

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

In the matter of the application of

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

Petitioner,

for judicial instructions pursuant to CPLR Article 77.

Index No. 656028/2021

Justice Andrew S. Borrok
Part 53

**MEMORANDUM OF LAW IN SUPPORT OF
FIRST AMENDED PETITION AND PROPOSED ORDER TO SHOW CAUSE**

Petitioner U.S. Bank National Association, solely in its capacities as trustee, securities administrator, paying agent, and/or calculation agent (as named in such role or as successor to the named party, the “**Petitioner**”) for the seventy-seven residential mortgage-backed securitization trusts listed on Exhibit A (including any individually designated loan groups therein, the “**Subject Trusts**”) to its first amended petition filed herewith (the “**Amended Petition**”), respectfully submits this memorandum of law in support of its Amended Petition and the accompanying proposed Order to Show Cause (the “**Proposed Order to Show Cause**”).¹

PRELIMINARY STATEMENT

As described in detail in the Amended Petition, the judicial instruction sought by Petitioner concerns the interpretation and application of certain provisions of the contracts governing the Subject Trusts (the “**Governing Agreements**”) with respect to issues regarding (i) the manner in which distributions are calculated and applied under the waterfalls after the aggregate outstanding principal balances of the Class A, Class M, and/or Class B classes of certificates are reduced to

¹ Capitalized terms not defined herein shall have the meaning ascribed to such terms in the Amended Petition.

zero, and (ii) the treatment of borrower payments of deferred or forborne principal, interest, and/or other amounts on mortgages that have been subject to servicer modifications in connection with a default or a reasonably foreseeable default (as determined by servicers), which is a subsidiary issue that has the potential to impact issue (i). The Amended Petition modifies the list of Subject Trusts to add “SACO I 2005-10 (Grp. II)” (as defined in the Amended Petition) thereto, and revises certain aspects of the original petition ([NYSCEF No. 1](#)) (the “Original Petition”).

In light of the above issues concerning the Subject Trusts, Petitioner, through its Amended Petition, seeks instruction from this Court pursuant to [New York Civil Practice Law and Rules § 7701](#) (“Section 7701”). Petitioner expects that holders of certificates issued with respect to the Subject Trusts, *i.e.*, investors that may have an interest in the distribution of amounts at issue herein, may wish to be heard by the Court in this proceeding. Petitioner expects that such parties may include persons that have already contacted Petitioner concerning these matters.

ARGUMENT

I. THE COURT IS AUTHORIZED TO ISSUE THE REQUESTED JUDICIAL INSTRUCTION

This Court can provide Petitioner with judicial instruction because it has jurisdiction and this action is a special proceeding relating to express trusts.

Pursuant to the Governing Agreements, the Subject Trusts are governed by the laws of the State of New York. Amended Petition ¶ 37. U.S. Bank expects that many certificateholders are citizens of New York, and the Petitioner consents to personal jurisdiction in this matter. *Id.*; *see* [Evans v. Perl, No. 602898/2005, Slip Op. at 5 \(Sup. Ct. N.Y. Cnty. Dec. 5, 2006\)](#) (“[J]urisdiction over the trustee, even where the trust assets are located out of state, is sufficient for the court to exercise jurisdiction over issues that pertain to the trustee’s actions.”).

Section 7701 provides that “[a] special proceeding may be brought to determine a matter relating to any express trust[.]” The Subject Trusts are all “express trusts” within the meaning of Section 7701, which is “broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants.” [*In re Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 \(1st Dep’t 1982\)](#).

This Court has previously exercised its jurisdiction over proceedings brought pursuant to Section 7701 related to residential mortgage-backed securitization trusts, providing instruction and direction at the request of the trustees. See [*In re Bank of New York Mellon*, No. 150738/2019, Decision and Order \(Sup. Ct. N.Y. Cnty. May 29, 2020\) \(NYSCEF No. 126\)](#) (interpreting calculation method of RMBS trust governing agreements); [*In re Wells Fargo Bank, National Association*, No. 657387/2017, Decision and Order \(Sup. Ct. N.Y. Cnty. Feb. 13, 2020\) \(NYSCEF No. 843\)](#) (authorizing and directing method of distribution of settlement amount approved in a prior Article 77 proceeding); [*In re U.S. Bank National Association*, No. 652382/2014, Decision and Order \(Sup. Ct. N.Y. Cnty. Aug. 12, 2016\) \(NYSCEF No. 593\)](#) (approving proposed settlement related to claims belonging to the trusts); [*In re U.S. Bank National Association*, No. 653902/2014, Decision and Order \(Sup. Ct. N.Y. Cnty. Dec. 21, 2015\) \(NYSCEF No. 153\)](#) (same); [*In re Bank of New York Mellon*, No. 651786/2011, Decision and Order \(Sup. Ct. N.Y. Cnty. Mar. 6, 2015\) \(NYSCEF No. 1144\)](#) (same); see also [*BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 174 \(2d Cir. 2012\)](#) (“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...to obtain interpretations of the meaning of trust documents.”) (citations omitted).

The Governing Agreements are governed by the laws of the State of New York and questions concerning their interpretation fall within Section 7701 as a “matter of interest” within the Court’s jurisdiction. *See, e.g., id.* In addition, this Court has already assumed jurisdiction over separate Article 77 proceedings that (a) concern issues related to those raised by Petitioner herein and (b) certain of the same Subject Trusts at issue here, including twenty-two that are still included in that proceeding. *See [In re Wells Fargo Bank, National Association, No. 154984/2021, Second Amended Verified Petition \(Sup. Ct. N.Y. Cnty. Jul. 16, 2021\) \(NYSCEF No. 55\)](#)* (proceeding concerning payment administration issues); *[In re Wells Fargo Bank, National Association, No. 657387/2017, Pet. Exs. D-H \(Sup. Ct. N.Y. Cnty. Dec. 15, 2017\) \(NYSCEF Nos. 5-9\)](#)* (proceeding presently involving twenty-two of the trusts at issue in the Amended Petition).

As stated, the issues described herein and in the Amended Petition present questions concerning the interpretation and application of the Governing Agreements with respect to the (i) manner in which certain distributions are calculated and applied under the waterfalls and (ii) treatment of payments of certain deferred amounts. Amended Petition ¶ 2. The resolution of these issues has the potential to impact which investors receive the funds in question. These are precisely the types of issues that are appropriate for an Article 77 proceeding. *See [In re Wells Fargo Bank, National Association, No. 657387/2017, Decision and Order \(Sup. Ct. N.Y. Cnty. Feb. 13, 2020\) \(NYSCEF No. 843\)](#)* (determining contested issues with respect to the methodology for distributing funds to investors).

Accordingly, the Court has jurisdiction over the subject matter herein and the parties to this proceeding, and judicial instruction is necessary and appropriate with respect to the matters addressed in the Amended Petition.

II. PETITIONER'S SUPPLEMENTAL NOTICE PROGRAM COMPORTS WITH DUE PROCESS

Following the commencement of this proceeding, the Court approved Petitioner's proposed order to show cause ([NYSCEF No. 30](#)) (the "**Original Order to Show Cause**"). The Original Order to Show Cause, among other things, approved a notice program, and ruled that the notice program comported with due process requirements. That program has been completed, and notice has been provided pursuant to the Original Order to Show Cause.

Petitioner now requests that the Court immediately enter the Proposed Order to Show Cause. As detailed in the Amended Petition and the Affirmation Of Nidhi Nina Yadava In Support Of Amended Petition And Proposed Order To Show Cause filed contemporaneously herewith (the "**Yadava Affirmation**"), Petitioner plans to provide a supplemental notice of this Article 77 proceeding by: (a) mailing a copy of its supplemental notice concerning this proceeding, substantially in the form attached as Exhibit 2 to the Yadava Affirmation (the "**Supplemental Notice**"), by first class certified mail to certificateholders listed on the certificate registry for SACO I 2005-10 (Grp. II) as of the date of the commencement of this action; (b) electronically transmitting the Supplemental Notice to The Depository Trust Company ("**DTC**") to be posted to DTC's online Legal Notice System (LENS) in accordance with its established procedures; (c) posting the Supplemental Notice on the Petitioner's investor reporting website with respect to SACO I 2005-10 (Grp. II); and (d) posting the Supplemental Notice and all papers subsequently filed on the public docket in connection with this proceeding to a website created and maintained by Petitioner for this purpose (collectively, the "**Supplemental Notice Program**"). Amended Petition ¶ 39; Yadava Affirmation ¶¶ 4-5.

This Supplemental Notice Program comports with due process, is consistent with the notice program in the Original Order to Show Cause, and is similar to programs approved in other recent

Article 77 proceedings, including proceedings relating to RMBS payment distribution issues. *E.g.*, [In re Wells Fargo Bank, National Association, No. 154984/2021, Second Amended Order to Show Cause at ¶ 3-4 \(Sup. Ct. N.Y. Cnty. Jul. 20, 2021\) \(NYSCEF No. 105\)](#); [In re Bank of New York Mellon, No. 150738/2019, Order to Show Cause at ¶¶ 3-4 \(Sup. Ct. N.Y. Cnty. Feb. 1, 2019\) \(NYSCEF No. 12\)](#).

Due process does not require that every interested party actually receive direct notice from Petitioner. Rather, it requires only “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 \(1950\)](#). For this reason, similar, arguably less-robust notice programs have been approved in other cases. *See* [In re Wells Fargo Bank, National Association, No. 154984/2021, Second Amended Order to Show Cause at ¶ 3-4 \(Sup. Ct. N.Y. Cnty. Jul. 20, 2021\) \(NYSCEF No. 105\)](#) (requiring that court-approved notice and contemporaneously filed papers be mailed to each party in interest and posted to the investor reporting website for the applicable trustee and DTC Lens).

III. ESCROW IS NECESSARY TO PRESERVE THE STATUS QUO

For the Subject Trusts covered in the Original Petition, the Original Order to Show Cause also directed Petitioner to cause Post-Zero Balance Collections net of any expenses and other fees payable under the Governing Agreements (the “**Escrow Funds**”) to be maintained on deposit in escrow pursuant to an escrow agreement (“**Escrow Agreement**”) substantially in the form attached as [Exhibit 2](#) to the Affirmation Of Nidhi Nina Yadava In Support Of Petition and Order

to Show Cause filed on October 18, 2021 ([NYSCEF No. 18](#)), until such time as the Court enters an order concerning the distribution of such funds.²

U.S. Bank National Association, solely in its individual, non-trustee capacity, is designated as the “**Escrow Agent**” under the Escrow Agreement. The Escrow Agent will not receive any fees, interest, or other direct monetary benefit under the Escrow Agreement and neither will Petitioner or other parties involved in administration of the Subject Trusts covered in the Original Petition pursuant to the Governing Agreements. The Original Order to Show Cause also directed Petitioner to use commercially reasonable efforts to cause the Escrow Funds to be invested and reinvested in a designated high quality money market fund, the Morgan Stanley Institutional Liquidity Funds Treasury Securities Portfolio (Institutional Share Class) (ticker: MSUXX), with any earnings thereon to accrue to the benefit of certificateholders.

In light of the addition of SACO I 2005-10 (Grp. II) as a Subject Trust to the Amended Petition, the Proposed Order to Show Cause seeks an order directing Petitioner to escrow applicable funds for SACO I 2005-10 (Grp. II) pursuant to an amended and restated escrow agreement substantially in the form of the Escrow Agreement already approved, with respect to the other Subject Trusts, in the Court’s Original Order to Show Cause (the “**Amended and Restated Escrow Agreement**”). This Court has discretion to order Petitioner, as it did in the Original Order to Show Cause, to cause funds to be maintained in escrow “to maintain the status quo pending a hearing on the merits.” See [630 West 11th LLC v. ACG Credit Co. II, LLC](#), 46

² “**Deferred Principal Collections**” (as defined in the Amended Petition) may be included within Post-Zero Balance Collections, and thus certain Deferred Principal Collections may be included in escrowed funds. However, the Original Order to Show Cause does not direct Petitioner to hold in escrow any Deferred Principal Collections that do not constitute Post-Zero Balance Collections—*i.e.*, with respect to any Deferred Principal Collections where the Class A, Class M, and/or Class B classes are outstanding, Petitioner is continuing to apply and distribute such amounts consistent with its existing practices.

[A.D.3d 367, 367 \(1st Dep't 2007\)](#); [Ficus Invs. Inc. v. Private Capitol Mgmt. LLC, 61 A.D.3d 1, 11-12 \(1st Dep't 2009\)](#) (“The escrow order properly preserved the status quo [and]...[t]he equitable relief was appropriate because the assets constituted a specific res that is ‘the subject of the action’”) (internal citations omitted); *see also* [In re Wells Fargo Bank, National Association, No. 657387/2017, Interim Orders \(Sup. Ct. N.Y. Cnty. Dec. 19-20, 2017\) \(NYSCEF Nos. 31, 32\)](#) (instructing trustees to hold a settlement payment in escrow pending a hearing on the merits).

Moreover, an order directing Petitioner to escrow applicable funds for SACO I 2005-10 (Grp. II) pursuant to the Amended and Restated Escrow Agreement is appropriate here, just as it was for the Escrow Agreement. One of the primary purposes of this proceeding—to obtain instructions from this Court concerning the manner in which distributions with respect to Post-Zero Balance Collections are applied under the waterfalls—would be frustrated if such funds were distributed to certificateholders in SACO I 2005-10 without the benefit of instruction from this Court. Distributing these funds under any of the mutually-exclusive approaches described in the Amended Petition would be effectively irreversible. This is because it would be impractical if not impossible for Petitioner to claw-back distributed funds, and then redistribute them, to the extent this Court determines that funds should be distributed using an alternative approach.

CONCLUSION

For all the foregoing reasons, Petitioner requests that the Court enter the proposed Order to Show Cause and grant the relief requested in the Amended Petition.

Dated: December 28, 2021
New York, New York

JONES DAY

/s/ Nidhi Nina Yadava

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