

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

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In the matter of the application of	:	
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U.S. BANK NATIONAL ASSOCIATION (as	:	Index No. 656028/2021
Trustee, Securities Administrator, Paying Agent,	:	
and/or Calculation Agent under various Pooling and	:	
Servicing Agreements),	:	
	:	
Petitioner,	:	<b>AFFIRMATION OF KEITH M.</b>
	:	<b>KOLLMAYER IN SUPPORT OF</b>
for judicial instructions pursuant to CPLR Article 77.	:	<b>STIPULATION AND ORDER FOR</b>
	:	<b>THE PRODUCTION AND</b>
	:	<b>EXCHANGE OF CONFIDENTIAL</b>
	:	<b>INFORMATION</b>
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I, Keith M. Kollmeyer, an attorney duly licensed to practice law in the Commonwealth of Massachusetts and admitted *pro hac vice* in this action, hereby affirm under the penalties of perjury pursuant to CPLR § 2106, as follows:

- I am a partner of the firm Jones Day, counsel for petitioner, U.S. Bank National Association. I am admitted *pro hac vice* to practice before this Court. I respectfully submit this affirmation in support of the Stipulation and Order for the Production and Exchange of Confidential Information (the “Proposed Order”)<sup>1</sup> signed by all parties in this action, which is attached as Exhibit 1.
- Attached as Exhibit 2, pursuant to the Court’s Practices and Procedures, is a redlined version of the Proposed Order compared against the Court’s Model Form.

<sup>1</sup> Capitalized terms not defined herein shall have the same meanings ascribed to them in the Proposed Order.

3. This Proposed Order is substantially similar to the Stipulation and Order for the Production and Exchange of Confidential Information that this Court entered in the Wells Fargo Article 77 proceeding. *See In re Wells Fargo Bank*, No. 154984/2021, Stipulation and Order for the Production and Exchange of Confidential Information (Sup. Ct. N.Y. Cnty. Nov. 10, 2021) (Dkt. No. 179).

4. Since many of the parties and practical considerations are the same for this Article 77 proceeding, the parties have agreed to a substantially similar Proposed Order—for similar good cause bases and in the interest of efficiency.

5. There is good cause to amend paragraph 3 of the Court’s Model Form (paragraph 3 of the Proposed Order) to include a “Highly Confidential” designation and related provisions to further protect competitively sensitive information and other information for which disclosure to other parties in the Action would result in competitive, commercial, personal, or financial harm to the Producing Party or its affiliates, and to provide additional procedures for the treatment of such information in paragraph 7 of the Proposed Order. The parties to this action are counter-parties and competitors in the financial industry. Accordingly, certain discovery in this action may disclose sensitive information to competitors where that disclosure could commercially harm the Producing Party, its personnel, clients, or customers beyond the context of this action. To mitigate this harm, the Proposed Order has added a designation for “Highly Confidential Information.” *See* Proposed Order, paragraph 3(b). That designation would permit the materials so designated to be withheld from all party personnel other than outside counsel and those party personnel directly involved in the litigation who agree in writing to abide by the Proposed Order’s terms, and any individuals who previously had access to the materials. *See* Proposed Order, paragraph 7. By

comparison, “Confidential Information” under the Court’s Model Form can be shared with all party personnel actively engaged in assisting in the litigation.

6. There is good cause to amend paragraph 3 of the Court’s Model Form (paragraph 3 of the Proposed Order) to add the parties directing the appearance of the NIM trustee to the definition of “Receiving Party.” Good cause exists for that addition because, as set out in the Answers filed by U.S. Bank as NIM Trustee for certain Trusts, *see* NYSCEF Nos. 80, 81, the NIM trustee appears only at the direction of a NIM trust noteholder and expresses only the views of that directing holder. Adding the directing holder of the NIM trustee as a “Receiving Party” will allow the directing party adequately to direct and confer with the NIM trustee on positions in the litigation. Moreover, given that each directing holder of the NIM trustee already appears in the Action in its direct capacity, *see* NYSCEF Nos. 63, 78, there exists ample justification to ensure that the Proposed Order applies to these entities in their capacities as directing holders of the NIM trustee as well.

7. There is good cause to amend paragraph 3 of the Court’s Model Form (paragraph 3 of the Proposed Order) to include a definition of “Nonpublic Personal Information” as paragraph 3(e) of the Proposed Order, and to provide authorization for the disclosure of Nonpublic Personal Information in paragraph 23 of the Proposed Order, given that productions from the Trustee may include “nonpublic personal information” as defined and protected in the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802, et seq., and its implementing regulations, including without limitation individuals’ financial or credit information and personally identifiable information about such individuals.

8. There is good cause to amend paragraph 1 of the Court’s Model Form (paragraph 1 of the Proposed Order) to include specific types of information to which the Proposed Order shall apply.

Good cause exists for that amendment to clarify the scope of the Proposed Order because voluminous material may potentially be produced in the Action in a variety of different forms, and the parties seek to avoid or minimize any potential doubt about the scope of the Proposed Order.

9. There is good cause to amend paragraph 2 of the Court's Model Form (paragraph 2 of the Proposed Order) to clarify the manner in which the parties to this action can designate electronic Documents as "Confidential" or "Highly Confidential." Good cause exists for that amendment to clarify the scope of the Proposed Order because a significant percentage of any Documents that may be produced in the Action are likely to be in native, electronic form.

10. There is good cause to amend paragraph 3 of the Court's Model Form (paragraph 3 of the Proposed Order) to further specify the nature of Documents or Testimony properly deemed Confidential Information. Good cause exists for that amendment to clarify the scope of the Proposed Order because the parties to this action are counter-parties and competitors in the financial industry, and the amendment to paragraph 3 more specifically reflects the nature of the confidentiality concerns shared among the parties.

11. There is good cause to amend the Court's Model Form to add paragraph 4 of the Proposed Order to permit parties to produce documents, at their sole option, without detailed or any review as to whether such materials are privileged or otherwise protected from disclosure, subject to the "clawback" provisions provided in the Proposed Order. Good cause for that paragraph exists so that the parties may expedite the production of voluminous loan-specific information that may otherwise require burdensome, document-by-document review for such privileges or other protections from disclosure.

12. There is good cause to modify paragraph 5 of the Court's Model Form (paragraph 6 of the Proposed Order) to permit the disclosure of material designated as "Confidential Information" to

additional categories of persons, including the receiving party's former officers, directors, and employees as necessary for the Action (Proposed Order, paragraph 6(c)); third-party vendors and consultants retained by the parties or their counsel to furnish technical, litigation support, or expert services in connection with the Action (Proposed Order, paragraph 6(e)); persons or entities who are indicated on a face of a document, or by testimony, to be the author or recipient of, or to otherwise have had custody of such document (Proposed Order, paragraph 6(i)); and such other persons as required by law, regulation, the rules of applicable government entities or self-regulatory organizations, or by court order (Proposed Order, paragraph 6(j)). Good cause exists to add paragraphs 6(c), 6(e), and 6(i) of the Proposed Order to enable the parties to adequately prosecute or defend the Action, which may in many cases require the assistance of former employees, directors, or officers, expert witnesses and vendors, and the authors, recipients, or custodians of relevant documents. Good cause exists to add paragraph 6(j) of the Proposed Order to enable the parties as necessary to comply with applicable laws, regulations, rules, and court orders.

13. There is good cause to amend the Court's Model Form to add paragraph 8 of the Proposed Order to establish that the additional categories of persons included in paragraph 6 of the Proposed Order are not to retain copies of any Confidential or Highly Confidential Information shown to them absent a legal or regulatory requirement to do so. Good cause for that paragraph exists in order to enable the parties to adequately prosecute or defend the Action, which may in many cases require the assistance of former employees, directors, or officers, expert witnesses and vendors, and the authors, recipients, or custodians of relevant documents, while simultaneously ensuring that these parties' access to Confidential or Highly Confidential Information is limited to

purposes relating to the Action and ends when such access is no longer necessary for adequate prosecution or defense of the Action.

14. There is good cause to amend the Court's Model Form in paragraph 8 (paragraph 11 of the Proposed Order) to treat deposition transcripts as Highly Confidential for a period of fifteen (15) days after the final transcript of such deposition is received by counsel. Good cause exists for that amendment to preserve the rights of parties to designate material in deposition transcripts as Confidential Information or Highly Confidential Information as appropriate and to specify the relevant procedures and timeframes for doing so.

15. There is good cause to amend the Court's Model Form to add paragraphs 12 and 13 of the Proposed Order to require the parties to store and maintain Confidential and Highly Confidential Information in a reasonably secure location to ensure that access to such information is limited to persons authorized under the Proposed Order, and to provide prompt notice in the event of the unauthorized or inadvertent disclosure of such information. Good cause exists for that amendment to ensure the proper protection of Confidential or Highly Confidential Information, to minimize the harm caused by the unauthorized or inadvertent disclosure of such information, and to comply with applicable laws and regulations concerning Nonpublic Personal Information.

16. There is good cause to amend the Court's Model Form in paragraph 12 (paragraph 17 of the Proposed Order) to reduce the notice period to fourteen (14) days and to reduce the sealing motion period to seven (7) days in order to reduce the burdens on counsel prior to filing any motion with the Court.

17. There is good cause to amend the Court's Model Form to add paragraph 21 of the Proposed Order to require any Receiving Party who receives a subpoena or other legal process requiring the production of Confidential or Highly Confidential Information to not produce such information

for a period of ten (10) days. Good cause exists for such amendment to provide the Producing Party an appropriate opportunity to take steps, as necessary, to challenge that subpoena or legal process.

18. There is good cause to amend the Court's Model Form to add paragraph 27 of the Proposed Order requiring that any party seeking discovery from non-parties shall provide them with a copy of the Proposed Order and to make the provisions of such order applicable to the discovery produced, if any, by that non-party. Good cause exists to provide non-parties who produce discovery in this action the same protections afforded to parties under the Proposed Order.

19. There is good cause to amend paragraph 20 of the Court's Model Form (paragraph 28 of the Proposed Order) to state that any obligation to destroy electronically stored information shall be construed to require reasonable measures and shall not be construed to require the violation of any legal obligation to maintain records or the deletion of information from data sources that are not reasonably accessible. Good cause exists for such amendment to avoid undue burden and expense and to permit the parties to comply with their legal obligations to maintain records.

20. There is good cause to amend the Court's Model Order to add paragraph 29 of the Proposed Order to state that the Proposed Order shall not be construed to limit in any way any party's or person's use of its own documents. Good cause exists for such amendment to avoid any implication that a party's or non-party's use of its documents is limited solely by fact of another party's or person's production of the same or similar documents in this action.

21. There is good cause to amend the Court's Model Order to add paragraph 30 of the Proposed Order to state that nothing in the Proposed Order is intended to compromise or impair any Party's rights to seek additional protections for information on a case-by-case basis. Good cause for such amendment exists because, given that voluminous material may potentially be produced in the

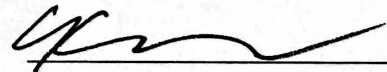
Action, it is difficult to completely foresee whether certain documents might be produced that could require additional protection on a case-by-case basis.

22. There is good cause to amend the Court's Model Order to add paragraph 32 of the Proposed Order to require encryption by the Producing Party of any media on which Confidential or Highly Confidential Information is produced. Good cause for such amendment exists because, given the nature of material that is likely to be produced in the Action, there is a strong likelihood that a substantial amount of, if not all, such material will be produced through a digital medium. As such, appropriate security measures, such as encryption, are required in order to minimize the likelihood of inadvertent disclosure of this material to third parties.

23. To the extent that an amendment, modification, or addition to the Court's Model Order is not specifically addressed herein, good cause exists for such amendment, modification, or addition based on the same or similar confidentiality and efficiency concerns that inform the deviations expressly explained herein, or such amendments, modifications, or additions facilitate the amendments, modifications, or additions that are expressly addressed herein.

Dated: Boston, Massachusetts

April 27, 2022



KEITH M. KOLLMEYER