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. 010**

HBK'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO AMEND HBK'S ANSWER TO THE PETITION

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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 support of HBK's motion pursuant to CPLR 3025(b) for leave to amend its answer (the "Answer") to the Petition for Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment (the "Petition").

A true and correct copy of HBK's proposed amended answer (the "Amended Answer"), clearly showing the changes or additions to the Answer, is attached as Exhibit A to the Lundin Affirmation, and a copy of the Answer (without exhibits) is attached as Exhibit B.

PRELIMINARY STATEMENT

HBK seeks leave to amend its Answer to the Petition to assert additional holdings in some of the same 21 settlement trusts HBK has already asserted an interest in during this Article 77 proceeding (the "HBK Trusts"). HBK seeks leave to assert additional holdings by way of HBK's direct ownership of certificates issued by some of the HBK Trusts falling into two categories: (1) holdings that HBK inadvertently omitted from its prior Answer; and (2) holdings that HBK has acquired since filing its initial Answer.

It is axiomatic that leave to amend a pleading pursuant to CPLR 3025(b) should be freely granted in the absence of unfair prejudice or surprise. Here, no party to this proceeding can claim unfair prejudice or surprise, because in the Amended Answer, HBK will continue to assert the same positions on the merits regarding the same Settlement Trusts for which it took those positions in its Answer. To the contrary, rather than cause any party prejudice, this amendment may be of benefit to all parties, as it will obviate the need for, and potential delay that may be caused by, HBK having to move to have the Indenture Trustee for the NIM Trusts in which HBK previously expressed an interest substitute for HBK in this proceeding, should this Court require that action in response to the currently pending motion to limit standing to Certificateholders in

the Settlement Trusts. Moreover, because this proposed amendment has no impact on the merits of HBK's claims, no party can show that the proposed amendments are palpably devoid of merit.

FACTUAL BACKGROUND

Pursuant to the Court's December 19, 2018 Order to Show Cause, and the Court's January 23, 2018 Clarifying Order, on January 29, 2018, HBK filed its Answer to the Petition in this proceeding. (Lundin Affirm. Ex. B.) In its Answer, HBK alleged that it was "an investor in 59 securities issued by 20 NIM trusts; which NIM trusts hold certificates issued by 21 RMBS trusts that are among the trusts to which the Petition relates." (*Id.* ¶ 1.) As Exhibit 2 to the Answer, HBK submitted the Affidavit of Beauregard A. Fournet, listing the specific NIM trusts in which HBK holds an interest. (Lundin Affirm. Ex. C.)

On March 3, 2018, certain Interested Parties (the "Challenging Respondents") filed a motion to limit standing in this proceeding to certificateholders in the Settlement Trusts (the "Standing Motion"). (Dkt. No. 251). The Challenging Respondents argued that parties such as HBK whose interest in the Settlement Trusts was through another vehicle, such as a NIM trust, had no standing to appear in this action. (*Id.*) HBK and the other parties whose standing was challenged vigorously opposed this severe limitation of Article 77 standing. That motion was fully submitted on April 26, 2018, and oral argument was held on May 7, 2018. During oral argument, counsel for the Challenging Respondents indicated that while the continued to challenge HBK's standing to appear, they would not oppose the Indenture Trustee for the NIMS Trusts, U.S. Bank, substituting in for HBK, and thus the Challenging Respondents conceded that HBK's position would be heard in this action in some manner, whether by HBK itself or by U.S. Bank as directed by HBK. (Lundin Aff. Ex. D at 19:23 – 20:21.)

After submission of the Standing Motion, HBK became aware that, in addition to its holdings in the NIMS Trusts, HBK also directly held certificates issued by certain of the HBK

Trusts as to which HBK had previously appeared pursuant to its status as an investor in the NIMS Trusts. Additionally, HBK has purchased yet other certificates issued by certain other of the HBK Trusts. In total, HBK now owns certificates directly issued by 17 of the 21 HBK Trusts.[1]

ARGUMENT

I. HBK SHOULD BE GRANTED LEAVE TO AMEND ITS ANSWER

A. Legal Standard.

It is black letter New York law that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *Fahey v. Ontario Cty.*, 44 N.Y.2d 934, 935, 380 N.E.2d 146, 147 (1978) (quoting CPLR 3025(b)); *see also Tushaj v. Elm Mgmt. Ass'n, Inc.*, 198 A.D.2d 127, 128, 604 N.Y.S.2d 52, 53 – 54 (1st Dep't 1993) ("Requests for leave to amend should be granted freely in the absence of prejudice or unfair surprise."); *Sze Kong Realty Corp. v. Tsang*, 59 Misc. 3d 1212(A) (Sup. Ct. N.Y. Cty. 2018) ("Courts should freely grant leave to amend a pleading if there is no surprise or prejudice to the other party."). Indeed, "mere lateness is not a barrier to an amendment. Lateness must be couple with significant prejudice." *Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 306, 771 N.Y.S.2d 72, 74–75 (1st Dep't 2004) (finding that trial court had properly granted reargument of its prior decision denying leave to amend defendant's answer where the only claim of prejudice was "the mere exposure of [plaintiff] to greater liability"); *see also Sze Kong*, 59 Misc. 3d 1212(A) (granting motion for leave to amend answer to assert counterclaims, holding that there was no prejudice to

[1] A complete list of the direct certificate holdings in the HBK Trusts that HBK wishes to add to its Amended Answer is attached as Exhibit E to the Lundin Affirmation. Should the Court grant HBK's motion for leave to amend, HBK will submit a revised affidavit including these additional holdings as Exhibit 2 to the Amended Answer.

plaintiff where "it fully expects to pursue its own claims for monetary damages in and through as yet nascent discovery").

Generally, the party seeking leave to amend must show that its proposed amendment is not "palpably devoid of merit." *East Asiatic Co. Inc. v. Corash*, 34 A.D.2d 432, 436 (1st Dep't 1970). "The party opposing the motion to amend, therefore, must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient." *Daniels v. Empire-Orr, Inc.,* 151 A.D.2d 370, 371, 542 N.Y.S.2d 614, 615 (1st Dep't 1989). However, such a showing may not be made by arguing that the **initial** claims have no merit—the showing must be that the proposed **amendments** are so wholly without merit that they warrant departing from the default rule that motions for leave to amend shall be freely granted. *Vectron Int'l, Inc. v. Corning Oak Holding, Inc.,* 106 A.D.3d 1164, 1168, 964 N.Y.S.2d 724, 728 (3d Dep't 2013) (holding that the "Supreme Court did not err in granting plaintiffs' cross motion to amend the complaint. Plaintiffs merely augmented the allegations contained in the original complaint. Defendants do not contest the amendment itself, other than arguing that the initial claims have no merit.").

B. No Party To This Proceeding Will Be Prejudiced By HBK's Amendment.

No party to this proceeding can claim that they will be unfairly prejudiced by HBK's proposed amendment.

First, there can be no prejudice from delay here because this proceeding is still in its nascent stages. Other than the exchange of affidavits of holdings (which, as HBK has previously noted, it will promptly file with its Amended Answer), there has been no discovery in this action, and there is not yet even a **schedule** for proposed briefing on the merits in place, let alone a scheduled hearing on the merits. Thus, should HBK's motion be granted, HBK would continue to be in the same place as every other Interested Party—if any discovery is ordered to be

produced, HBK will produce it as to its direct holdings in addition to its NIMS holdings, and HBK will brief and argue its positions on the merits on the same schedule as every other Interested Party. *See Giuffre v. DiLeo*, 90 A.D.3d 602, 603, 934 N.Y.S.2d 449, 451 (2011) ("Although the defendants waited several years before moving for leave to amend the answer, there was no showing that the plaintiff would be prejudiced, as discovery is ongoing and the plaintiff may still discover relevant information regarding the date of posting or re-posting.").

Second, to the extent that any party argues that HBK's motion for leave to amend should be denied because the Court order such answers or submissions to be filed on or before January 29, 2018, and thus that they may be prejudiced by HBK being allowed to amend after this date, that position is wholly without merit. Indeed, after January 29, several Interested Parties amended their answers to the Petition to assert different or additional holdings pursuant to CPLR 3025(A), even to assert holdings in **new** Settlement Trusts regarding which that Interested Party **had not previously appeared**. *See* Dkt. No 191 (Strategos Capital Amended Statement of Grounds For Appearance) (alleging holdings in new Settlement Trust BSABS 2005-AQ2); Dkt. No. 200 (DW Partners Amended Statement of Grounds for Objection to Petition) (asserting holdings in new Settlement Trust HPMF 2006-AR2); Dkt. No. 202 (Prophet and Poetic Amended Submission) (alleging holdings in new Settlement Trust SACO 2005-WM1). There was no objection to any such amendment on the grounds that it was barred by the Court's order. By contrast to these parties, HBK's amendment is minimal—HBK is **not** seeking to allege an interest in any new or additional Settlement Trusts, just to allege additional holdings in the same HBK Trusts in which it has already alleged it holds an interest.

Third, to the extent that any party argues that HBK should not be allowed to amend because absent amendment, HBK may be dismissed from this proceeding based on the

arguments made on the Standing Motion, that argument too is without merit. During argument on the Standing Motion, the Challenging Respondents stated that they would not object to HBK being replaced in this proceeding by U.S. Bank, who would assert HBK's same positions in this proceeding on HBK's behalf. (Lundin Affirm. Ex. D at 19:23 – 20:21.) Thus, one way or another, HBK will likely be heard on the merits regarding the HBK Trusts. And even if any Interested Party could show that it may be put in a worse position on the merits because of HBK's amendment, this is not the type of prejudice required to be shown to warrant denial of a motion for leave to amend. *See Masterwear*, 3 A.D.3d at 306 ("the mere exposure of [plaintiff] to greater liability" is not the type of prejudice sufficient to warrant denial of motion for leave to amend).

Accordingly, because no party can show that they will be unfairly prejudiced by HBK's proposed amendment, HBK's motion should be granted.

C. HBK's Proposed Amendment Contains No Changes Or Additions To The Merits Of HBK's Position

The final reason for deviating from the default rule that "leave to amend should be freely granted" is where the proposed amended pleading is **palpably devoid of merit**. However, this argument is wholly inapplicable here, because the Amended Answer does not alter the position on the merits taken in HBK's answer. As the Third Department noted in *Vectron,* a party opposing leave to amend cannot do so by "arguing that the initial claims have no merit." 106 A.D.3d at 1168. That is because the purpose of the requirement that a proposed amendment not be devoid of merit is to prevent **amendments** that would be futile—not to rule on the merits of the original pleading. *See Farallon v. Mexvalo, S. de R.L. de C.V.*, 146 A.D.3d 442, 442, 44 N.Y.S.3d 902, 903 (1st Dep't 2017) (trial court "properly declined to grant leave to amend, based on its finding that **the proposed amendment** would be futile") (emphasis added); *Genger v.*

Genger, 120 A.D.3d 1102, 1104, 993 N.Y.S.2d 297, 299 (1st Dep't 2014) (trial court properly denied motion to amend because "**the proposed amendment** lacked merit and would be futile") (emphasis added). Here, because the Amended Answer asserts the identical position on the merits as the Answer, any arguments against the merits of HBK's positions are not arguments that the **proposed amendment** is futile. Thus, such arguments are properly directed to the briefing on the merits, and not on this motion for leave to amend.

CONCLUSION

For the foregoing reasons, HBK respectfully requests that the Court grant HBK leave to amend its Answer to the Petition in the form submitted as Exhibit A to the Lundin Affirmation.

Dated: New York, New York
May 16, 2018

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