

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.

**MEMORANDUM OF LAW IN SUPPORT OF
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-six residential mortgage-backed securitization trusts (the “**Subject Trusts**”) listed on Exhibit A to its petition filed herewith (the “**Petition**”), respectfully submits this memorandum of law in support of its Petition and the accompanying proposed Order to Show Cause.¹

PRELIMINARY STATEMENT

As described in detail in the 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 zero, and (ii) the treatment of borrower payments of deferred or forborne principal, interest, and/or

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

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).

In light of the above issues concerning the Subject Trusts, Petitioner, through its 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 prior to the commencement of this proceeding.

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. 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) (Dkt. 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) (Dkt. No. 843) (authorizing and directing concerning 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) (Dkt. 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) (Dkt. No. 153) (same); *In re Bank of New York Mellon*, No. 651786/2011, Decision and Order (Sup. Ct. N.Y. Cnty. Mar. 6, 2015) (Dkt. 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-three 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) (Dkt. 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) (Dkt. Nos. 5-9) (proceeding presently involving twenty-three of the trusts at issue in the Petition).

As stated, the issues described herein and in the 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. 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) (Dkt. 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 Petition.

II. PETITIONER'S NOTICE PROGRAM COMPORTS WITH DUE PROCESS

Petitioner requests that the Court immediately enter the proposed Order to Show Cause contemporaneously filed herewith (the "**Order to Show Cause**"). As detailed in the Petition and the Affirmation Of Nidhi Nina Yadava In Support Of Petition And Proposed Order To Show Cause, filed contemporaneously herewith (the "**Yadava Affirmation**"), Petitioner plans to provide notice of this Article 77 proceeding to certificateholders in the Subject Trusts and other potentially interested persons by: (a) mailing a copy of its notice concerning this proceeding, substantially in

the form attached as Exhibit 1 to the Yadava Affirmation (the “**Notice**”), by first class registered mail to certificateholders listed on the certificate registry for each Subject Trust as of the date of the commencement of this action; (b) electronically transmitting the 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 Notice on the Petitioner’s investor reporting website; and (d) posting the 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 “**Notice Program**”). Petition ¶ 39; Yadava Affirmation ¶¶ 4-5.

This Notice Program comports with due process 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) (Dkt. 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) (Dkt. No. 12). The Notice Program differs from notice programs recently approved in other proceedings in that, rather than mailing copies of “first day” court papers to certificateholders, Petitioner will establish and maintain a website specifically for the purpose of posting copies of its Notice and all papers filed with the Court during the pendency of this action, including its “first day” court papers, such that all of these documents will be readily available online to all potentially interested persons.

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) (Dkt. 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

The Order to Show Cause also would direct Petitioner to cause Post-Zero Balance Collections for each Subject Trust 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 (the “**Escrow Agreement**”) substantially in the form attached as Exhibit 2 to the Yadava Affirmation, 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 pursuant to the Governing Agreements. Petitioner also requests that the Court direct 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

² Deferred Principal Collections may be included within Post-Zero Balance Collections for a particular Subject Trust, and thus certain Deferred Principal Collections may be included in escrowed funds. However, Petitioner is not proposing 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 for Subject Trusts where the Class A, M, and/or B classes are outstanding, Petitioner intends to continue to apply and distribute such amounts consistent with its existing practices.

Treasury Securities Portfolio (Institutional Share Class) (ticker: MSUXX), with any earnings thereon to accrue to the benefit of certificateholders.

This Court has discretion to order Petitioner to cause such 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 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) (Dkt. Nos. 31, 32) (instructing trustees to hold a settlement payment in escrow pending a hearing on the merits).

Such an order is appropriate in this case. 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 without the benefit of instruction from this Court. Distributing these funds under any of the mutually-exclusive approaches described in the 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 Petition.

Dated: October 18, 2021
New York, New York

JONES DAY

/s/ Nidhi Nina Yadava

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