SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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

DECISION/ORDER

Petitioners, the trustees of more than 250 residential mortgage-backed securities (RMBS) Trusts (collectively, the Settlement Trusts), commenced this special proceeding, pursuant to CPLR Article 77, for judicial instructions regarding the distribution of a $4.5 billion settlement payment made by JPMorgan Chase & Co. to petitioners.[1] Investors seeking to be heard on the methodology to be used in distributing the settlement payment have appeared as respondents in this proceeding. Four groups of investors seek to be heard on the distribution methodology for Settlement Trusts in which they do not own certificates. They claim an interest in these Settlement Trusts by virtue of ownership interests in other structures, either CDO, re-REMIC or

[1] The settlement, which covered claims against JPMorgan Chase & Co. as securitizer and servicer of the RMBS Settlement Trusts, was approved by this court in a prior Article 77 proceeding. (See U.S. Bank N.A. v Federal Home Loan Bank of Boston, 2016 WL 9110399 [Sup Ct, NY County, Aug. 12, 2016].)

NIM trusts, which in turn own certificates in these Settlement Trusts. The standing of these investors (the Challenged Respondents) is contested, on the instant summary judgment motion, by investors that do hold certificates in the Settlement Trusts with respect to which they seek to be heard on the distribution methodology (the Challenging Respondents).[2]

Standing as Beneficiaries of the Settlement Trusts

The Challenging Respondents contend that certificateholders of the Settlement Trusts are the sole beneficiaries of the Trusts, and are therefore the only proper parties to this proceeding.[3] (Memo. In Supp. at 2.) More particularly, they contend that standing to participate in an Article 77 proceeding is limited to beneficiaries of the Settlement Trust at issue, that a beneficiary must "have a current or contingent entitlement to some part of the corpus of the trust," that only a

[2] The Challenged Respondents are: Poetic Holdings VI LLC, Poetic Holdings VII LLC, and Prophet Mortgage Opportunities LP (together, Poetic and Prophet); Axonic Capital LLC (Axonic); HBK Master Fund L.P. (HBK); and Nover Ventures, LLC (Nover).

The Challenging Respondents include: Tilden Park Investment Master Fund LP, Tilden Park Management I LLC and Tilden Park Capital Management LP, on behalf of themselves and their advisory clients (collectively, "Tilden Park"); AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC, Invesco Advisers, Inc., Kore Advisers, L.P., Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Teachers Insurance and Annuity Association of America, the TCW Group, Inc., Thrivent Financial for Lutherans, Western Asset Management Company (collectively, the "Institutional Investors"); 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, The Variable Annuity Life Insurance Company (collectively, "the AIG Parties"); DW Partners LP; Olifant Fund, Ltd., FYI Ltd., and FFI Fund Ltd. (collectively, "the Olifant Funds"). Respondents D. E. Shaw Refraction Portfolios, L.L.C. and Ellington Management Group L.L.C. separately filed Memoranda in Support joining in the arguments briefed by the other Challenging Respondents.

[3] Although the Challenging Respondents at times categorically assert that certificateholders are the sole beneficiaries of the Settlement Trusts, they also acknowledge that Ambac Assurance Corporation, as a certificate insurer in a trust, has standing to enforce the terms of the trust agreement. (Memo. In Supp. at 1 n 2.)

The Challenging Respondents dispute the standing of the Challenged Respondents only with respect to Settlement Trusts in which the Challenged Respondents do not hold certificates. To the extent that certain Challenged Respondents also claim an interest in other Settlement Trusts in which they do hold certificates, their standing to be heard on the distribution methodology for such Trusts is unchallenged.

certificateholder of the trust has such an entitlement, and that the language of each Settlement Trust's governing agreements makes clear that certificateholders are the only intended beneficiaries of the Trust. (Memo. In Reply at 1.) The Challenged Respondents, in separate memoranda of law, all contend that their financial interests in the outcome of this proceeding are sufficient to confer beneficiary status within the meaning of Article 77.[4] (See HBK Memo. In Opp. at 11; Poetic and Prophet Memo. In Opp. at 8-9, 14; Axonic Memo. In Opp. at 1-2; Nover Memo. In Opp. at 8.) Although they will not receive direct distributions of funds from petitioner-trustees, they nevertheless contend that they are "entitled" to a portion of the settlement payment. (See e.g. Nover Memo. In Opp. at 14; Axonic Memo. In Opp. at 16; HBK Memo. In Opp. at 18.) Under their theory, they have an entitlement to the corpus of the Settlement Trusts because the trustee of a CDO, re-REMIC, or NIM trust holding a certificate may be entitled to a portion of the settlement payment, and that trustee will in turn be obligated to distribute funds to investors in those trusts. The settlement payment will accordingly "pass through" to the Challenged Respondents. (See HBK Memo. In Opp. at 1-2; Axonic Memo. In Opp. at 2; Poetic and Prophet Memo. In Opp. at 9, 14.)

Article 77 provides, with exceptions not here relevant, that "[a] special proceeding may be brought to determine a matter relating to any express trust. . . ." (CPLR 7701.) "Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents." (Blackrock Fin. Mgt. Inc. v

[4] The Challenged Respondents advance common arguments. To the extent that their contentions differ, they will be discussed separately.

Segregated Account of Ambac Assur. Corp., 673 F3d 169, 174 [2d Cir 2012] [internal quotation marks and citation omitted].) Article 77 limits the parties who may properly participate to "persons interested," within the meaning of the statute. CPLR 7703 thus expressly provides: "The 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." SCPA § 103 (39) defines the term "Person 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. A creditor shall not be deemed a person interested." SPCA § 103 (8) defines "Beneficiary" as "[a]ny person entitled to any part or all of an estate."

In determining an intent to confer a beneficial interest in a trust, a court must look to the trust agreement. (See generally Matter of Fields, 302 NY 262, 272 [1951] [under Civil Practice Act Article 79, the predecessor to CPLR Article 77, the Court, in construing the language of the trust instrument to determine the beneficiaries, must give effect to the settlor's intent as manifested in the "general scheme of the trust, its object and purpose . . ."].) "It is well settled that the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." (Matter of Chase Manhattan Bank, 6 NY3d 456, 460 [2006] ["We are to search, not for the probable intention of the settlor merely, but for the intention which the trust deed itself, either expressly or by implication, declares. We are to ascertain the intention from the words used and give effect to the legal consequences of that intention when ascertained"], citing Mercury Bay Boating Club Inc. v San Diego Yacht Club, 76 NY2d 256, 267 [1990] ["The rationale underlying this basic rule of construction is that the words used in the instrument itself are the best evidence of the intention of the drafter of the document"].)

The court accordingly looks to the terms of the governing agreements of the Settlement Trusts to determine intent to confer a beneficial interest in the Trusts. As described by the Challenging Respondents, the agreements that govern RMBS trusts typically provide that "[c]ertificates eviden[ce] the entire beneficial ownership interest in the Trust Fund." (See Memo. In Supp. at 11, quoting BSMF 2006-SL5 Pooling and Servicing Agreement [PSA], Preliminary Statement [annexed as Reed Aff., Ex 3].) They further typically require the Trustee to act for the benefit of the certificateholders. (See Memo. In Supp. at 11, citing BSABS 2006-AC1 PSA § 2.06, which provides: "The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates and the Insurer . . . ."; see also BSABS 2006-AC1 PSA § 2.01 "Granting Clause," conveying right, title, and interest in the trust fund to the Trustee "for the use and benefit of the Certificateholders" [annexed as Reed Aff., Ex. 4].)

The Challenged Respondents do not dispute that these terms are typical of RMBS PSAs, and they do not identify any additional terms of the governing agreements of the Settlement Trusts that contemplate beneficiaries other than certificateholders or insurers. Instead, they claim that their ownership of interests in, and rights with respect to, CDO, re-REMIC, or NIM trusts afford them beneficiary status in the Settlement Trusts.

The structures through which the Challenged Respondents claim an interest differ. However, the governing agreements for each, whether a CDO, re-REMIC, or NIM trust, contain provisions, like those for the Settlement Trusts, which transfer "all right, title, and interest" in the underlying assets held by the structure to its Trustee.

Nover claims an interest in this proceeding as a noteholder in CDOs (Collateralized Debt Obligations), which own certificates in numerous Settlement Trusts. (Nover Memo. In Opp at

3.) As described by the Challenging Respondents, a CDO, which is typically governed by an Indenture, is an asset-backed security created by "bundl[ing] a variety of revenue-generating assets (the 'collateral' or underlying assets')." (Memo. In Supp. at 4 -5, quoting House of Europe Funding I, Ltd. v Wells Fargo Bank, N.A., 2014 WL 1383703, * 1 [SD NY, Mar. 31, 2014].) The assets are transferred to a special purpose entity which "issues debt securities whose interest payments are backed by the income stream generated by the entity's assets." (Memo. In Supp. at 4, quoting Matter of Citigroup Inc. Securities Litigation, 753 F Supp 2d 206, 215 [SD NY 2010].)

Under a "typical" CDO indenture granting clause, an "Issuer hereby Grants to the Trustee, for the benefit and security of the Secured Parties, all of its right, title, and interest in . . . the Collateral Debt Securities." (Triaxx Prime CDO 2006-1 Indenture [excerpt annexed as Ex. 4-6, Schiefelbein Aff.].)[5] Nover claims that as a noteholder in the CDOs it is a Secured Party and has an interest in the RMBS certificates that back the CDOs. (See Nover Memo. In Opp. at 9-11 ["Under the language of the granting clauses in both RMBS PSAs and CDO indenture agreements, the granting clauses confer beneficiary status on both the certificate holders of those trusts and those whose interests in the certificates is held through alternative means such as a CDO"].) Put another way, Nover claims that it "is a beneficiary because, through the Nover CDO Holdings, it derives a financial benefit from Settlement Trusts." (Id. at 8.)

Axonic claims an interest in the Subject Trusts as a certificateholder in re-REMIC trusts, which it defines as "pass-through entit[ies] that own[] tranches (or classes) of existing mortgage-backed residential securities for the benefit of certificateholders in the re-REMIC trust[s]."

[5] The Challenging Respondents and Nover agree that this granting clause is "typical" of a CDO Indenture. (Memo. In Supp. at 5, Nover Memo. In Opp. at 10.)

(Axonic Memo. In Opp. at 6.) The Challenging Respondents describe re-REMICs as "typically comprised of unsold [RMBS] certificates" that are "re-packaged" by depositing the original certificates into a new structure. (Memo. In Supp. at 6.) A re-REMIC Pooling Agreement, like a CDO Indenture, transfers all right, title and interest in the underlying securities to the trustee of the structure. (Id. at 7.) Axonic states that although a re-REMIC trust typically owns certificates in several different RMBS REMIC trusts, "the structure of the re-REMIC trust is designed to segregate the interests of the re-REMIC investors." (Axonic Memo. In Opp. at 6.) According to Axonic, the re-REMIC investor is "entitled to distributions based on the amounts received by the re-REMIC trust from certain classes of RMBS certificates issued by the specific underlying RMBS REMIC trust. What this means for Axonic is that its interest in the re-REMIC trust flows directly from the payments made by the Settlement Trust." (Id. at 7 [internal citation omitted].)

HBK and Poetic and Prophet claim an interest in this proceeding as noteholders in NIM trusts, which own certificates in Settlement Trusts. The Challenging Respondents describe a NIM trust as a structure "created when an issuer securitizes residual cash flows from other asset-backed transactions," with collateral typically comprised of "certificates that receive cash flows from an underlying trust only after all fees and expenses related to the transaction and amounts due on all other classes of certificates have been paid." (Memo. In Supp. at 8.) HBK defines a NIM Trust as "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." (HBK Memo. In Opp. at 1 n 1.)

The indenture trustee of a NIM trust, like a CDO or re-REMIC trustee, holds all right, title and interest in the underlying certificates for the use and benefit of the noteholders. (Id. at 16; Memo. In Supp. at 9.) HBK describes the NIM trusts as pass-through entities, which are

required to distribute assets under mandatory provisions in their establishing agreements. HBK contends that, because these distributions are not subject to discretion, the payment stream to HBK based on payments received by the NIM trusts from the Settlement Trusts can be calculated with precision, and is neither contingent nor remote. (HBK Memo. In Opp. at 1-2.) HBK further claims that the NIM trusts were created "in parallel" with the underlying Settlement Trusts and that the certificates that the NIM trusts own in the Settlement Trusts (i.e., Class C certificates) were not offered for sale to investors in the Settlement Trusts but, rather, were securitized through the NIM trusts. (Id. at 4-5.) Poetic and Prophet are the holders, collectively, of 100% of the outstanding balance of notes in several NIM Trusts. Like HBK, they claim a beneficial interest in the Settlement Trusts based on these holdings. (See Poetic and Prophet Memo. In Opp. at 1-2, 6.)

As the Challenging Respondents correctly argue, each of the Challenged Respondents in effect urges the court to conclude that it is "entitled" to distributions from the Settlement Trusts because: 1) each is entitled to distributions from the structure in which it is invested; and 2) that structure is entitled to distributions from the Settlement Trust. (See Memo. In Reply at 7-8.) As the Challenging Respondents also correctly argue, it is the trustees of the structures in which the Challenged Respondents are investors that hold the certificates in the Settlement Trusts and attendant rights to distributions from those Trusts, although they do so for the benefit of the investors in those structures. The rights and entitlements of the Challenged Respondents to distributions from the structures in which they are investors are accordingly "separate and distinct" from the rights and entitlements of the trustees of those structures to distributions from the Settlement Trusts. (Id.) The Challenged Respondents' economic interests in the Settlement Trusts are thus, at best, indirect.

A principal authority on which the Challenged Respondents rely, Matter of Cowles (22 AD2d 365, 370 [1st Dept 1965], affd no opinion 17 NY2d 567 [1966]), does not alter this conclusion. This case does not support the Challenged Respondents' claim to beneficiary status based on their indirect interests in the Settlement Trusts, and stands merely for the proposition that "contingent remaindermen" with a remote and uncertain interest in a trust may be proper, although not necessary, parties to a trust proceeding.[6] The challenged parties in Cowles had a direct—albeit, contingent—interest in the estate that was the subject of the proceeding. In the event of the occurrence of specified conditions, they would take as beneficiaries of the estate. Here, there are no conditions under which the Challenged Respondents will acquire a direct interest in the Settlement Trusts. They will only acquire funds from the Settlement Trusts indirectly, through distributions of those funds to the trustees of the separate investment structures in which the Challenged Respondents hold interests. The Challenged Respondents' eventual receipt of funds may be more certain or likely than that of the Cowles contingent remaindermen. But their status is not analogous, as the Challenged Respondents' interest is not direct.[7]

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[6] Matter of Cowles was a trust accounting proceeding brought under Civil Practice Act Article 79, the predecessor of CPLR Article 77, which held that "[t]he provisions of the statute [Civ. Prac. Act, § 1311, now 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." (22 AD 2d at 370.) The Appellate Division reasoned that the trial court had properly considered the objections, made through a guardian ad litem, of infant grandchildren of a secondary life beneficiary of the trust. The children would not take under the trust indenture if the secondary life beneficiary exercised his power of appointment, or if, having failed to exercise that power, the children's mother survived him. (Id. at 369.) The children, although contingent remaindermen, were not found to be necessary parties, as their mother was a party and they would ordinarily be considered to be adequately represented by her. (Id.) Having already appeared and objected to the trustee's accounting, the children were, however, found to be proper parties. (Id. at 371.)

[7] The authorities on which the parties rely in addressing beneficiary status, including Cowles, were developed largely in the context of long-established proceedings involving the administration of wills and testamentary trusts. In the aftermath of the 2008 financial crisis, however, CPLR Article 77 has provided a mechanism for RMBS trustees to seek judicial approval of settlements with securitizers. (Vincent C. Alexander, 2016 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7701.) Application of Article 77 to proceedings

The Challenged Respondents do not cite any case in which a person with an indirect economic interest in a trust has been recognized as a beneficiary of the trust. Nor do they cite any case in which beneficiary status has been predicated on a person's expectation of incidental benefits from a trust separate from that in which they hold an interest.

Consistent with New York law, the definition of beneficiary in the Restatement of Trusts[8] excludes persons who may derive an incidental benefit from the trust:

> "The 'beneficiaries' of a trust are the persons or classes of persons, or the successors in interest of persons or class members, upon whom the settlor manifested an intention to confer beneficial interests (vested or contingent) under the trust, plus persons who hold powers of appointment (special or general) or have reversionary interests by operation of law. Also included are persons who have succeeded to interests of beneficiaries by assignment, inheritance, or otherwise.
>
> Persons who may incidentally benefit in some manner from the performance of the trust are not beneficiaries of the trust and cannot enforce it. Cf. Restatement Second, Contracts § 302 (on incidental beneficiaries of contracts). Those persons, however, may have other rights, for example, as creditors."

(Restatement [Third] of Trusts, § 48 [2003].) The Court of Appeals has confirmed that a recipient of incidental benefits is not a beneficiary. Thus, "[a] person who might incidentally benefit from the performance of a trust but is not a beneficiary thereof cannot maintain a suit to enforce the trust or to enjoin a breach." (Cashman v Petrie, 14 NY2d 426, 430 [1964] [holding that a trustee of a trust holding a minority interest in two corporations lacked standing to compel the trustee of the trust which held the majority interest to distribute larger dividends, the Court

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involving investors in complex financial instruments thus presents yet another instance, in the RMBS and related litigation, in which the courts are called upon to apply traditional legal precepts to novel uncontemplated structures.

[8] Both this court and the Appellate Division have looked to the Restatement of Trusts in deciding issues presented by Article 77 petitions involving the settlement of RMBS claims. (See Matter of Bank of N.Y. Mellon, 127 AD3d 120, 126 [1st Dept 2015]; Matter of U.S. Bank N.A., 51 Misc 3d 273 [Sup Ct, NY County 2015] [this court's prior decision].)

reasoning that the plaintiff trustee "ha[d] no standing to enforce the fiduciary obligations to others arising from another trust"].)

The Challenged Respondents' remaining bases for asserting beneficiary status in the Settlement Trusts are not persuasive. As to the NIM trusts, the Challenged Respondents assert that holders of interests in those trusts are beneficiaries of, or persons interested in, the Settlement Trusts, because the creation of the NIM trusts was contemplated at the time of, or occurred close in time to, the creation of the Settlement Trusts. (HBK Memo. In Opp. at 4-5; Poetic and Prophet Memo. In Opp. at 5.) Whether or not re-securitization of certain certificates was contemplated when the Settlement Trusts were created, however, the agreements governing the Settlement Trusts do not contain any term reflecting an intent to confer beneficiary status on investors in the separate trusts. As the sophisticated parties to these agreements did not specifically include such a term, the court will not do so under the guise of contract interpretation. (See generally Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]; accord ACE Sec. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 597 [2015].)

As to the CDO and re-REMIC trusts, the Challenged Respondents contend that the re-securitization of RMBS certificates in these trusts effectuated an assignment of the interest of the original RMBS certificateholders (i.e., Settlement Trust certificateholders) to the investors in the CDO or re-REMIC trusts. (See Nover Memo. In Opp. at 9-10; Axonic Memo. In Opp. at 21.) This claim is without merit, as the granting clauses of the agreements for these structures convey right, title, and interest in the underlying assets to the trustees, not to the investors, although the trustees hold the assets for the benefit of the investors.

Having considered the structure of the Challenged Respondents' interests and the governing legal authority, the court concludes that the Challenged Respondents are not

beneficiaries of the Settlement Trusts and therefore are not entitled as a matter of law to participate in this proceeding.[9] The remaining issue is therefore whether they should be permitted to intervene in this proceeding.

Intervention

The Challenging Respondents claim that Article 77 explicitly defines the parties that may participate in Article 77 proceedings and that there is "no basis for the Court to expand the scope of participation permitted by the statute." (Memo. In Reply at 2.) They further claim that the general intervention standards set forth in CPLR 1012 and 1013 are not applicable in a special proceeding, that intervention in a special proceeding requires leave of court pursuant to CPLR 401, and that leave should not be granted where the statute creating the special proceeding does not provide for intervention. (Id. at 10-12.) They also argue that, even if the court has discretion to permit intervention under Article 77, the exercise of discretion is not appropriate here. (Id. at 13-14.) As discussed above, the Challenged Respondents claim that they are entitled to participate in this proceeding as beneficiaries or persons interested in the proceeding. (See HBK Memo. In Opp. at 11; Poetic and Prophet Memo. In Opp. at 14; Axonic Memo. In Opp. 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"]; Nover Memo. In Opp. at 7.) They claim, however, that they satisfy the standards

[9] In so holding, the court notes that Poetic and Prophet affirmatively assert that Article 77 does not limit the right to appear to beneficiaries. (Poetic and Prophet Memo. In Opp. at 10 ["A party need not be a 'beneficiary' at all to participate in an Article 77 proceeding," and may appear if it has "a 'real and substantial interest' in the outcome of [the] proceeding"].) To the extent that any of the Challenged Respondents contends that its status as a beneficiary is irrelevant to whether it is a "person interested," within the meaning of CPLR 7703 and the SCPA, this court rejects that contention.

The court also rejects the Challenged Respondents' contention that this court's orders, which directed notice of this proceeding, authorized joinder of the Challenged Respondents. These orders provided an opportunity to potentially interested persons to appear. They did not reflect a determination as to whether an appearing party would qualify as a "person interested" within the meaning of the SCPA.

for intervention under CPLR 1012 and 1013. (See Poetic and Prophet Memo. In Opp. at 17; Axonic Memo. In Opp. at 19; Nover Memo. In Opp. at 18.)

CPLR 401 expressly provides that after a special proceeding is commenced, "no party shall be joined . . . or intervention shall be allowed, except by leave of court." This court holds that intervention as of right under CPLR 1012 is unavailable in this Article 77 proceeding as it is a type of special proceeding governed by CPLR 401. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7701 ["A proceeding brought pursuant to CPLR 7701 is governed generally by CPLR Article 4, which supplies rules of procedure for all special proceedings"].) The court further assumes that it retains inherent discretion to grant leave to intervene.[10]

Neither the Challenging nor the Challenged Respondents cite any authority which permits a non-beneficiary to appear in an Article 77 proceeding or addresses the standards for intervention in such a proceeding in particular. The Challenged Respondents cite substantial authority, in other contexts, that intervention may be permitted where a party has a real and substantial interest in the outcome of the proceeding. (E.g. Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC, 77 AD3d 197, 201-202 [1st Dept 2010] [permitting intervention under CPLR 1012 by the mortgagee in an action by a tenant to enforce a lease surrender agreement in which the mortgagor-landlord defaulted]; County of Westchester v Department of Health of the State of New York, 229 AD2d 460, 461 [2d Dept 1996] [permitting intervention by hospitals in an action to declare State regulations invalid, where the hospitals were potential recipients of funds under such regulations]; Plantech Hous. Inc. v Conlan, 74 AD2d 920, 921 [2d Dept 1980],

[10] The court accordingly does not address the Challenging Respondents' contention that the court may not permit intervention because Article 77 does not specifically provide for intervention or because CPLR 7703 limits joinder to persons interested—i.e., beneficiaries—as provided in the SCPA.

lv dismissed 51 NY2d 862 [permitting intervention by a school district in a tax certiorari proceeding].)

The Challenged Respondents also rely on Matter of Petroleum Research Fund (3 AD2d 1 [1st Dept 1956]), a case decided under Civil Practice Act Article 79, the predecessor of Article 77, which permitted intervention by a group of for-profit corporations in a proceeding to dispose of the assets of a charitable trust. The corporations could not have qualified as beneficiaries of the trust due to their for-profit status, but were oil companies that derived "incidental nonmonetary benefits" from the trust, which was set up to promote research and development in the petroleum field. (Id. at 4.) The Court expressly found that the intent of the donors to the trust was to "benefit [] the refining industry – including the intervenors. . . ." (Id.) Here, in contrast, as held above, the intent of the settlors of the Settlement Trusts was to benefit the certificateholders of those Trusts, not of the separate trusts in which the Challenged Respondents hold their interests.

Significantly also, the Challenged Respondents may seek to have their interests represented in this Article 77 proceeding by the trustees of the CDO, re-REMIC or NIM trusts which hold the certificates in the Settlement Trusts on their behalf. HBK and Poetic and Prophet have in fact represented that their trustees will appear for them in this proceeding if they are not permitted to participate. (See HBK and Poetic and Prophet Letters, both dated July 3, 2018.) Nover has arranged for the trustee of one of the CDOs in which it is a bondholder to appear, but claims that there is a dispute with the trustee of two other CDOs, and that it is "cost prohibitive" to arrange for the trustees of the remaining CDOs to appear. (Nover Letter, dated July 3, 2018.) Axonic has advised the court that trustees of its two remaining re-REMIC trusts will not appear. (Axonic Letter, dated May 14, 2018.)

The Challenged Respondents do not dispute that they invested in structures which are governed by agreements with no action clauses that specify the terms on which the investors may direct the trustees to act on their behalf. They cannot be heard to complain that these limitations, by which they are bound, are too burdensome. The court is also unpersuaded by the Challenged Respondents' suggestion that the trustees' appearance at their direction would not be proper, given that the same institutions are petitioners in this proceeding. (See Poetic and Prophet Memo. In Opp. at 12; Axonic Memo. In Opp. at 15.) Although the major financial institutions that serve as trustees of the separate trusts in which the Challenged Respondents hold their interests also serve as the trustees of the Settlement Trusts, the Challenged Respondents make no showing that these institutions are not acting in separate capacities or cannot make appropriate arrangements to avoid a conflict of interest in the event that they appear at the Challenged Respondents' direction.

Finally, the court declines, under these circumstances, to exercise its discretion to expand the directives of CPLR 7703 and SCPA §§ 103 (8) and (39), which together limit participation in this proceeding to beneficiaries. The Challenged Respondents' indirect economic interest in the distribution of the settlement payment is too attenuated to support a discretionary grant to them of leave to intervene.[11] To permit intervention of investors asserting such indirect interests would potentially invite requests for intervention from a broad range of other investors, including investors in even more remote re-securitizations and in synthetic instruments such as Credit Default Swaps. Such investors could similarly claim that they may be indirectly affected by this court's interpretation of the agreements governing the Settlement Trusts and consequent

[11] It is noted that there is a possibility that there could be a conflict between or among the various investors in the separate structures. (See May 7, 2018 Tr. of Oral Argument, at 53-54 [acknowledgment by Nover of such possibility].)

instructions as to the distribution of the settlement payment to those Trusts, in which they do not hold an interest. This expansion of participation would undermine the effectiveness of the Article 77 proceeding as a mechanism for providing judicial instructions to the trustees and enabling beneficiaries to be heard on issues affecting the disposition of assets held by their trusts.

It is accordingly hereby ORDERED that the motion of the Challenging Respondents for summary judgment is granted to the following extent: Poetic Holdings VI LLC; Poetic Holdings VII LLC; Prophet Mortgage Opportunities LP; Axonic Capital LLC; HBK Master Fund L.P.; and Nover Ventures, LLC are dismissed as respondents with respect to any Settlement Trust in which they do not hold certificates. Provided that: Trustees of the trusts in which the Challenged Respondents hold interests may be substituted for the Challenged Respondents pursuant to this court's ruling on the record on May 31, 2018. The parties shall promptly meet and confer in an effort to reach agreement on the terms of an order effectuating substitution. If agreement is reached, they shall file a stipulated order. If no agreement is reached, they shall arrange for a conference with the court.

This constitutes the decision and order of the court.

Dated: New York, New York
August 7, 2018

MARCY FRIEDMAN, J.S.C.