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

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 Administration and Distribution of a Settlement Payment.	Index No. 657387/2017 IAS Part 60 Honorable Marcy S. Friedman Motion Sequence 006

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules / Statutes

Other Authorities

INTRODUCTION

In their four separate opposition briefs, the Challenged Respondents do their best to make a simple issue complicated. Their briefs total over 90 pages, but it does not take nearly that many to respond to them because, when the rhetoric and red herrings are stripped away, the following principles remain unrebutted: (1) Standing to appear in an Article 77 proceeding is limited to the beneficiaries of the trust at issue; (2) the beneficiaries are those who have a current or contingent entitlement to some part of the corpus of the trust; (3) the only persons with any entitlement to some part of the corpuses of the Subject Trusts are the certificateholders of those trusts; and (4) the Challenged Respondents are not certificateholders of the Subject Trusts and, therefore, do not have any entitlement to the corpuses of those trusts and are not proper participants in this proceeding. The Challenged Respondents advance various convoluted theories in an effort to break or circumvent this logical chain, but all of them fail.

First, the affiliated Prophet and Poetic respondents ("P&P") contend that Article 77 does not require a party to have beneficiary status in order to appear as a respondent in an Article 77 proceeding. They are alone among the Challenged Respondents in taking this position, and they are wrong. The plain language and structure of the statute make clear that beneficiary status is required for participation in an Article 77 proceeding, and there is no persuasive authority to the contrary.

Second, a number of the Challenged Respondents contend that they qualify as beneficiaries of the Subject Trusts, even though they are not certificateholders, because they purportedly have an entitlement to part of the cash flow of the Subject Trusts by virtue of holding interests in other structures that own Subject Trust certificates. Here, however, the Challenged Respondents confuse "entitlement" with "expectation"; they have an *expectation* that their investments in the other structures will result in their receipt of funds that originate from the

Subject Trusts, but their only *entitlement* is vis-à-vis those other structures. None of the Challenged Respondents persuasively establishes in its opposition brief that it has any enforceable entitlement with respect to the Subject Trusts.

Third, Respondents Nover and P&P contend that, even if Article 77 does not authorize them to appear in this proceeding, they should nonetheless be permitted to intervene pursuant to CPLR 1012 and 1013. However, as Axonic and HBK recognized, the generally applicable intervention standards set forth in CPLR 1012 and 1013 do not apply in a special proceeding. CPLR 401 displaces them by providing that intervention in special proceedings shall be permitted only "by leave of court." Article 77, moreover, is explicit in defining the parties who may participate in special proceedings thereunder, and the Challenged Respondents provide no basis for the Court to expand the scope of participation permitted by the statute.

Respondents' remaining arguments are devoted largely to addressing general standing principles. While such principles have limited relevance here (because Article 77 controls who may appear in an Article 77 proceeding), they are nonetheless instructive in demonstrating the limits courts place on who may seek judicial relief, including who may appear as a respondent in an Article 77 proceeding. *See, e.g., In re Malasky*, 290 A.D.2d 631, 632 (3d Dep't 2002) ("We conclude that respondents, having no pecuniary interest in the irrevocable trust until decedent's death, lack standing to object").[1] In their oppositions, the Challenged Respondents suggest that denying them standing would work unfairness because, in their absence, there is nobody to represent their views and protect their interests. What this overlooks, of course, is that each of

[1] To the extent some Challenged Respondents claim that standing principles apply only to plaintiffs commencing actions and not to Article 77 respondents (HBK Brief at 19-22; Nover Brief at 16-17; Axonic Brief at 21-23; P&P Brief at 15), this case, among others, demonstrates that they are wrong.

the Challenged Respondents invested in a structure that has a trustee charged with protecting their interests and, in fact, ceded that responsibility to such trustee. The obvious and proper way for the Challenged Respondents to be represented in this proceeding was for the trustees of the CDOs, NIMS trusts and Re-REMICs in which the Challenged Respondents have invested to appear here in their capacity as certificateholders of the Subject Trusts. The Challenged Respondents offer various reasons why they do not *want* to rely on their respective trustees, but none of them denies that they *could* have done so. Indeed, HBK and P&P expressly ask for permission to do so in the event they are denied standing. The Challenged Respondents' failure to involve their respective trustees in this proceeding in a timely way is not a basis to grant them standing that they do not have.

ARGUMENT

I. ONLY TRUST BENEFICIARIES CAN PARTICIPATE IN AN ARTICLE 77 PROCEEDING

The CPLR and the Surrogate's Court Procedure Act limit participation in an Article 77 proceeding like this one to the beneficiaries of the trusts at issue. Opening Brief at 10. The statutes' plain text is unequivocal: CPLR 7703 provides that "[t]he provisions as to joinder and representation of ***persons interested*** in estates as provided in the surrogate's court procedure act shall govern joinder and representation of persons interested in express trusts." N.Y. Civ. Prac. L. & R. ("CPLR") 7703 (McKinney) (emphasis added). The SCPA in turn defines "persons 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 ("SCPA") § 103 (McKinney) (emphasis added). As a result, only "beneficiaries" under the SCPA are "persons interested" who may participate, either by "joinder or representation," in an Article 77 proceeding. This plain language is dispositive. *People v. Sayavong*, 83 N.Y.2d 702, 714 (in

cases of statutory interpretation, "[t]he plain meaning of the statutory words ought to control and resolve th[e] case"); *see also Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017) (courts "cannot construe a statute in a way that negates its plain text").

The Court's order to show cause faithfully applies that plain text by inviting only "Interested Persons" to serve an answer and appear at the final hearing. Order to Show Cause ¶¶ 1, 9. Similarly, and unsurprisingly, all but one of the Challenged Respondents admit that participation in this Article 77 proceeding is limited to "persons interested" as defined by the SCPA:

- "Joinder and the participation of interested parties in Article 77 proceedings are governed by the Surrogate's Court Procedure Act (the 'SCPA'), which defines such persons to include '[a]ny person entitled or allegedly entitled to share as beneficiary in the estate.'" Axonic Capital LLC's Memorandum of Law in Opposition to the Challenging Respondents' Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts ("Axonic Brief") at 1–2;

- "Pursuant to the Surrogate's Court Procedure Act ('SCPA') that governs the joinder and representation of persons interested in Article 77 proceedings . . . 'Any person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person' is an interested person for purposes of the SCPA." Nover Ventures LLC's Memorandum in Opposition to Consolidated Memorandum of Law in Support of Joint Motion to Limit Standing to Certificateholders in the Settlement Trusts ("Nover Brief") at 8 (citations omitted);

- "Movants correctly note that the representation of persons interest [*sic*] in an Article 77 Proceeding is governed by the standards in the Surrogate's Court Procedure Act (SCPA)." HBK's Memorandum in Opposition to Joint Motion to Limit Participation ("HBK Brief") at 18.

Multiple provisions of Article 77 reinforce that only "persons interested" may participate in trust instruction cases. The statute contemplates only that "objections [would] be[] filed to the transactions set forth in the [trustee']s account ***by any of the persons interested in the trust***" or their representatives. CPLR 7704 (emphasis added). It also provides for settling a trustee's

account only by "one or more such trustees and ***by one or more of the persons interested*** in the subject-matter of the trust." *Id.* 7705 (emphasis added). And where the court approves an accounting, it may "discharg[e] the petitioner [trustee] and sureties on his bond, if any, from any further liability to all ***persons interested*** therein." *Id.* 7706 (McKinney) (emphasis added).[2]

If the drafters of Article 77 had wished to expand the scope of who could join, be represented, object, settle the trustee's account, or be barred from future suit against a trustee beyond "interested persons," they could have done so easily. Other types of special proceedings allow a broader range of persons to participate than does Article 77. Article 78, for example, permits the court to direct that notice of an Article 78 proceeding be given "to any person" and authorizes the court to "allow other interested persons to intervene." CPLR 7802(d). There is no analogous provision in Article 77. *See also, e.g.*, N.Y. Pub. Health L. § 2994-r(1) ("***[a]ny person*** connected with the case" may bring a special proceeding regarding health-care directives (emphasis added)); N.Y. Sup. Ct. R. § 202.71 (***"any person"*** may bring a special proceeding to recognize a tribal court's judgment (emphasis added)); N.Y. Mental Hygiene Law § 81.06 (***any "person otherwise concerned*** with the welfare of [a] person" can begin a special proceeding to appoint a guardian for that person (emphasis added)). The absence of any similar language in Article 77 confirms that the participants joined in an Article 77 proceeding must be "persons interested" in the trusts.

In the face of all this, only P&P stakes out the lonely position that standing to appear in Article 77 proceedings is not limited to "persons interested" – i.e., trust beneficiaries – asserting

---

[2] Moreover, the requirement in CPLR 7706 that the trustees "present to the court a petition showing the names and post office addresses of all persons interested in the trust" indicates that the interested persons must be a group knowable to the trustees, not unknown and unknowable holders of remote or indirect interests.

that "neither CPLR 7703 nor SCPA § 315 purport to limit the parties who may, in the Court's discretion, participate in a Section 77 proceeding."[3] P&P Memorandum of Law in Opposition to Respondents' Motion to Limit Standing ("P&P Brief") at 13. Notably, P&P does not offer any case law in support of that conclusion, *nor does P&P cite any case in which a party who was not an actual or intended beneficiary of a trust was permitted to participate in an Article 77 proceeding concerning that trust. In re The Petroleum Research Fund*, 3 A.D.2d 1, 3 (1st Dep't 1956), the dated case interpreting then-Article 79 of the CPLR (a predecessor of Article 77) that P&P primarily relies upon actually ***contradicts*** its argument. The parties who were permitted to participate in *Petroleum Research Fund* could not technically be acknowledged as "beneficiaries" because the trust at issue, a charitable trust, would have been "invalidate[d]" if for-profit corporations were formally denominated as its beneficiaries. *Id.* at 4. Critically, however, the trust instrument "clearly spell[ed] out a definitive intent" to "***benefit [] the refining industry—including the intervenors herein—***all of which they deem to be in the interest of the public welfare." *Id.* at 696 (emphasis added). At most, then, *Petroleum Research Fund* indicates that a person may participate in a trust instruction proceeding if he is actually an intended beneficiary of the trust.[4]

[3] While P&P is correct that SCPA § 315 largely concerns the technical aspects of service and virtual representation, that in no way detracts from the fact that the two statutes read together provide for joinder only of persons interested. Nothing in SCPA § 315 indicates that anyone who is not a person interested can participate in an Article 77 proceeding.

[4] The other case cited by P&P, *In re Cowles' Will*, 22 A.D.2d 365 (1st Dep't 1965), stands for the same inapposite proposition. *Cowles' Will* only extended standing to beneficiaries (albeit contingent ones) under the trust instrument. 22 A.D.2d at 370 (allowing "contingent remainderman" to participate).

II. THE CHALLENGED RESPONDENTS ARE NOT BENEFICIARIES

There is no dispute that, for purposes of Article 77, a "beneficiary" is defined as "[a]ny person entitled to any part of or all of an estate." SCPA § 103 (McKinney); see also CPLR 7703. There is also no dispute that, under the PSAs governing the Subject Trusts, the only persons entitled to cash flows generated from the assets in those trusts are the trusts' certificate holders.

The Challenged Respondents nonetheless contend that they qualify as beneficiaries of the Subject Trusts at issue on this motion, even though they do not hold certificates in those trusts. Each of them argues in one form or another that their holdings in one or more CDOs, NIMS trusts or Re-REMICs that, in turn, hold certificates in Subject Trusts give them the requisite entitlement to the cash distributed by those Subject Trusts and thereby make them a beneficiary. *See* Axonic Brief at 16-19 ("This definition of 'Person Interested' is broad enough to cover Axonic's interest, as there is no question that Axonic is entitled to a portion of the Settlement Payments."); HBK Brief at 10-11 (arguing that HBK is a beneficiary because the trustee of the NIMS trusts in which it is invested must pass on all payments received from Subject Trusts to "the NIM noteholders"); Nover Brief at 8 ("Nover is a beneficiary because, through the Nover [redacted], it derives a financial benefit from Settlement Trusts."), 14 (arguing Nover is a beneficiary because it is entitled to cash flows from a [redacted] which owns certificates of Subject Trusts); P&P Brief at 14 ("[W]here P&P owns 100% of the outstanding notes in the relevant NIM trusts and the NIM trusts hold 100% of the Subject Classes, and where the NIM trustee . . . merely passes on all proceeds to the beneficial owners, P&P should be deemed 'beneficiaries' under CPLR 7703 and SCPA 315.")

The Challenged Respondents' argument on this point boils down to a dubious use of the transitive property. Each of them says, in essence, "I am entitled to distributions from the CDO/NIMS/Re-REMIC in which I have invested. That CDO/NIMS/Re-REMIC is entitled to

distributions from a Subject Trust. Therefore, I am entitled to distributions from that Subject Trust." The fallacy in this logic is obvious: The rights and entitlements the Challenged Respondents have against the structures in which they have invested are separate and distinct from the rights those structures have against the structures in which they have invested (*e.g.*, the Subject Trusts). There is no mechanism – and the Challenged Respondents certainly have not articulated one – via which that first set of rights and entitlements gets expanded into or merged with that second set of rights and entitlements. To the contrary, as discussed in the Challenging Respondents' opening memorandum, the documents that typically govern CDOs, NIMS trusts and Re-REMICs ensure that the two sets of rights and entitlements are separate and distinct. First, they specify that all "right, title, and interest" in the assets held by those structures is vested in the trustees of those structures, and second, they include no-action clauses that forbid investors (such as the Challenged Respondents) from exercising rights with respect to the structures' assets.[5] *See* Opening Memorandum at 5, 7, 9. *Critically, the Challenged Respondents do not dispute that the governing documents for their respective CDOs, NIMS trusts and Re-REMICs include these standard provisions.*[6]

[5] This position is especially absurd as it relates to Nover's [redacted]

[6] The Challenged Respondents each argue that the "no action" clauses in the documents creating the structures in which they have invested merely prevent them from instituting proceedings and do not bar them from appearing in a proceeding commenced by another party. The Challenging Respondents believe this to be a dubious reading of those provisions, but it misses the point in any event. Whether or not those "no action" clauses bar the Challenged Respondents from appearing here, they are indisputably intended to reserve to the relevant trustee the ability to enforce rights related to the assets maintained by the trustee. Those clauses, therefore, make clear that investors such as the Challenged Respondents do not have direct entitlements vis-à-vis those assets.

HBK and Nover note that the documents governing their [redacted] specify that the trustees of those structures hold their assets for the benefit of the structures' investors. *See* HBK Brief at 16-17; Nover Brief at 9-11. This is an obvious and unremarkable fact; trustees in these types of structures *always* act for the benefit of the investors, as opposed to the trustee's own benefit. But the conclusion HBK and Nover would draw from this fact – that their beneficial interest in a portion of the assets owned by the [redacted] in which they have invested gives them the ability to assert "rights" or "interests" with respect to the assets held by those structures – does not follow. The CDO indenture quoted by Nover, for *Triaxx Prime CDO 2006-1*, makes this clear. As Nover recites, that indenture provides that "'[t]he Issuer hereby *Grants to the Trustee*, for the benefit and security of the Secured Parties [*i.e.*, investors], *all of its right, title and interest* in, to and under'" all assets owned by the Issuer. Nover Br. at 10 (emphasis added). The indenture also provides that this grant of what is defined as the "Pledged Securities" (including RMBS certificates) includes "*all rights, powers and options* . . . 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 instruments, and all other Cash payable thereunder." *Id.* at 11 (emphasis added). Further, the granting clause expressly includes the right "*generally to do and receive anything that the granting party is or may be entitled to do or receive*" under or with respect to the RMBS certificates. *See* Dkt. No 54-2 (Ex. 4 to Schiefelbein Aff. in support of Nover motion, at p. 22) (defining the term "Grant" under the granting clause) (emphasis added). Likewise, the granting clause in the NIMS trust cited by HBK expressly include the assignment of "the rights . . . under the Underlying Certificates and … *all proceeds of the foregoing of every*

kind and nature whatsoever, including . . . all cash proceeds." *See* Dkt. 318 (Ex. 13 to Lundin Aff. in support of HBK's motion) (emphasis added).[7]

These provisions, read together, make clear that the *trustees* are the only parties with any "right" or "interest" with respect to the RMBS certificates (and any other assets) owned by the [redacted] in which Nover and HBK have invested.[8] That the trustees of those structures exercise those rights for the benefit of investors does not change this fact.

III. THE CHALLENGED RESPONDENTS SHOULD NOT BE PERMITTED TO INTERVENE IN THIS ARTICLE 77 PROCEEDING

The Challenged Respondents, other than HBK, argue that if the Court finds they lack standing to participate in this proceeding under Article 77, they should be permitted to intervene pursuant to CPLR 1012 and 1013.

In making this argument, the Challenged Respondents either fail to recognize or fail to acknowledge that CPLR 1012 and 1013 do not apply in special proceedings. In a special proceeding, if intervention is allowed at all, it is governed by CPLR 401, which explicitly

---

[7] The cases discussing comparable granting clauses also make clear that they assign "*all rights*" under the certificates to the trustee. *See CRAFT EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 139 A.D.3d 638 (1st Dept 2016) (explaining that under granting clause, issuer granted indenture trustee "all of [issuer's] rights under the swap agreements"); *Natl. Credit Union Admin. Bd. v. U.S. Bank N.A.*, 14-CV-9928, 2016 WL 796850, at *9 (S.D.N.Y. Feb. 25, 2016) (noting that granting clause conveyed "all rights to the Underlying Securities" to the indenture trustee and "nothing was held back" by the issuer).

[8] Nover's contention (Nover Brief at 4-6) that the Challenging Respondents themselves lack standing under their proposed standard because they "do not have 'ownership of the [Subject Trusts'] assets'" rests on a misunderstanding of their position. The Challenging Respondents do not contend that a party must have ownership of a Subject Trust's underlying assets in order to have standing vis-à-vis that trust. Rather, the Challenging Respondents' standing derives from their beneficiary status vis-à-vis the Subject Trusts, which status derives from their entitlement to cash generated by the Subject Trusts' assets, which in turn derives from their ownership of certificates issued by the Subject Trusts. The Challenged Respondents do not own certificates and, therefore, do not have an entitlement to cash paid by the Subject Trusts. Consequently, they do not have beneficiary status and do not have standing.

provides that intervention in a special proceeding shall not be allowed, "except by leave of court." CPLR 401; *see Vanderbilt Credit Corp. v. Chase Manhattan Bank, N.A.*, 100 A.D.2d 544, 545 (2d Dept. 1984). This makes clear that intervention as of right under CPLR 1012 does not exist in a special proceeding and that a court need not apply the discretionary intervention analysis provided for in CPLR 1013.[9] *See In re E.T.N.*, 42 Misc.3d 526, 529 (N.Y. Fam. Ct. 2013) ("CPLR 401 provides that in a special proceeding intervention can only be had by leave of court. Accordingly, there is no right to intervene and this application is not governed by CPLR 1012(a)(2).");[10] *In re Financial Guaranty Ins. Co.*, 40 Misc.3d 1220(A) at *1 (N.Y. Sup. Ct. July 31, 2013) (standard for participation in special proceeding is determined by rules governing the proceeding and not CPLR 1012 and 1013); *NY City Health and Hosps. Corp. v. City of N.Y.*, 85 Misc.2d 501, 503 (N.Y. Sup. Ct. 1976), *aff'd* 391 N.Y.S.2d 83 (N.Y. Special Term 1981). Axonic and HBK recognize as much; HBK made no request to intervene, and Axonic explicitly acknowledged that the general rules for intervention do not apply in Article 77 proceedings. *See* Axonic Brief at 16 ("The participation requirements for this Article 77 proceeding are determined by the definition of 'Person Interested' under the SCPA and not with reference to the general rules for standing or intervention.")

At least one court, moreover, has recently held that where the statute creating a special proceeding does not provide for intervention, that procedure is not available in such proceedings.

---

[9] P&P notes that in the original Article 77 proceeding relating to the JP Morgan settlement, the Institutional Investors were granted leave to "intervene" in that proceeding. In truth, while styled as an intervention, the Institutional Investors' appearance was more in the nature of a joinder under CPLR 7703, as they are certificateholders of a substantial number of the trusts at issue in the case. Further, their application for to "intervene" was unopposed. *See* Institutional Investors' Memorandum of Law in Support of Motion to Intervene as Co-Petitioners, dated August 5, 2014 at 4 [Index No. 652382/2014, Dkt. No. 26]

[10] While the court in *In re E.T.N.* did consider CPLR 1013 in conducting its analysis, it did so only for "guidance" and did not consider that provision to be controlling. *Id.*

Thus, in *In re Financial Guaranty Insurance Co.*, a special proceeding pursuant to New York Insurance Law Article 74, the court noted that:

> nowhere in NYIL Article 74, which governs this special proceeding, does it permit intervention. This is in contrast to Article 78 (which is also a special proceeding governed by CPLR Article 4), which does specifically provide for intervention. . . . The absence of such corresponding language in the NYIL Article 74 rehabilitation statute indicates that the Legislature did not intend for intervention in such rehabilitation proceedings.

In re Financial Guaranty Insurance Co., 40 Misc.3d 1220(A) at *1. The court in *In re Financial Guaranty Insurance Co.* further noted that Article 52, which is a special proceeding, also specifically permits intervention in CPLR 5225, 5227, and 5329. *Id.*

The logic applied by the court in *In re Financial Guaranty Insurance Co.* applies here too. The provisions in Article 78 and Article 52 explicitly authorizing intervention make clear that when the Legislature intends for a court to have authority to permit intervention in a special proceeding under CPLR 401, it knows how to say so. The provisions of Article 77 are devoid of any language permitting intervention, suggesting that the Legislature did not intend to allow intervention in Article 77 proceedings. *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74 ("A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."); *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (N.Y. 1982) (holding that the "failure of the Legislature to provide that mental illness is a valid defense in an action for divorce based upon the ground of cruel and inhuman treatment must be viewed as a matter of legislative design."); *Bay Shore Family Partners, L.P. v. Foundation of Jewish Philanthropies of the Jewish Federation of Greater Fort Lauderdale*, 239 A.D. 373, 374-75 (2d Dept. 1997) (holding that the

omission of a "substantial compliance provision" in the Revised Limited Partnership Act article 8-A is "not to be viewed as a legislative oversight but rather as an indication that the exclusion of such a provision was intended").[11]

In any event, even if Article 77 permitted courts to allow intervention in Article 77 proceedings, the Challenged Respondents would not warrant such relief. The Challenged Respondents' primary argument for intervention is that their participation in this proceeding is the only way for their economic interests to be protected. *See* Axonic Brief at 19-20; Nover Brief at 18-19; P&P Brief at 18-19. This overlooks the obvious fact that there was a mechanism for the Challenged Respondents to have their voices heard here: The trustees of the CDOs, NIMS trusts and Re-REMICS in which the Challenged Respondents have invested could have appeared on their behalves. Those trustees are indisputably certificateholders. They were given notice of this proceeding and passed that notice on to the Challenged Respondents. The Challenged Respondents at that point could have enlisted the trustees to appear for them here and take direction as to what position to advocate.

Certain of the Challenged Respondents suggest that doing so would have been futile, as their trustees are the same trustees that filed this proceeding and so purportedly cannot be expected to advocate a position here. But nothing would have prevented the same party from acting simultaneously as Petitioner (in its own capacity) and as advocate for the Challenged Respondents' positions (as trustee). HBK and P&P, in fact, have apparently belatedly secured

[11] Some of the Challenged Respondents rely on *In re Petroleum Research Fund*, *supra*, in support of their ability to intervene. As noted above, however, that case is distinguishable on the ground that the parties allowed to intervene in that case were for all intents and purposes intended beneficiaries of the trust at issue. Further, there is no indication that any party argued to the court that intervention was not permissible.

the agreement of U.S. Bank, the trustee of their NIMS trusts and also one of the petitioners here, to seek to substitute in for them if their standing is rejected.

That the other Challenged Respondents preferred not to involve their trustees, or found it cumbersome to do so, does not alter the fact that doing so was the appropriate mechanism for them to be heard here. Their failure to follow the proper procedure does not justify their request that they now be allowed to circumvent that procedure through the mechanism of intervention. Allowing that, moreover, would establish a problematic precedent that could vastly expand the universe of parties appearing in Article 77 proceedings by opening them up to persons who have only an indirect interest in the trust at issue by virtue of an investment or other interest in an entirely separate entity. For example, if Nover is permitted to appear here by virtue of its investment in a [redacted] that is a certificateholder of a Subject Trust, there would be no basis to refuse participation to *every* investor in *every* [redacted] that is a certificateholder in one of the Subject Trusts. That result would be inimical to Article 77's purpose to provide a streamlined and efficient method to resolve trust-related issues. *See* 14 *Weinstein, Korn & Miller, New York Civil Practice* ¶ 7701.00 (David L. Ferstendig ed. 2d Ed.) (Article 77 "was designed to provide a simple, cheap, and rapid method of accounting for trustees of inter vivos trusts").

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 the Challenged Respondents do not have standing to appear in connection with Settlement Trusts in which they do not hold certificates.

New York, New York
April 26, 2018

SCHINDLER COHEN & HOCHMAN LLP

/s/ Jonathan L. Hochman
JONATHAN L. HOCHMAN
ANNA VINOGRADOV
100 Wall Street, 15th Floor
New York, NY 10005
Tel.: (212) 277 6330
Fax: (212) 277 6333
Email: jhochman@schlaw.com
avinogradov@schlaw.com

Co-Counsel for Tilden Park

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ Philip Bentley
PHILIP BENTLEY
ANDREW POLLACK
1177 Avenue of the Americas
New York, New York 10036
Tel.: (212) 715-9100
Fax: (212) 715-8000
Email: pbentley@kramerlevin.com
apollack@kramerlevin.com

WARNER PARTNERS, P.C.

/s/ Kenneth E. Warner
KENNETH E. WARNER
950 Third Avenue, 32nd Floor
New York, NY 10022
Tel.: (212) 593-8000
Fax: (212) 593 9058
Email: kwarner@warnerpc.com

Co-Counsel for the Institutional Investors

GIBBS & BRUNS, LLP

/s/ Kathy D. Patrick
Kathy D. Patrick *(pro hac vice)*
David M. Sheeren *(pro hac vice)*
1100 Louisiana, Suite 5300
Tel.: (713) 650-8805
Fax: 713.750.0903
Email: kpatrick@gibbsbruns.com
dsheeren@gibbsbruns.com

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ Kevin S. Reed
KEVIN S. REED
51 Madison Avenue
New York, NY 10010
Tel.: (212) 849-7000
Fax.: (212) 849-7100
Email: kevinreed@quinnemanuel.com

Counsel for the AIG Parties

PERRY, JOHNSON, ANDERSON, MILLER & MOSKOWITZ LLP

/s/ *Isaac M. Gradman*
ISAAC M. GRADMAN, *pro hac vice*
KRISTIN A. MATTISKE-NICHOLLS, *pro hac vice*
E. PAGE ALLINSON, *pro hac vice*
438 First Street, 4th Floor
Santa Rosa, CA 95401
Tel.: (707) 525-8800
Fax: (707) 545-8242
Email: gradman@perrylaw.net
nicholls@perrylaw.net
allinson@perrylaw.net

Co-Counsel for DW Partners LP

DOGRAMACI KUSHNER LLP

/s/ *Amiad Kushner*
AMIAD KUSHNER
1120 Avenue of the Americas, 4th Fl.
New York, NY 10036
Tel.: (212) 309-7580
Fax: (646) 568-3727

Email: akushner@dklitigation.com

PATTERSON BELKNAP WEBB & TYLER LLP

/s/ Peter W. Tomlinson
PETER W. TOMLINSON
DANIEL A. FRIEDMAN
1133 Avenue of the Americas
New York, NY 10036-6710
Tel.: (212) 336-2000
Fax: (212) 336-2222
Email: pwtomlinson@pbwt.com
dfriedman@pbwt.com

Counsel for the Olifant Funds

BECKER, GLYNN, MUFFLY, CHASSIN AND HOSINSKI LLP

/s/ Robin L. Alperstein
ROBIN L. ALPERSTEIN
299 Park Avenue
New York, NY 10171
Tel.: (212) 888-3033
Fax: (212) 888-0255
Email: ralperstein@beckerglynn.com

Counsel for Ellington Management Group L.L.C.