificateholders, Movants want to make sure that the Class C certificateholders are excluded from this proceeding.

FACTUAL BACKGROUND

A. Creation of the NIM Trusts and HBK's Holdings in the NIM Trusts.

The NIM Trusts were created in the mid-2000s by issuers CMO Holdings II Ltd. and CMO Holdings III LTD., structured finance arms and vehicles of Bear, Stearns & Co. Inc. LaSalle Bank National Association was the NIM Trustee at inception, but LaSalle since has been replaced by U.S. Bank, which now serves as NIM Trustee.

The NIM Trusts were created in parallel with the creation of the Underlying Settlement Trusts, which were also created by Bear Stearns & Co. Inc. subsidiaries, and for which LaSalle Bank also served as trustee. In every case, the underlying assets of the NIM Trusts include certificates of Underlying Settlement Trusts, and the Underlying Settlement Trusts certificates were repackaged and placed in trust for the benefit of the noteholders of the NIM Trusts (the "NIM noteholders") within little more than a month of the issuance of the underlying agreements.[3] Indeed, rather than offer for sale all of the certificates in any given Underlying Settlement Trust at the time of offering, the prospectus supplements for the Underlying

[3] Lundin Affirm. Ex. 1.

Settlement Trusts note that "the Class CE Certificates . . . are not [being] offer[ed] by this prospectus supplement."[4] Thus, at the time the Underlying Settlement Trusts were created and sold, the same parties that created those trusts expressly contemplated that certain certificates would be sold in some manner other than a direct sale of certificates to purchasers—*i.e.* as resecuritizations, such as the NIM Trusts.

The NIM Trusts and the Underlying Settlement Trusts still are closely linked—U.S. Bank is the trustee of all but one relevant Underlying Settlement Trusts, and is the trustee of every NIM Trust. Moreover, U.S. Bank, in its capacity as trustee of the Underlying Settlement Trusts and in its capacity as NIM Trustee, is represented by the same attorney, Nina Yadava Esq. of Jones Day.[5]

B. Payments to Class C Certificates Will Flow Directly to the NIM Noteholders.

If settlement funds reach an Underlying Settlement Trusts' Class C certificates, those funds will flow inevitably and directly to HBK. The NIM Trusts' transfers of funds to their noteholders, including HBK, are governed by indentures and, insofar as noteholders are NIM Class C noteholders, Fiscal Agency Agreements. Pursuant to these documents, the NIM Trustee is to deposit all funds it receives, including those from the Underlying Settlement Trusts or in any way relating to the Underlying Settlement Trusts in an account ("Note Account").[6] On each payment date, the NIM Trustee must pay out all funds in the Note Account ("Available Funds").[7] First, the interest and principal must be paid to the Class A-1, A-2, and A-3 Notes,

[4] Lundin Affirm. Ex. 2.
[5] Lundin Affirm. ¶ 5.
[6] Lundin Affirm. Ex. 3. This includes any payments paid directly under the Underlying Certificates, or any payments under the Derivative Administration Agreement, along with any other amounts obtained.
[7] Lundin Affirm. Ex. 4.

and any remaining Available Funds are transferred to the Fiscal Agent.[8] The holders of the Class C Notes are paid by the Fiscal Agent once the other noteholders are paid in full, first interest, then principal down to $1.00, then any additional amounts as interest.[9]

The NIM Trustee has no discretion regarding this waterfall of payments. Further, the only compensation to which the NIM Trustee and the other NIM Trust administrators are entitled is a onetime fee, which was already paid on when the NIM Trust was created and/or which expressly states that it may not be paid out of the Trust Estate.[10] The NIM Trustee and its agents thus are not entitled to any share of funds to be distributed from the Underlying Settlement Trusts; those funds will all flow to NIM noteholders like HBK.[11]

C. The Course of Proceedings.

1. The Petition and Court Orders.

This proceeding was commenced by the trustees of the Underlying Settlement Trusts, including U.S. Bank, to ask the Court for guidance on several questions relating to distribution the Settlement Funds, including: (1) whether to apply the pay-first, write up second method or the write-up first, pay second method to the Underlying Settlement Trusts; and (2) whether to enforce the Retired Class Provisions included in many of the PSAs governing the Underlying Settlement Trusts.[12] The Petition itself expressly considered that parties other than certificateholders or noteholders may have the right to appear in this proceeding. For example, in Paragraph 1 it stated that "[t]he Settlement Payment is thereafter to be distributed to the holders of certificates, notes, **or other securities**"; in Paragraph 13 it noted that in the 2016

[8] Lundin Affirm. Ex. 5.
[9] Lundin Affirm. Ex. 6.
[10] Lundin Affirm. Ex. 7.
[11] U.S. Bank as NIM Trustee confirms this understanding of the NIM trust structure. See Lundin Affirm. Ex. 12.
[12] Petition ¶¶ 24, 54 – 57.

Settlement Order, "this court ruled 'Certificateholders, Noteholders, and **any other parties claiming rights** in the Accepting Trusts are barred from asserting claims against any Trustee with respect to such Trustee's evaluation and acceptance of the Settlement Agreement . . . "; and in paragraph 1 of the Prayer for Relief, it asked this Court to take jurisdiction over "the Petitioners, and all certificateholders, noteholders, and **other parties claiming rights** in the Settlement Trusts." (Emphasis added.)

By Order to Show Cause filed on December 19, 2017 (Dkt. No. 30), the Court imposed a notice program and set a schedule for the trustees to provide notice not just to any certificateholder in the Underlying Settlement Trusts but also to any "Interested Person," noting that this "Notice Program . . . is reasonably calculated to put interested parties on notice of this action." Specifically, the Court's order provided that "any Interested Person who wishes to be heard on the merits of the questions presented by the Petition may appear by counsel . . . at the Final Hearing and present such evidence or argument" provided that "nothing submitted by any Interested Person shall be considered by the Court unless such Interested Person serves an answer to the Petition" by a date set by the Court.

2. Notice of the Settlement Agreement and This Proceeding Is Posted to The NIMs Websites by U.S. Bank.

In accordance with the notice provisions in the December 19, 2017, order, on January 5, 2018, the trustees for the Underlying Settlement Trusts, including U.S. Bank, posted a notice of the settlement agreement, this proceeding and the Court's orders to their websites.[13] On the same date, U.S. Bank, as NIM Trustee, posted the same notice on the website for the NIM Trusts, with a cover letter stating that "[y]ou are receiving the Notice in connection with a

[13] Lundin Affirm. Ex. 8.

resecuritization, CDO, or other security that directly or indirectly owns or hold certificates, notes or other securities issued by ones or more of the [RMBS] trusts covered under the Settlement."[14]

3. U.S. Bank, Which Is Both Trustee of Underlying Settlement Trusts and the NIM Trustee Considers HBK To Be an Interested Person.

After learning of this proceeding, HBK took steps to ensure that as an interested person, it would be heard. HBK believed that, as a noteholder in the NIM Trusts, which would be directly impacted by the issues to be decided in this proceeding, it was an "Interested Party" in accordance with the Court's orders and Article 77. However, to ensure that it was taking every step possible to protect its interests, HBK contacted the NIM Trustee's counsel to ask whether U.S. Bank intended to appear on behalf of the NIM Trusts, or whether it would agree to assign the right to appear in the proceeding to HBK or join HBK's Answer.[15] U.S. Bank took the position that the NIM Trustee was not an interested person, but rather that "it is HBK and other Noteholders—and not the [NIM] Trustee—that may be directly impacted by the outcome of the Article 77 Proceeding."[16]

HBK therefore appeared in this action as an interested person on January 29, 2018.

In response to the Joint Motion, U.S. Bank has reaffirmed its position that it is HBK and other NIM noteholders—rather than itself as NIM Trustee—"that have a financial interest and a beneficial interest" in the Class C certificates of the Underlying Settlement Trusts.[17] U.S. Bank has further agreed that, if the Court disagrees, U.S. Bank will agree to take direction from HBK regarding the NIM Trusts and move to substitute for HBK to appear on behalf of the noteholders of the NIM Trusts to advance the positions in HBK's Answer under HBK's direction.[18]

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[14] Lundin Affirm. Ex. 9.
[15] Lundin Affirm. Ex. 10.
[16] Lundin Affirm. Ex. 11.
[17] Lundin Affirm. Ex. 12.
[18] (*Id.*)

4. HBK's Position on The Merits of This Proceeding.

In its Answer, HBK took a position on two of the key questions raised by the Petition: (1) that the HBK PSAs require the Pay First, Write-Up Second method to be applied to the NIM Trusts; and (2) that the Retired Class Provisions contained in the HBK PSAs should be enforced, meaning that zero-balance certificates are not entitled to payment from the Settlement Funds.[19] HBK's position on these merits questions conflicts with the position taken by several other respondents on one or more of these questions, including the Institutional Investors, AIG, and Tilden Park—who now have moved to prevent HBK's position regarding the distribution of the Settlement Amount by the Underlying Settlement Trusts from being heard.

ARGUMENT

I. HBK IS AN INTERESTED PERSON BECAUSE IT HAS A CLEARLY-APPARENT STAKE IN THE OUTCOME OF THIS PROCEEDING

A. HBK is an Interested Person Under Established Article 77 Precedent.

1. Even Holders of Contingent and Remote Interests are Interested Persons.

The status of "interested person" in an Article 77 proceeding is defined very broadly. "The provisions of the statute [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." *In re Cowle's Will*, 22 A.D.2d 365, 370, 255 N.Y.S.2d 160, 166 (1st Dep't 1965) *aff'd* 17 N.Y.2d 567 (1966). In *Cowle's Will*, the interested persons were children who would only obtain a benefit from the trust if not one but two contingent events took place. *See id*. at

[19] HBK Answer, Dkt. No. 78, ¶¶ 22 – 42.

369, 165 ("Accordingly, the Hipkins infants would not take under the trust indentures if Ernest exercised his power of appointment or, having failed to exercise the same, if Louise P. Hipkins, their mother, now age 36, survived Ernest, now about 59 years of age").[20] And the First Department recognized that the children were not necessary parties to the proceeding. *Id.* ("They would be considered as being properly and sufficiently represented in the proceedings by their mother as the taker of the remainder interest"). But all the same, the First Department held—and the Court of Appeals affirmed—that (a) the children had been properly included as "interested parties" at the outset, and that (b) because they had "a valid interest in having the action or proceeding continue for a determination of issues presented by [them]," they should not be dropped from the proceeding. *Id.* at 371, 167.

2. HBK Has a Direct Interest in This Proceeding.

HBK's interest in the outcome of this proceeding is far less contingent than the children's in the *Cowle's Will* case; indeed, by comparison, HBK's interest is not contingent at all. In *Cowle's Will*, the children would only recover from the trust if the present beneficiary did not exercise his power of appointment and even then, if their mother were still living, she, not they, would receive the trust proceeds. Here, on the other hand, if the Court accepts HBK's argument on the merits, HBK's right to recover would not be contingent on the discretion (or the life) of any third party—any payments to the Underlying Settlement Trusts' Class C certificateholders would flow **directly** to the NIM Trusts and thence **directly** to HBK pursuant to pre-determined formulae.[21] Put another way, the *Cowle's Will* children were permitted to appear as interested

[20] Compare this decision with the three trust accounting cases cited by Movants, *infra* II.B—a party with **no** expectation of financial benefit may not be "interested," but even a **remote** likelihood of future benefits gives rise to "interested person" status.

[21] The NIM Trustee concurs: "If the Class C NIM Collateral receives payments from the Settlement Trust, the payments are deposited in the NIM Trusts and passed through to the noteholders." Lundin Affirm. Ex. 12

persons even though they would likely not recover even if they prevailed on the merits. That is not the case for HBK, which has a definite interest that will be affected by the disposition of this proceeding.

Further, as will be explored in more detail below, as a NIM noteholder, HBK is a beneficiary of the underlying trusts under the governing agreements, and therefore must be an interested person. U.S. Bank, as NIM Trustee, is not entitled to any funds that flow to the Class C certificates and thus to the NIM Trusts; U.S. Bank is paid only a one-time, up-front payment for its service as NIM Trustee, and is not entitled to any type of fee or percentage of amounts received by the NIM Trusts; it is the NIM noteholders who are entitled to all such funds.

3. No Other Party to This Proceeding Will Protect HBK's Interests.

Another dissimilarity between *Cowle's Will* and the present case is the presence of intervening beneficiaries. In *Cowle's Will*, the present beneficiary and the children's mother—of whose senior interests the children's interests were entirely derivative—were both parties to the proceeding. As the First Department noted, the children "would be considered as being properly and sufficiently represented in the proceedings by their mother as the taker of the remainder interest," but the children were recognized as "interested parties" despite that fact. *Cowle's Will*, 22 A.D.2d at 369, 255 N.Y.S.2d at 166.

Here, on the other hand, the entity Movants point to as HBK's proper representative, U.S. Bank as NIM Trustee (Br. at 14), has not appeared. Indeed, the entire purpose of the Joint Motion is to ensure that HBK's interests will **not** be "properly and sufficiently represented in the[se] proceedings."

U.S. Bank's non-appearance strongly supports recognizing HBK as an interested person. *See Beltway Capital, LLC v. Soleil*, No. 22244/07, 2009 WL 4263346 at *4 (Sup. Ct. Kings Cty. 2009) (Allowing intervention where rights in property will be determined in individual's

absence); s*ee also In re Estate of Wells*, No. 00–0193, 2012 WL 4854700 at *2 (Sur. Ct. Chautauqua Cty. 2012) (where representation is not adequate a potentially interested person must be given a right to appear). Where no one is representing a beneficiary's interests, then that representation must be inadequate. *Compare Matter of Ziegler*, 157 Misc. 2d 423, 430 (Sur. Ct. N.Y. Cty. 1993) (noting that a trustee can serve as a legal representative of beneficiary).

4. If HBK is Found to Lack Standing, U.S. Bank Will Move to Appear and Advance the Same Arguments at HBK's Direction.

U.S. Bank has twice told HBK that it views HBK, not U.S. Bank, as the financially interested person here. Nonetheless, U.S. Bank has agreed if necessary to move to substitute for HBK in this proceeding and make the same arguments HBK is making at HBK's direction. Thus, granting the Joint Motion will resolve nothing on the merits and will simply delay this proceeding while the Court decides U.S. Bank's motion.

B. HBK's Status as an Interested Person Would Be Recognized in a Variety of Analogous Proceedings and Actions.

It is settled law that the right to appear as an "interested person" is broader that the right to file an action *ab initio* or even the right to intervene in an already-pending action. *See Roosevelt Islanders for Responsible Southtown Development v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 48, 735 N.Y.S.2d 83, 90 – 91 (1st Dep't 2001) ("CPLR 7802(d) provides that the court may permit 'other interested persons' to intervene in a proceeding, conferring upon the court **broader authority** to allow intervention in an Article 78 proceeding than is permitted pursuant to CPLR 1013, which requires that a claim or defense proposed to be asserted in an action involve "a common question of law or fact") (emphasis added).

Despite the right to intervene being narrower than the right to appear as an interested person, parties with much less direct interests than HBK's here are allowed in intervene in

various circumstances. *A fortiori*, HBK is an interested person under the broader standards of Article 77.

First, even an indirect financial interest is sufficient to permit intervention in a pending legal action. For example, in a rent dispute between a landlord and a tenant, the First Department held it an abuse of discretion to deny the mortgage holder's motion to intervene where the mortgage holder was also the assignee of the rents. *Yuppie Puppy Pet Products, Inc., v. Street Smart Realty, LLC*, 77 A.D.3d 197, 906 N.Y.S.2d 231 (1st Dep't 2010). There, the IAS court had rejected the mortgage holder's motion to intervene because "as the mortgage lender, Petra had no interest in the outcome of the action, [and] as an assignee, Petra's rights and duties are between it and Street Smart, as it was not in privity with Yuppie Puppy." *Id*. at 200, 232. The First Department noted that "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action . . . . As the holder of the mortgage on the underlying premises, it cannot be seriously disputed that Petra has a real, substantial interest in the outcome of this litigation," because the outcome of the litigation "substantially impairs the interest of Petra in receiving the rents of the premises as a guarantee of the mortgage." *Id*. at 201 – 202, 233 – 234. The same relationship exists here—regardless of Movants' assertion that HBK's "rights and duties" are between it and the NIM Trusts, it cannot be disputed that HBK "has a real, substantial interest in the outcome of this litigation." *Supra*.

Accordingly, indirect beneficiaries of a charitable trust have been permitted to intervene in proceedings concerning the trust's disposition:

> "[W]hile the intervenors are not trust beneficiaries, they do have a real and substantial interest in the outcome of this proceeding.
>
> The trust was established by agreement dated October 26, 1944, between six major oil companies as donors and Guaranty Trust Company as Trustee. By its terms the

> donors transferred to the Trustee their interests in Universal Oil Products Company (hereinafter called 'Universal') and the income derived from the operation of Universal was to be paid to the beneficiary, American Chemical Society, to be used by it 'exclusively for advanced scientific education and fundamental research in the 'petroleum field'.'
> . . .
> We also find persuasive that, in the absence of the intervenors, there is, as a practical matter, no real adversary proceeding before the court. The beneficiary of the trust and the Attorney General do not oppose the trustee's application. Responsibility for ultimate decision rests with the court. **Obviously, the court will be assisted materially by a presentation of relevant facts by the intervenors who propose to contest the petitioner's application.**
>
> **Permission to intervene does not depend on any finding that the intervenors are beneficiaries of the trust.** The incidental non-monetary benefits which the intervenors derive, while of sufficient importance to permit their being heard in this proceeding, are not such as to make them beneficiaries of a charitable trust . . . .

In re The Petroleum Research Fund, 3 A.D.2d 1, 3 – 4, 157 N.Y.S.2d 693, 695 – 696 (1st Dep't 1956) (internal citations omitted, emphasis added) *affirming* 3 Misc.2d 790, 155 N.Y.S.2d 911 (Sup.Ct. N.Y. Cty. 1956) ("Under the liberal language of the present statute, it is not required that a proposed intervenor shall have a direct personal or pecuniary interest in the subject of the action. If he would be indirectly affected by the litigation in a substantial manner, and his claim or defense with respect to the subject-matter of the litigation has a question of law or fact in common therewith, it would seem that he may be permitted to intervene").

Second, the same rule has been followed in proceedings under other statutes. For example, in tax proceedings, entities with indirect interests, even where the interests are contingent or hypothetical, are permitted to intervene:

> CPLR 1012 (subd. (a), par. 2) provides for intervention by a third party as of right when the representation of that person's interest by the parties is inadequate and that person is or may be bound by the judgment . . . **Thus, it has been said that where the intervenor has a real and substantial interest in the outcome of the proceeding, intervention should be allowed**.
>
> **Although petitioner's property does not lie within the appellant's jurisdiction, it is clear that appellant is affected by the judgments in the tax certiorari**

> **proceedings in a real and substantial way**, to wit, a demand has been made upon it for a refund of taxes. Moreover, although we take no position on the issue at this time, it is foreseeable that further demand may, at some time in the future, be made of the appellant to pay over to the Monroe-Woodbury district the whole of the taxes paid by petitioner. Under these circumstances, a**ppellant should not have been foreclosed from presenting its point of view on the record** before final judgments were entered requiring it to refund to the petitioner any excess taxes.

Plantech Housing, Inc. v. Conlan, 74 A.D.2d 920, 920 – 921, 426 N.Y.S.2d 81, 82 (2d Dep't 1980) (internal citations omitted, emphasis added).

Third, the same standard applies to interventions in declaratory judgment actions, which have many similar characteristics to this proceeding. For example, indirect beneficiaries of governmental regulations have been permitted to intervene in declaratory judgment actions seeking to modify the regulations:

> Before joinder of issue, the proposed intervenors moved for leave to intervene as defendants. The proposed intervenors are nine hospitals which, pursuant to the MOE regulations, are entitled to reallocated BDCC funds in excess of $40 million. The Supreme Court denied the motion to intervene. We reverse.
>
> Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings. **Here, if the MOE regulations are declared invalid, the proposed intervenors *may* lose a substantial amount of BDCC funds. Accordingly, the proposed intervenors have a real and substantial interest in the outcome of the action.** Hence, the Supreme Court should have granted the motion to intervene.

County of Westchester v. Department of Health of State of N.Y., 229 A.D.2d 460, 460, 645 N.Y.S.2d 534, 535 (2d Dep't 1996) (internal citations omitted, emphasis added); *accord Application of Helms*, 76 Misc.2d 253, 255, 349 N.Y.S.2d 917, 918 (Sup. Ct. Schen. Cty. 1973) (Article 78 proceeding challenging regulated use of seaplanes in forest preserves; "Subdivision (d) of CPLR 7802 states that a court may allow other interested persons to intervene in an article 78 proceeding. This subdivision grants a court broader power to allow intervention than is provided in CPLR 1013. In addition, the Adirondack Mountain Club, Inc. owns real estate

surrounded by forest preserve lands and thus has a direct interest in the outcome of this litigation") (internal citation omitted).

C. The NIM Noteholders Have a Greater Interest Than the NIM Trustee in This Proceeding.

Movants largely do not dispute that some party connected to the NIM Trusts can appear as an interested person in this proceeding. Instead, they argue that the NIM Trustee is the proper interested person instead of NIM noteholders such as HBK. (Br. at 14.) However, this argument misinterprets the governing documents of the NIM Trusts, and is contradicted by the NIM Trustee's own statements and actions.

1. As A General Matter of Trust Law, The Trustee May Hold Legal Ownership of The Trust Assets but The Beneficiaries Hold Equitable or Beneficial Ownership of The Trust Assets.

As Movants correctly point out:

> [T]he Indenture Trustee holds on behalf of *all* certificate holders in that NIMS Trust . . . all right, title and interest in and to (i) the Underlying Certificates and all distributions thereon after the Closing Date, (ii) the Note Account, (iii) the right to enforce remedies against the Administrator under certain agreements, (iv) all present and future claims, demands, causes and choses in action in respect of the foregoing and (v) all proceeds of the foregoing of every kind and nature whatsoever

(Br. at 9 (emphasis added).) But Movants misinterpret the indentures, incorrectly arguing that they evidence a transfer of the beneficial interest in the trust to the trustees. Rather, this language conveys only **legal** possession of these underlying certificates to the trustees. No provision in any of the governing agreements transfers **beneficial** rights to the NIM Trustee, nor would such a transfer make any sense.

Instead, the NIM noteholders, as the beneficiaries of the NIM Trusts that hold the Underlying Settlement Trust Class C certificates and their proceeds as *res*, are the beneficial owners of the Underlying Settlement Trust Class C certificates, and are therefore the interested party for the purposes of Article 77. The NIM Issuer, as holder of those certificates, transferred

its legal interest in the certificates to the NIM Trustee, but transferred its **beneficial** interest in the RMBS certificates to the NIM noteholders.[22] *See, e.g., Canron Corp. v. City Of New York*, 89 N.Y.2d 147, 157 – 158, 652 N.Y.S.2d 211, 216 – 217 (1996) ("Moreover, defendants' position is inconsistent with the long-settled principle that the contractor-trustee holds the trust assets in a fiduciary capacity akin to that of the trustee of an express trust and thus, does not have a sufficient beneficial interest in the moneys, due or to become due . . . to give him a property right in them); *In re Coutts' Will*, 249 N.Y.S. 788, 794 (Sur. Ct. 1931) ("A trust arises where the legal and equitable or beneficial interests in specific property are vested in different individuals or sets of individuals"), *aff'd sub nom. Matter of Wild*, 235 A.D. 705 (2d Dep't 1932), *aff'd sub nom. In re Coutts' Will*, 260 N.Y. 128 (1932); (internal citation omitted); *Schoellkopf v. Marine Trust Company Of Buffalo*, 267 N.Y. 358, 362 (1935) ("Any person who under the terms of the instrument has a right, whether present or future, whether vested or contingent, to income or principal of the trust fund, has a beneficial interest in the trust"); Restatement (Third) of Trusts §§ 11(3), 51 (2003); Restatement (Second) of Trusts § 83 (1959) (Note Illustration 1: "A devises Blackacre to B in trust for C and D. C devises his interest under the trust to E in trust for F. E is trustee for F of C's equitable interest in Blackacre"). Accordingly, it is the NIM noteholders, and not the NIM Trustee, who are the interested persons here. *See Myer v. Myer*, 64 N.Y.S.2d 540, 542 (Sup. Ct. N.Y. Cty. 1946) (The trustee is the "representative[ ] of the beneficial owner, [and] the right which he possesses . . . must be considered as an extension of the ownership of the settlor of the trust which created his office and hence for the purpose of measuring the

[22] Lundin Affirm. Ex. 13 (noting that the grant is by the NIM Issuer to the Indenture Trustee for the benefit of the noteholders); Lundin Affirm. Exs. 14 & 15.

substantive rights involved the beneficiary of the trust and not the trustee must be regarded as the [interested party]").

2. The NIM Trustee Is Not an Interested Person Because It Has No Right to Any Distributions from The Underlying Certificates, Including the Settlement Funds.

Movants correctly note that the representation of persons interest in an Article 77 Proceeding is governed by the standards in the Surrogate's Court Procedure Act (SCPA), and that "the SCPA defines 'Person interested' as '[a]ny person entitled to any part or all of an estate." (Br. at 10.) Yet they then make the completely unsupported factual assertion that it is the NIM Trustee, not the NIM noteholders, who may be entitled to settlement funds. But this is not how the NIM Trusts work: all the money that flows through the waterfall of the Underlying Settlement Trusts to underlying Class C certificates held by the NIM Trusts are deposited by the trustee of those trusts into the Note Account and are then distributed, first interest and then principal, on each payment date, to the NIM noteholders, in sequence of the NIM Class A-1, A-2 and A-3 Notes, and then to the Class C noteholders. The NIM Trustee is not entitled to **any portion** of any amounts that are due to the underlying certificates. U.S. Bank is therefore not an interested person for the purposes of Article 77, which is concerned strictly with the beneficial rights conveyed in trust, namely who is entitled to beneficially share in the trust. *See* CPLR 7703 and SPCA 103 and 315.

This is the same position taken by the NIM Trustee itself. U.S. Bank has expressly taken the position that "it is HBK and other NIM noteholders—and not the Indenture Trustee—that may be directly impacted by the outcome of the Article 77 Proceeding." Moreover, by notifying the NIM noteholders in accordance with the Court's directive to notify "Interested Parties," U.S. Bank made clear that it believed that NIM noteholders are interested parties in this proceeding.

II. MOVANTS' STANDING DOCTRINE ARGUMENTS ARE BOTH IRRELEVANT AND MERITLESS

A. The Doctrine of Standing Primarily Addresses the Right to Commence an Action or A Proceeding, Which Is Irrelevant Here.

Movants devote most of their argument to the question of standing to bring an action to enforce the rights of an RMBS trust (Br. at 12 – 16), an issue that has nothing to do with whether HBK is an interested person under Article 77.

The principal flaw in Movants' argument is apparent from language in one of their own cases, where the Court of Appeals characterized the essence of New York standing doctrine as follows: "Under the common law, there is little doubt that a court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the **plaintiff** in the action or the **petitioner** in the proceeding are affected." *The Society of The Plastics Industry, Inc., v. County of Suffolk*, 77 N.Y.2d 761, 772, 570 N.Y.S.2d 778, 784 (1991) ("In land use matters especially, we have long imposed the limitation that the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large"). Because HBK is neither a "plaintiff" nor a "petitioner," almost all the standing cases relied upon are irrelevant.

For example, in *Calvary Hospital v. Tweedy*, No. 18049/2005, 2007 WL 1953412 at *3 (Sup.Ct. Queens Cty. June 18, 2007) the party lacking standing in the Article 78 proceeding was one of the petitioners. *See id*. ("Respondents, in opposition, assert that UtiliSave lacks standing to **bring** this Article 78 proceeding") (emphasis added). In *Grunewald v. Metropolitan Museum of Art*, 125 A.D.3d 438, 438 – 439, 3 N.Y.S.3d 23, 24 (1st Dep't 2015), members of the public lacked standing to sue the Met as plaintiffs for failing to comply with its statutory entrance-fee obligations. In *Roberts v. Health & Hospitals Corp.*, 87 A.D.3d 311, 319 – 320, 928 N.Y.S.2d 236 (1st Dep't 2015), city council members and trade union officials lacked standing to bring an

action to enjoin hospital layoffs. *See id*. ("They point to no specific violation of any building code provision which will, as a result of these layoffs, actually occur and which will cause actual injury to them"). And in *Bank v. Allen*, 58 Misc.2d 150, 152, 294 N.Y.S.2d 813, 815 (Sup.Ct. Albany Cty. 1968), pharmacists lacked standing to bring an Article 78 proceeding challenging a license awarded to another pharmacy.

Although *One William Street Capital Management, LP, v. Education Loan Trust IV*, No. 652274/2012, 2015 WL 4501194 (Sup. Ct. N.Y. Cty. July 18, 2015), technically concerns an Article 77 proceeding, the standing issue in question concerned the right to **bring** an Article 77 proceeding, not whether a party was "interested." *See id*. at *3 ("the parties dispute whether OWS is the owner of the Notes and, as such, whether OWS has standing to assert its cause of action for breach of contract").

Movants' citations to federal cases are even less convincing.[23] If anything, *Lujan v. Defenders Of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992) is favorable to HBK; HBK certainly meets the three standing requirements of (1) an injury in fact which is actual or imminent (*i.e*. the substantial risk of not getting money for their NIM interests), (2) causation (a decision on the merits resulting in the Underlying Settlement Trusts' Class C certificates not receiving any funds would directly result in HBK not getting money), and (3) redressability (a decision on the merits resulting in payments flowing to the Underlying Settlement Trusts' Class C certificates would directly result in HBK getting money). *Id*. at 560, 2136. HBK's standing argument cannot remotely be compared to the plaintiff in *Lujan*, who filed suit based upon her hope to "observe[ ]

[23] Federal standing cases are also of limited relevance because "[t]he standing requirement in Federal actions has been grounded in the Federal constitutional requirement of a case or controversy, a requirement that has no analogue in the State Constitution." *Society of the Plastics Industry*, 77 N.Y.2d at 772, 570 N.Y.S.2d at 784 (internal citations omitted).

the traditional habitat of the endangered Nile crocodile." *Id*. at 563, 2138. And *Sanchez v. Blustein, Shapiro, Rich & Barone LLP*, No. 13–CV–8886 (CS), 2014 WL 7339193 at *6 (S.D.N.Y. Dec. 23, 2014), merely stands for the proposition that an owner of an LLC may not bring a personal action to redress injuries to the LLC's property.

B. The Few Cases Movants Cite That Do Not Concern the Right to Commence an Action Are Easily Distinguishable.

Movants cite to three cases where contingent or non-beneficiaries were not permitted to object in trust accounting proceedings (Br. at 15 – 16), but these cases support one of HBK's central arguments. Accounting proceedings necessarily only concern a trustee or fiduciary's **past** distributions, whereas this Article 77 proceeding addresses **future** distributions. *See, e.g., In re Hunter*, 4 N.Y.3d 260, 267, 794 N.Y.S.2d 286, 290 (2005) ("Executors ordinarily account at the conclusion of estate administration while trustees account when the trust is terminated or when they cease to serve") (internal citations omitted). And if a beneficiary's interest remains contingent at the end of an accounting period, it is highly **unlikely** that an objection to a past action will result in a financial benefit. HBK, on the other hand, has shown that, if this Court accepts its position on the merits, it is highly **likely** to receive a financial benefit. So, for example, in *Matter of Citibank N.A. (Inman)*, 2016 N.Y. Misc. Lexis 4308 (Sur. Ct. N.Y. Cty. Nov. 21, 2016), the trust remaindermen were held to lack standing because, their interest would not be affected regardless of the outcome of their objection. *See id*. at *4 ("Consequently, even assuming that movants' allegations of fiduciary misconduct could result in a surcharge, such surcharge would inure not to the benefit of movants"). *In re Malasky*, 290 A.D.2d 631, 632, 736 N.Y.S.2d 151, 151 (3d Dep't 2002) ("decedent and petitioner were the only persons who had an interest in the income and principal of the trust during their respective joint lives and respondents therefore had no pecuniary interest in the trust during this period of time . . . respondents, having

no pecuniary interest in the revocable trust until decedent's death, lack standing to object to the account for the first accounting period"), and *In re Mary XX*, 52 A.D.3d 983, 985, 860 N.Y.S.2d 656, 657 (3d Dep't 2008) ("as the settlor (Mary) is still alive, respondent's status as a contingent remainder beneficiary of the trust did not confer standing on her to challenge the accounting") follow the same rule. Indeed, in *Malasky* the Appellate Division held that the same respondents **had** standing to object to the accounting for a subsequent period. *See* 290 A.D.2d at 632, 736 N.Y.S.2d at 151.

Finally, the issue of "interested person" was not before the court in *In re Rehabilitation of Financial Guaranty Insurance Co.*, No. 401265/12, 2013 WL 4405157 (Sup.Ct. N.Y. Cty. Aug. 16, 2013). There, the question presented was whether certain objections to a pre-negotiated settlement should be rejected or sustained, and the language movants quote is *dicta* by the court noting that the objectors' complaint that they had not been consulted was meritless. *See id*. at *3 ("Notwithstanding this, the Objectors complain that they were not consulted about the settlement and were not aware of the settlement negotiations"). Also, notably, and despite the foregoing, the court went on to consider the objectors' positions on the merits. *See id*. at *5 ("Here, the Objectors have failed to show that the Rehabilitator acted arbitrarily and capriciously, or abused its discretion, in entering into the Settlement Agreement").

C. The No-Action Clauses Only Prohibit the NIM Noteholders from Filing Suit as Plaintiffs; They are Irrelevant Here.

1. The No-Action Clauses Are Irrelevant.

Movants' argument that only the NIM Trustee, and not the NIM noteholders have standing because the PPMs or indentures include "no-action clauses" (Br. at 9), fails for the same reason as their standing argument: the no-action clauses only prohibits HBK from filing suit as plaintiffs, not from appearing as an interested person in an Article 77 Proceeding. This is

apparent from the opening sentence of the no-action clause, which says that "[n]o Noteholder has any right to **institute** any proceedings with respect to the Indenture."[24] And under New York law, "no-action clauses are to be construed strictly and thus read narrowly." *Quadrant Structured Products Co., Ltd., v. Vertin*, 23 N.Y.3d 549, 560, 992 N.Y.S.2d 687, 694 (2014).

Movants' cases all address the same, irrelevant, point. (Br. at 12 – 14.) For example, in *Triaxx Prime CDO 2006-1, Ltd., v. Bank Of New York Mellon*, 16 Civ. 1597 (NRB), 2017 WL 1103033 at * 2 (S.D.N.Y. March 31, 2017) the existence of a no-action clause barred the interest holders from filing an action against the underlying trustee for breach of contract, *see id*. ("U.S. Bank argues that the **plaintiffs** lack standing to pursue their contract **claims** because they assigned away their right to do so") (emphasis added), and their other cases are all the same—the party was trying to commence an action as a plaintiff, not seeking leave to appear as an interested person in an existing Article 77 proceeding. *See CRAFT EM CLO 2006-1, Ltd., v. Deutsche Bank AG*, 139 A.D.3d 638, 638, 34 N.Y.S.3d 7, 7 (1st Dep't 2016) ("in the indentures, CRAFT granted nonparty HSBC Bank USA, as trustee, all of CRAFT's rights under the swap agreements, including the right to **bring** actions and proceedings") (emphasis added); *N.C.U.A. Board v. U.S. Bank*, No. 14-cv-9928 (KBF), 2016 WL 796850 at *8 (S.D.N.Y. Feb. 25, 2016) (There is an essential and critical difference between believing that one has the ability to pursue a claim directly, and in fact having such an ability"); *Phoenix Light SF Ltd. v. U.S. Bank National Association*, No. 14–cv–10116 (KBF), 2015 WL 2359358 at *3 (S.D.N.Y. May 18, 2015) ("Accordingly, there is no basis for this Court to find that plaintiffs have standing to bring the instant claims on their own behalf "); *House Of Europe Funding I, Ltd., v. Wells Fargo Bank N.A.*, No. 13 Civ. 519(RJS), 2014 WL 1383703 at *16 (S.D.N.Y. March 31, 2014) ("It follows

[24] Lundin Affirm. Ex. 16 (emphasis added).

that HOE I lacks standing to sue Collineo for breaches of the CAA under any circumstances, and for breaches of the AMA if the three conditions discussed above are met").

House of Europe, upon which Movants rely, strongly supports HBK's position regarding the need for some party to assert the interests of the Underlying Settlement Trusts' Class C certificateholders here. The *House of Europe* decision reminds us that expecting U.S. Bank as NIM Trustee to sue U.S. Bank as trustee of Underlying Settlement Trusts would be "absurd." *Id.* at * 13 ("Wells Fargo cannot articulate, and the Court cannot fathom, why the absurdity of a self-suit would be diminished by the fact that the entity brings and resists the suit under different capacities"). It would be similarly absurd to expect U.S. Bank as NIM Trustee to appear as an interested person in this proceeding commenced by U.S. Bank, in which U.S. Bank as trustee of Underlying Settlement Trusts is expected to remain impartial. *See In re Bond & Mortg. Guarantee Co.*, 303 N.Y. 423, 430 (1952) (A trustee must act with "complete unselfishness and inflexible loyalty to the interest of the beneficiaries [because] 'no man can serve two masters'"); Simes and Smith, *The Law of Future Interests* § 1811 (3d ed.) ("[I]f the proceeding were . . . for the purpose of determining the scope of the trustee's powers . . . the trustee might not be permitted to represent persons in being who will be affected by the decision").

2. <u>If No-Action Clauses Prohibited NIM Noteholders from Appearing as Interested Persons, Movants Would Also Be Barred.</u>

Not only do the indentures and PPMs for the NIM Trusts include "no-action clauses," but the PSAs for the Underlying Settlement Trusts do as well.[25] Movants did not plead compliance with their no-action clauses in their responses to the Petition. Thus, Movants' position here is inconsistent with their approach to their own standing to appear in this proceeding.

[25] Lundin Affirm. Ex. 17.

Movants conflate possession of substantive rights as interested persons, and legal rights to enforce claims. The determination as to whether an individual has Article 77 standing is simply a determination as to whether an individual has a substantive right to share as beneficiary of the trust. Whether there is likewise the legal right to bring a claim is irrelevant. *See* SPCA 109(39). Movants cannot, and do not, cite a single case in which a no-action clause barred a party from appearing as an interested person in an Article 77 proceeding, nor could they, because these clauses do not apply in such circumstances. If they did, no Movant would have standing to appear in this action; instead, the only participants could be the Petitioners, the trustees of the settlement trusts, against themselves. Movants' argument that the no-action clauses prevent HBK from participating as an interested person should be rejected as the absurdity that it is.

3. Movants Do Not Appear to Have Complied with Other Standing Requirements.

Not only do Movants not have standing under the standard they advance because they have not complied with the Underlying Settlement Trust's no-action clauses, they similarly do not appear to have complied with the other standing requirement of the line of decisions upon which they rely, which is the requirement to seek permission from Cede & Co. as holder of record to bring an action. *See Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 46 A.D.3d 377, 849 N.Y.S.2d 34, 34 (1st Dep't 2007); *Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n*, 109 F. Supp. 3d 587, 607 (S.D.N.Y. 2015). That Movants do not themselves have standing under the standards they propose illustrates how completely misguided Movants' standing argument is.

CONCLUSION

For the foregoing reasons, HBK respectfully requests that the Court deny all relief sought against it in the Joint Motion.

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SCHLAM STONE & DOLAN LLP

By: _____/S/_____

John M. Lundin
Niall D. Ó Murchadha
Seth D. Allen
Alexandra M.C. Douglas
Lee J. Rubin
26 Broadway, 18th Floor
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
E-mail: jlundin@schlamstone.com
nomurchadha@schlamstone.com
sallen@schlamstone.com
adouglas@schlamstone.com
lrubin@schlamstone.com

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004
Telephone: (646) 771-7377
E-mail: jmc@mcferrin-clancy.com

Attorneys for Respondent HBK Master Fund L.P.