

<b>Nomura Asset Acceptance Corp. v Nomura Credit &amp; Capital, Inc.</b>
2022 NY Slip Op 32253(U)
July 8, 2022
Supreme Court, New York County
Docket Number: Index No. 652614/2012
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MELISSA CRANE PART 60M**

*Justice*

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NOMURA ASSET ACCEPTANCE CORPORATION,  
MORTGAGE PASS-THROUGH CERTIFICATES, SERIES  
2006-AF2 TRUST, BY HSBC BANK USA, NATIONAL  
ASSOCIATION, AS TRUSTEE,

Plaintiff,

- v -

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

-----X

NOMURA CREDIT & CAPITAL, INC.

Plaintiff,

-against-

WELLS FARGO BANK, N.A.

Defendant.

-----X

INDEX NO. 652614/2012

MOTION DATE 02/23/2022

MOTION SEQ. NO. 021

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595358/2014

The following e-filed documents, listed by NYSCEF document number (Motion 021) 1133, 1134, 1135, 1137, 1138, 1139, 1140, 1141, 1413

were read on this motion to/for MODIFY

This is one of seven identical motions in seven related RMBS actions (652619/2012 - MS 23; 652842/2014 - MS 13; 653390/2012 - MS 22; 651124/2013 - MS 22; 650337/2013 - MS 21; 653783/2012 - MS 22; and 652614/2012 - MS 21). These cases are extraordinarily complex. Nevertheless, nonparty Freedom Trust 2011-2 (Freedom Trust) moves to modify or vacate the parties' stipulated scheduling orders that the court so-ordered (Scheduling Orders) (e.g. 652619/2012, Doc 1272). These orders extend the parties' time to submit applications to seal or redact documents filed in connection with their voluminous summary judgment motions.

Specifically, nonparty Freedom Trust requests an order directing some of the parties (HSBC Bank USA, N.A. [HSBC] and Nomura Credit & Capital, Inc. [Nomura], but none of the other parties to the Scheduling Orders) to re-file their respective summary judgment briefs and supporting exhibits now, before the motions are fully submitted, with narrowly-tailored redactions.

### **Background**

The parties to these related actions entered scheduling stipulations to create sealing/redacting protocols for their motions for summary judgment. The parties' confidentiality orders (*e.g.* 652619/2012, Doc 221 [filed 8/24/15]) previously governed the procedures for filing documents marked confidential. However, given the complex and often proprietary nature of the documents in this case, the court extended the parties' time to make applications to seal/redact so they would track the motions to which they apply. Accordingly, the parties were to file documents with their summary judgment papers under temporary seal. Once reply papers are filed, the parties are to meet and confer, and then present the court with their applications to seal/redact documents that they submitted in support of their motions. Of course, the parties must establish good cause to seal or redact any information that they wish to remain sealed or redacted. Any information that the court does not authorize to remain under temporary seal will be re-filed without redactions.

After the Scheduling Orders were entered, Nonparty Freedom Trust moved by orders to show cause in all seven actions to vacate the Scheduling Orders. Nonparties Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd. (collectively, Olifant Fund) have submitted papers joining in Freedom Trusts' motions.

Freedom Trust argues that the temporary sealing period the court authorized is of an “extraordinary duration” that scheduling or other logistics do not justify. Freedom Trust requests the Court to reevaluate the temporary protections in the so-ordered stipulations. Olifant Fund argues that “under black-letter New York law, the wholesale sealing done by the Trustee and Nomura is improper” and that it does not satisfy the applicable “good cause” standard (*see Applehead Pictures LLC v Perelman*, 80 AD3d 181, 192 [1st Dept 2010]).

### Discussion

As technology progresses, the judicial system faces challenges to determine whether and how to adapt their policies and procedures. The issue these motions present is at what the point in the filing process should documents become available to the public. Prior to electronic filing, motions were not public until fully submitted. Electronic filing permits the public to see motions in the process of being briefed. Movant here, discontented with the long briefing schedule, wants the court to review the papers for confidentiality mid-stream, as the papers are being filed.

There is no dispute that there is a “broad presumption that the public is entitled to access to judicial proceedings and court records” (*Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016]), or that a “party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access” (*id.*). It is also undisputed that neither the designation of information as confidential, nor the parties’ mutual agreement, is adequate to warrant permanent sealing of documents (*see e.g. Angiolillo v Christie’s, Inc.*, 64 Misc 3d 500, 523-524 (Sup Ct, New York County 2019); *see also Maxim*, 145 AD3d at 516-518).

However, “the right to inspect and copy judicial records is not absolute,” “[e]very court has supervisory power over its own records and files,” and “the decision as to access is one best

left to the sound discretion of the trial court” (*Nixon v Warner Comms., Inc.*, 435 US 589, 598-599 [1978]); *see also Crain Comms., Inc. v Hughes*, 74 NY2d 626, 628 [1989]).

Contrary to movant’s implications, the court did not permit the parties to stipulate to wholesale seal their summary judgment papers. The court has, instead, given the complexity of this case and for judicial economy, permitted the parties to file their papers under temporary seal. Then, after submission of reply papers, the parties are to make their applications to seal. The Scheduling Orders afford the parties the opportunity to file their motions in compliance with the strict deadlines under CPLR 3212 and *Brill v City of New York* (2 NY3d 648 [2004]) before they make their applications to seal or redact portions of their summary judgment papers permanently.

To have to determine access to potentially confidential papers within still unsubmitted motions would cause the judicial system to face heavy administrative burdens. It would also impact litigants’ ability to comply with the strict deadlines for filing motions for summary judgment mentioned earlier.

Moreover, public policy favors an efficient court system. Back-ending sealing issues on complex summary judgment issues until the motion is fully submitted aids that process. Given their substantive nature, a fully briefed summary judgment motion will only help the court in determining what truly warrants sealing.

Freedom Trust’s approach asks the court to spend extra time reviewing documents in advance of these motions’ full submission. However, litigants regularly designate new documents as confidential as a motion progresses. The court is well within its discretion to avoid a perpetual cycle of reviewing new requests to seal/redact, especially within the same motion. Litigants also sometimes withdraw motions, which would render determining the issue of confidentiality entirely moot. For example, here, a new Court of Appeals decision caused the

court to vacate the note of issue in several of these related cases and the parties to withdraw a series of summary judgment motions (*e.g.* Index No. 652619/2012, Doc 1750).

The interests of the nonparties in gaining access to these documents sooner does not justify the additional burden on the court. Moreover, these nonparties have the key to unlocking the documents in their own hands. They can sign onto the confidentiality agreement the court has endorsed in this case. For reasons that are not entirely clear, they refuse to do so.

The court also notes that the nonparties do not actually represent the public's interest. Freedom Trust contends that it "makes [these motions] as a member of the public seeking access to court records," but does not indicate what true interest the public has in obtaining these papers earlier. Likewise, Olifant Fund fails to explain what sincere public interest there is in obtaining these documents sooner. Olifant Fund states it is a certificate holder for one of the trusts at issue in one of these seven related actions. This circumstance may be the reason it refuses to sign a non-disclosure agreement with the trustee (*see* Index No. 652619/2012, Doc 1307 at 4 n3). Thus, both Freedom Trust and Olifant Funds appear to represent their own private interests, and really just take issue with what they view as an overly long summary judgment briefing schedule. These are not reasons to unseal on a schedule not of this court's making. In any event, the nonparties do not demonstrate that the public has any real or substantial interest in the existing timeframe for the parties to make their motions to seal or redact.

Nevertheless, at oral argument, the court ordered the briefs unsealed by April 2022. The reason for this was that it should be possible to craft legal memoranda, as opposed to the documents upon which they rely, without referencing confidential information, or at least only referencing a small portion that could then be redacted. Therefore, wholesale sealing of legal

memoranda will not be permitted. To the extent the parties have failed to obey the directive from oral argument, they must do so within 5 business days from the e-filed date of this decision.

Accordingly, the court exercises its discretion to manage its own docket in an effective manner and declines to cede control of its docket to benefit the nonparties' interests at the expense of efficiency. This is especially apt here, where there is no apparent public interest to support speeding up the timeline for the parties to make their formal applications to seal and/or redact.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that the motion is denied without prejudice until such time as the motions at issue are fully submitted; and it is further

ORDERED that, to the extent not already completed, the parties are to unseal all legal memoranda filed in connection with the summary judgment motions, and are allowed only limited redactions in those memoranda, within five business days of the e-filed date of this decision and order.

7/8/2022

DATE



MELISSA CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: