

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

In the Matter of the Application of

U.S. BANK NATIONAL ASSOCIATION and U.S.  
BANK TRUST COMPANY, NATIONAL ASSOCIATION  
(as Trustee, Securities Administrator, Paying Agent, and/or  
Calculation Agent under various Pooling and Servicing  
Agreements),

*Petitioner,*

For Judicial Instructions Under CPLR Article 77.

Index No. 656028/2021

Justice Andrew S. Borrok

IAS Part 53

**RESPONDENTS PIMCO AND HBK'S MEMORANDUM OF LAW  
IN SUPPORT OF ORDER TO SHOW CAUSE**

**WARNER PARTNERS, PC**

Kenneth E. Warner  
950 Third Avenue, 32nd Floor  
New York, New York 10022  
(212) 593-8000

**GIBBS & BRUNS, LLP**

David Sheeren (*pro hac vice*)  
Caitlin Halpern  
Pete McDonald (*pro hac vice*)  
Nick Beachy (*pro hac vice*)

1100 Louisiana, Suite 5300  
Houston, Texas 77002  
(713) 650-8805

*Attorneys for PIMCO*

**AKIN GUMP STRAUSS HAUER & FELD LLP**

Uri. A. Itkin  
Richard J. D'Amato  
Michael Chen  
One Bryant Park  
New York, NY 10036  
(212) 872-1000

*Attorneys for HBK Master Fund L.P.*

Respondents Pacific Investment Management Company LLC (**PIMCO**) and HBK Master Fund L.P. (**HBK**), respectfully submit this memorandum of law in support of their motion, brought by order to show cause, for an order staying this proceeding pursuant to N.Y. CPLR § 2201, or in the alternative, adjourning or continuing the final hearing in this matter to November 4–8, 2025.

### PRELIMINARY STATEMENT

Petitioners filed their original Petition in this action on October 18, 2021 (NYSCEF Doc. No. 1), and their Second Amended Petition (**SAP**) on July 27, 2023 (NYSCEF Doc. No. 290). A primary matter upon which Petitioners seek instruction in their SAP is whether payments of deferred principal balances on mortgage loans should be treated as “Subsequent Recoveries” as defined by certain Pooling and Servicing Agreements (**PSAs**) (NYSCEF Doc. No. 290 at ¶¶ 2, 151).

The same issue has been raised in another matter, *In the Matter of Wells Fargo Bank, National Association* (Index No. 154984/2021) (**Wells Fargo**), with respect to another set of PSAs. (Index No. 154984/2021, NYSCEF Doc. No. 121 at 29). Petitioners cite *Wells Fargo* in depth in their SAP, alleging that the Subsequent Recovery language at issue in that proceeding “relate[s] to this matter.” (Index No. 656028/2021, NYSCEF Doc. No. 290 at ¶¶ 28-35).<sup>1</sup>

*Wells Fargo* was first filed in this Court on May 21, 2021 (Index No. 154984/2021, NYSCEF Doc. No. 1), and on October 23, 2023, the Court issued rulings on motions in *limine* in that case (Decision and Order on Motion, NYSCEF Doc. No. 823). The Court found that “Deferred Principal Payments are Subsequent Recoveries,” and that this issue was “already resolved by” the First Department’s decision in *Wells Fargo Bank v. Aegon USA Inv. Mgt., LLC*, 154 N.Y.S.3d 305 (N.Y. App. Div. 1st Dept. 2021) (**JPM II**). This finding significantly narrowed the scope of the *Wells Fargo* trial. (Decision and Order on Motion, NYSCEF Doc. No. 823 at 9). At a pre-trial

---

<sup>1</sup> See also *id.* (noting the RMBS trusts at issue in *Wells Fargo* “were issued around the same time as the Subject Trusts, and the trusts have the same sponsor as the Subject Trusts, *i.e.*, Bear Stearns”).

hearing on October 27, 2023 in *Wells Fargo*, the Court confirmed that it stood by its October 23 ruling and declined to hear further argument on that issue. (Aff. ¶ 5).

The *Wells Fargo* ruling is subject to and will be appealed. (Aff. ¶ 5). On October 27, multiple parties advised the Court that they were either considering or intended to appeal the Court's October 23 ruling. (*Id.*). A central issue on appeal will be the relevance of *JPM II* to the issues in *Wells Fargo* (*i.e.*, whether deferred principal payments constitute Subsequent Recoveries under the PSAs). Notably, appeals may follow as to the *JPM II* decision itself over the coming months, too. (Order to Show Cause, Nov. 1, 2023, Index No. 657387/2017, NYSCEF Doc. No. 1055 at 2 (explaining “the Proposed Judgment is not a waiver of any Interested Person’s rights to take an appeal from, or seek further review of the Proposed Judgment, which rights are explicitly preserved by the Proposed Judgment”); Proposed Final Judgment, Oct. 27, 2023, Index No. 657387/2017, NYSCEF Doc. No. 1049 at 7 (explicitly noting date that order becomes “fully non-appealable following the exhaustion of all appeals”); *id.* ¶ 9 (explicitly noting order is not a waiver of any party’s rights to appeal)).

The same issue—whether deferred principal payments constitute Subsequent Recoveries under the PSAs—is also central to the above-captioned *U.S. Bank* proceeding, and Petitioners allege that the Subsequent Recovery language at issue here relates to the language in the *Wells Fargo* PSAs. (Index No. 656028/2021, NYSCEF Doc. No. 290 at ¶¶ 28-35). Therefore, the issues in this proceeding substantially overlap with those in *Wells Fargo*. In addition, Petitioners allege that the second issue presented in this *U.S. Bank* matter—how to calculate and apply distributions for trusts with outstanding principal balances that have been reduced to zero—is intertwined with the Subsequent Recovery issue and will likely be impacted by application of the *JPM II* decision. *See* SAP ¶ 2 (pleading that resolution of the Subsequent Recovery issue may impact the resolution of the zero-balance issue); *id.* ¶¶ 24-30, 107-115, 119 (discussing *JPM II*, including its analysis of

the Retired Class Provision in the PSAs). A stay or adjournment of the final hearing in this case will therefore conserve the Court's and the parties' time and resources, by avoiding wasteful and premature adjudication of issues that may be significantly impacted by the *Wells Fargo* appeal.

The final hearing in this matter is currently scheduled for the week of December 11-15, 2023. (Aff. ¶ 3). At a pre-trial hearing on November 1, 2023, the Court stated that the next available trial setting for this matter would be November 4-8, 2025. PIMCO and HBK respectfully request that this Court stay this proceeding, or in the alternative, continue or adjourn the final hearing in this matter until the Court's next available trial setting, to allow time for resolution of the *Wells Fargo* and *JPM II* appeals.

#### ARGUMENT

The Court has authority “to stay an action pending before it upon such terms as may be just, and a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, duplication of proof and potential waste of judicial resources” (*215 W. 84th St Owner LLC v. Ozsu*, 174 N.Y.S.3d 584, 585 [1st Dept. 2022] [affirming court's stay based upon determination that resolution of parties' holdover proceeding would “limit the issues to be resolved” in stayed action]). It is “well settled” that motions pursuant to CPLR § 2201 seeking to stay a civil action are “directed to the sound discretion of the trial court” (*Britt v. Intl. Bus Services, Inc.*, 679 N.Y.S.2d 616, 617 [1st Dept. 1998]). The Court may grant a stay of proceedings in an action pending before it on its own accord or upon the motion of one of the parties (*Halloran v. Halloran*, 555 N.Y.S.2d 139, 141 [2d Dept. 1990]).

Further, a court is “vested with broad discretion to control its calendar” (*174 Second Equities, Corp. v. Hee Nam Bae*, 869 N.Y.S.2d 433, 435 [1st Dept. 2008]; see also *JPMorgan Chase Bank, Natl. Assn. v. Newton*, 165 N.Y.S.3d 568, 573 [2d Dept. 2022] [“Courts have an inherent power to control their calendars.”]). “The grant or denial of a motion for an adjournment

for any purpose is a matter resting within the sound discretion of the trial court” (*In re Steven B.*, 850 N.E.2d 646, 647 [2006] [internal quotations omitted]; *Dench-Layton v. Dench-Layton*, 56 N.Y.S.3d 598, 600 [3d Dept. 2017] [same]). Such determinations “will not be disturbed absent an improvident exercise of that discretion” (*L. Offs. of Linda M. Toga, P.C. v. Matthews*, 41 N.Y.S.3d 719, 720 [App. Term. 2016]).

New York courts favor the disposition of legal actions in a way that “preserve[s] judicial resources, further[s] the interest of justice by preventing inequitable results,” and “promote[s] orderly procedure by furthering goals of comity and uniformity” (*Concord Associates, L.P. v. EPT Concord, LLC*, 957 N.Y.S.2d 509, 510 [3d Dept. 2012] [granting stay in favor of parallel proceeding where parties and issues “not completely identical” but many issues regarding parties’ rights under contracts overlapped]; *see also, e.g., Hipple v. Oatly Group AB*, 167 N.Y.S.3d 384 [Sup. Ct. 2022] [Borrok, J.] [stay warranted “to avoid the risk of inconsistent rulings and a waste of judicial resources” where there was “substantial overlap” between two actions and resolution of the first would “dispose of or limit the issues to resolve” in the second]).

Going forward with the December 11, 2023 final hearing in this case would risk inconsistent adjudications, jeopardize principles of uniformity, and unnecessarily tax the Court’s, parties’, and underlying trusts’ resources, as it would require preparation from Petitioners, who are indemnified by the trusts. If the Court were to issue a ruling in this case as to deferred principal, consistent with its October 23 ruling in *Wells Fargo*, the ruling may conflict with the eventual ruling from the First Department, which would result in inconsistency.

Nor would pressing ahead on December 11 preserve judicial resources. To the contrary, given the substantial overlap between the issues in this matter and *Wells Fargo*, it would not serve the Court, parties, attorneys, or witnesses to proceed with a week-long trial in December while fundamental issues relevant to this matter are on appeal—the outcome of which may have the

effect of requiring a new trial in the future on all, or a significant portion, of the issues in dispute. Rather than risk multiple trials on the same issues, the most efficient path for this Court and the parties is to put this proceeding on hold, allow the *Wells Fargo* and any *JPM II* appeals to reach a conclusion, and then proceed as appropriate in this case.

The Court has broad discretion to issue a stay, or in the alternative, adjourn or continue an action in an effort to avoid the risk of inconsistent rulings and to conserve the Court's and the parties' time and resources. PIMCO and HBK respectfully request that the Court do so here.

### **CONCLUSION**

For the reasons set forth herein, the undersigned parties respectfully request that the Court enter the [Proposed] Order Resetting Trial Dates.

Respectfully submitted,

/s/ Kenneth E Warner

Kenneth E. Warner

**WARNER PARTNERS, PC**  
950 Third Avenue, 32nd Floor  
New York, New York 10022  
(212) 593-8000

/s/ Caitlin Halpern

David Sheeren (*pro hac vice*)  
Caitlin Halpern  
Pete McDonald (*pro hac vice*)  
Nick Beachy (*pro hac vice*)

**GIBBS & BRUNS, LLP**  
1100 Louisiana, Suite 5300  
Houston, Texas 77002A  
(713) 650-8805

***ATTORNEYS FOR PIMCO***

/s/ Uri A. Itkin

Uri. A. Itkin  
Richard J. D'Amato  
Michael Chen

**AKIN GUMP STRAUSS HAUER & FELD LLP**  
One Bryant Park  
New York, NY 10036  
(212) 872-1000

***ATTORNEYS FOR HBK***

**WORD COUNT CERTIFICATION**

This brief complies with this Court's Rule 17 of Section 202.70 (Rules of the Commercial Division) and contains 1552 words as calculated by Microsoft Word, excluding the parts of the brief exempted by Rule 17.

Dated: November 3, 2023

By: /s/ Caitlin Halpern

Kenneth E. Warner  
**WARNER PARTNERS, P.C.**  
950 Third Avenue, 32<sup>nd</sup> Floor  
New York, New York 10022  
(212) 593-8000

**GIBBS & BRUNS LLP**  
David M. Sheeren (*pro hac vice*)  
Caitlin Halpern  
Nicholas J. Beachy (*pro hac vice*)  
Pete J. McDonald (*pro hac vice*)  
1100 Louisiana, Suite 5300  
Houston, Texas 77002  
(713) 650-8805

*Attorneys for PIMCO*