SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
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In the matter of the application of

WELLS FARGO BANK, NATIONAL ASSOCIATION, et al.,

Petitioners,

For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.

Appellate Div. No. 2020-02716

New York County Clerk's Index No. 657387/2017

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MEMORANDUM OF LAW IN OPPOSITION TO MOTION BY SOLULA LLC FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

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The Institutional Investors,[1] the AIG Investors,[2] and the Ellington and DW Parties[3] submit this Memorandum of Law in opposition to the motion by Solula LLC ("Solula") for Leave to File a Brief *Amicus Curiae* (Doc. No. 93).

Briefly stated, Solula's motion should be denied because (a) the motion does not satisfy a single one of the criteria for permitting *amicus* briefing, and the requested *amicus* would contribute nothing new to the briefing already submitted; and (b) Solula's belated attempt at participation in this case is untimely and can only act to delay the Court in reaching its decision.

The Article 77 proceeding below was intensely litigated among dozens of investors who timely appeared. Solula, as an investor in the Settlement Trusts at issue, was required to have appeared years ago if it wanted to be heard, but it failed to do so. Now, Solula improperly attempts an end-run around the entire litigation through its proposed *amicus* brief, which simply joins Nover, one of the appealing

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[1] The sixteen Institutional Investors are: AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, Federal Home Loan Bank of Atlanta, Federal Home Loan Mortgage Corp., Federal National Mortgage Association, Goldman Sachs Asset Mgmt L.P., Voya Investment Mgmt LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Metropolitan Life Ins. Co., Pacific Investment Mgmt Company LLC, Teachers Ins. and Annuity Assoc. of America, TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Mgmt. Co.

[2] The AIG Investors are: American General Life Insurance Company, American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., The United States Life Insurance Company in the City of New York, and The Variable Annuity Life Insurance Company.

[3] The Ellington and DW Parties are: Ellington Management Group, L.L.C. and DW Partners L.P.

parties, in support of the position Nover has fully briefed already, while contributing nothing new to that briefing.

I. Solula Fails the Legal Test to Obtain *Amicus Curiae* Relief

Appearance of an *amicus curiae* is a privilege granted at the discretion of the court. *Price v. N.Y.C. Bd. of Educ.*, 16 Misc.3d 543, 553 (Sup. Ct. N.Y. Cnty. 2007), *aff'd*, 51 A.D.3d 277 (1st Dep't 2008). The Court of Appeals has promulgated a rule setting forth the factors that must be met to gain *amicus curiae* relief in that Court (22 NYCRR 500.23(a)(4)(i)), and courts often look to that rule, and the standards set forth in the oft-cited ruling in *Kruger v. Bloomberg*, 1 Misc.3d 192, 197 (Sup. Ct. N.Y. Cnty. 2003), when determining whether to permit an *amicus* appearance.

Three central factors are weighed when determining whether to permit *amicus* relief: whether the movant demonstrates that (i) "the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency"; (ii) "the movant would invite the court's attention to the law or arguments which might otherwise escape its consideration"; and (iii) the "amicus curiae brief would otherwise be of special assistance to the court." *Kruger*, 1 Misc.3d at 197; *see also 210 E.68th St. Corp. v City Rent Agency*, 34 N.Y.2d 552, 552 (1974) (applying three-factor test).[4] Solula's proposed *amicus* brief fails to meet any element of this test.

[4] The current Court of Appeals rule on *amicus* briefs also requires, among other things, disclosure from a proposed *amicus* indicating whether "a party's counsel . . . participated in the preparation of the [*amicus*] brief" and whether a party helped fund the preparation of the brief. 22 NYCRR

Further, an *amicus* brief is confined to issues of law, not fact. *Price*, *supra*, at 553. An *amicus* has no status to present new factual issues in a case. *Lezette v. Bd. of Ed., Hudson City School Dist.*, 35 N.Y.2d 272, 282 (1974); *Price*, *supra*, at 553 ("the inclusion of factual material [in an *amicus* submission] is almost always improper"). Finally, an *amicus* brief is improper if it "merely reiterates arguments or authority already submitted to the Court" or "merely alerts the Court to [the movant's] 'position.'" *Price*, *supra*, at 554. Solula's proposed *amicus* brief violates these principles as well.

Fundamentally, Solula argues that (i) the contracts support Nover's position[5] and (ii) Nover's reading of the contracts is commercially reasonable.[6] In support of this argument, Solula offers its interpretation of the key contractual terms, attempts to describe the economics of RMBS waterfalls, and provides an overview of the financial crisis. (Motion at 6-21.) All of this, however, has already been briefed multiple times by the parties to this appeal.[7]

500.23(a)(4)(iii). Though this rule is formally limited to proceedings in the Court of Appeals, Solula has not made such a disclosure here.

[5] (Motion at 5 ("The Subordinate Write Up Provision is clear that Petitioners must first write up the highest priority subordinate certificate that has incurred a loss, and then write up each lower priority subordinate certificate. The Court's inquiry should stop there.").)

[6] (Motion at 13-21.)

[7] Doc. No. 65 (Opening Brief of Institutional Investors, AIG Investors, and the Ellington and DW Parties); Doc. No. 75 (Nover Response Brief) at pp. 25-42; Doc. No. 83 (Reply Brief of Institutional Investors, AIG Investors, and the Ellington and DW Parties).

Thus, Solula does not point out any new legal issues that would otherwise escape the Court's attention and fails to demonstrate that the parties are incapable of a full and adequate presentation to the Court. Instead, Solula seeks to introduce new facts related to the "commercial context in which Subordinate Write Up Provisions were drafted."[8] However, Solula's attempts to inject its views on the contracts into these proceedings are improper and do not offer any "special assistance" to the Court. *Price*, *supra*, at 554 ("an *amicus* which merely alerts the court to [the movant's] 'position' or submits petitions signed by persons interested in a particular result constitutes an improper attempt to influence the Court to make its decision on other than on the facts and the law.")

As shown in the merits briefs, for over a decade the Trustees have interpreted the contracts to permit Senior Certificate write-ups, and have written up Senior Certificates when subsequent recoveries were received by the trusts (Doc. No. 65 (Opening Brief of Institutional Investors, AIG Investors, and the Ellington and DW Parties at pp. 27-38.)). Indeed, out of the untold thousands of investors in these RMBS trusts, only *one* timely appeared in the Article 77 below to argue that the Trustees should stop following this procedure: Nover. Solula's *amicus* seeks to create the impression that Nover is not alone in wanting to *undo* the Trustees' decade-long interpretation of the PSAs.

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[8] (Motion at 1.)

But this is a fundamentally improper use of an *amicus* brief, as it merely "reiterates arguments" already submitted to the Court by Nover and attempts to "alert[ ] the court to its 'position,'" both of which independently constitute improper types of amicus submissions. *Price*, s*upra,* at 553-554. As such, the *Price* court held that "[s]uch material should not even be submitted" and that such a submission "is wasteful and essentially frivolous as it can add nothing to the process except to waste the Court's time… and can only act to delay the court in completing its duty to render a timely decision." *Id.* at 554. This point applies here, because the *amicus* relief Solula seeks would only further delay this proceeding and thus substantially prejudice the rights of the parties. *Kruger*, *supra*, at 197.

II. Solula's Appearance is More Than Three Years Too Late.

By its own admission, Solula is an investor in some of the RMBS trusts at issue in this appeal. (Cater Aff. ¶ 10.) Solula's appearance, however, is more than three years too late. The Petition for Article 77 instructions was filed on December 15, 2017. (R.386). On December 19, 2017, the IAS Court issued an Order to Show Cause requiring all "Interested Persons" – including investors like Solula – to appear in this Article 77 proceeding by January 29, 2018. (R.689; R.694). Dozens of investors, including Nover, did just that, but not Solula.

Under the IAS Court's Order to Show Cause, investors who failed to appear were deemed to have "waived the right to be heard" on the Petition, were expressly

barred from appealing any judgment, and were "forever and finally barred from raising the right to be heard . . . in this action . . . unless the Court orders otherwise." (R.694-695.)[9] Solula's Motion for Leave fails to cite this Order to Show Cause, much less explain why it failed to appear below or why it is exempt from the permanent bar on being heard or participating in any appeal.

Instead, Solula now tries to enter this appeal through the *amicus* back door, over one year after the first notice of appeal was filed and three months after all appeals were fully briefed, its sole purpose being to attempt to bolster Nover's fully briefed arguments. Solula claims that Nover's arguments benefit Solula's investments in unspecified RMBS trusts not before the Court (Motion at 1; Cater Aff. ¶ 11.), but Solula's true interests in this appeal are not known. That is because Solula has not made the detailed disclosures of its holdings required of all investors who appeared in this proceeding three years ago pursuant to a Scheduling Order entered by the IAS Court on February 13, 2018. (R.3201-3202.)

Those disclosures required the submission of a sworn affidavit disclosing the investor's particular interests in the Article 77 and the form in which their investments are held. (*Id.*) Like Nover, Solula is organized as a Limited Liability Company, which obscures whether a hedge fund or some other investor controls

[9] Thereafter, the Trustees issued an extensive notice program to ensure all investors in the trusts received notice of this case—a notice program that has never been challenged by anyone. (R.692-693).

Solula—or indeed whether Solula and Nover are affiliated or have coordinated their efforts in some other way.[10]

CONCLUSION

For all of the reasons set forth above, Solula's motion should be denied in its entirety.

Dated: New York, New York
April 1, 2021

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[10] Investors' standing to appear in the proceedings below was highly controversial, with Nover arguing that its investments in Collateralized Debt Obligations (CDOs), which in turn held certificates issued by the Settlement Trusts, constituted a sufficient interest to confer standing on Nover to appear in the Article 77. The First Department rejected Nover's position, holding that only investors with direct investments in the settlement trusts had standing to appear and be heard. *See Wells Fargo Bank v Nover Ventures, LLC*, 173 A.D.3d 626, 627 (1st Dep't 2019). Notably, one of Solula's primary points of speculation in its proposed amicus brief is that CDO investors specifically bargained for the certificate write-up provisions in question for the benefit of the CDOs. (Motion at 14-16.) This argument constitutes both an effort to relitigate a question this Court has already settled (i.e., that CDO investors do not have a sufficient interest in the settlement trusts to appear in this proceeding) and to introduce new facts (i.e., whether the provisions at issue were specifically bargained-for).

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