Nomura Asset Acceptance Corp. v Nomura Credit & Capital, Inc.
2020 NY Slip Op 33912(U)
November 24, 2020
Supreme Court, New York County
Docket Number: 652619/2012
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2006-S3, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of July 1, 2006,

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

NOMURA CREDIT & CAPITAL, INC.,

Third-Party Plaintiff,

-against-

WELLS FARGO BANK, N.A. and OCWEN LOAN SERVICING, LLC,

Third-Party Defendants.

Index No. 652619/2012

Mot. Seq. Nos. 016, 017, 018

DECISION AND ORDER ON MOTION

NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2006-S4, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 653390/2012 **Mot. Seq. Nos.** 015, 016, 017
NOMURA CREDIT & CAPITAL, INC., Third-Party Plaintiff, -against- WELLS FARGO BANK, N.A. and OCWEN LOAN SERVICING, LLC, Third-Party Defendants.	

NOMURA HOME EQUITY LOAN, INC., SERIES 2006-FM2, pursuant to a Pooling and Service Agreement, dated as of October 1, 2006, by HSBC BANK USA, NATIONAL ASSOCIATION, solely in its capacity as the Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 653783/2012 **Mot. Seq. Nos.** 016, 017, 018
NOMURA CREDIT & CAPITAL, INC., Third-Party Plaintiff, -against- WELLS FARGO BANK, N.A. and OCWEN LOAN SERVICING, LLC, Third-Party Defendants.	

NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 TRUST, by HSBC BANK USA, National Association, as Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 652614/2012 **Mot. Seq. Nos.** 015, 016, 017
NOMURA CREDIT & CAPITAL, INC., Third-Party Plaintiff, -against- WELLS FARGO BANK, N.A. Third-Party Defendants.	

NOMURA HOME EQUITY LOAN, INC., SERIES 2007-3, pursuant to a Pooling and Service Agreement, dated as of April 1, 2007, by HSBC BANK USA, NATIONAL ASSOCIATION, solely in its capacity as the the Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 651124/2013 **Mot. Seq. Nos.** 016, 017, 018
NOMURA CREDIT & CAPITAL, INC., Third-Party Plaintiff, -against- WELLS FARGO BANK, N.A. and OCWEN LOAN SERVICING, LLC, Third-Party Defendants.	

NOMURA HOME EQUITY LOAN, INC., HOME EQUITY LOAN TRUST, SERIES 2007-2, by HSBC Bank USA, National Association, as Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 650337/2013 **Mot. Seq. Nos.** 015, 016, 017
NOMURA CREDIT & CAPITAL, INC., Third-Party Plaintiff, -against- WELLS FARGO BANK, N.A. and OCWEN LOAN SERVICING, LLC, Third-Party Defendants.	
NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2007-1, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee, Plaintiff, -against- NOMURA CREDIT & CAPITAL, INC., Defendant.	**Index No.** 652842/2014 **Mot. Seq. Nos.** 008, 009, 010

HON. MARCY S. FRIEDMAN:

These are seven separate residential mortgage-backed securities (RMBS) put-back actions brought by plaintiff trustee HSBC Bank USA, National Association (HSBC or Trustee), on behalf of seven separate RMBS trusts against defendant Nomura Credit & Capital, Inc. (Nomura). By three motions filed in each of the seven actions, the Trustee and Nomura appeal

three orders, one dated November 11, 2019 and two dated December 16, 2019, issued by Special Discovery Master Theodore H. Katz. (NYSCEF Doc. Nos. 517, 518, 552) The appeals are brought pursuant to Section III (E) of the Part 60 RMBS Putback and Monoline Case Management Order, dated December 7, 2015.[1] (NYSCEF Doc. No. 526.)

As relevant to the appeals, the Special Master's November 11, 2019 Order held that the Trustee must produce Confidentiality and Indemnification Agreements (C&I Agreements) entered into by the Trustee and various certificateholders of the trusts. (11/11/19 Order, at 3.) The Special Master reasoned that "because the C&I Agreements do not appear to contain privileged information, they cannot be properly withheld pursuant to the common-interest doctrine under New York law." (Id.) Further reasoning that "the C&I Agreements are only relevant to the extent they relate to HSBC's prospective claims for its attorneys' fees and costs in these Actions," the Special Master directed that "the remainder of the C&I Agreements may be redacted." (Id.) The Special Master also held that the Trustee was not required to produce the "additional related documents that Nomura seeks – i.e., drafts of the C&I Agreements, and communications with Fir Tree, other certificateholders, servicers and master servicers." (Id.) This holding was based on the Special Master's determination that these documents are properly withheld by the Trustee under the common interest doctrine. (Id., 3-4.) The Special Master's December 16, 2019 Order adhered to these holdings in response to a request for clarification by Nomura. (12/16/19 Order, at 1.) In a separate Order, also dated December 16, 2019, the Special Master granted Nomura's request for additional time to depose the Trustee's reunderwriting

[1] The trusts at issue in each of the seven actions are as follows: NAAC 2006-S3, Index No. 652619/2012; NAAC 2006-S4, Index No. 653390/2012; NHELI 2006-FM2, Index No. 653783/2012; NAAC 2006-AF2, Index No. 652614/2012; NHELI 2007-3, Index No. 651124/2013; NHELI 2007-2, Index No. 650037/2013; NAAC 2007-1, Index No. 652842/2014. References to the motion sequence numbers and NYSCEF document numbers in this decision and order are to motions filed under Index No. 650337/2013.

experts, and denied the Trustee's request for additional time to depose Nomura's reunderwriting expert. (11/16/2019 Deposition Order, at 2.)

The Case Management Order provides for appeal of the Special Master's orders pursuant to Federal Rule of Civil Procedure 53 (t)(3)(A),(4),(5), with the court to "review[] factual findings for clear error, conclusions of law made or recommended de novo, and rulings on procedural matters for abuse of discretion." (12/17/15 Case Management Order, § III [E].)

C&I Agreements

Motion Sequence Nos. 15 and 16 address the Special Master's Order to the extent that the Order concerns the production of C&I Agreements and related documents. In Motion Sequence No. 15, Nomura argues that the C&I Agreements should be produced without redactions for relevance. (Mot. Seq. No. 15 Memo. In Supp., at 1 [NYSCEF Doc. No. 515].) In Motion Sequence No. 16, the Trustee argues that the C&I Agreements should not be produced at all because they are privileged and, alternatively, because they are not relevant. (Mot. Seq. No. 16 Memo. In Supp., at 1 [NYSCEF Doc. No. 534].)

In addressing the issue of whether the C&I Agreements related to the trusts at issue in the actions are privileged, the Special Master reviewed a C&I Agreement that involves two of the RMBS trusts at issue in this action (the Sample C&I). (11/16/2019 Order, at 2; 7/29/2018 Nomura Letter Br., at 1 [NYSCEF Dkt. No. 538]; Sample C&I, dated 7/12/2012 [NYSCEF Doc. No. 545].) The Sample C&I was publicly filed by the Trustee in a Virginia action concerning two of the trusts at issue in these actions. This action is referred to by the parties and the Special Master as the Fir Tree litigation. (Id.)

The Sample C&I between HSBC and certificateholders directing repurchase litigation on behalf of the trust, provides, among other things, for indemnification of the trustee and payment

of attorney's fees and expenses in connection with the litigation. The Special Master found with respect to the Sample C&I:

> "There is no clear evidence of shared legal advice on the face of the document. Moreover, even if the C&I Agreement relates in some way to the anticipated litigation in which the certificateholders and HSBC (as Trustee) would share a common interest, it does not reveal or reflect legal strategy; nor does it appear to discuss in any meaningful way how the litigation should be conducted."

(11/16/2019 Order, at 3.) The Special Master concluded: "It follows that because the C&I Agreements do not appear to contain privileged information, they cannot be properly withheld pursuant to the common-interest doctrine under New York law." (Id.)

The Trustee argues that the Special Master erred because the "C&I Agreements reflect legal strategy about which claims to pursue in the litigation, how to pursue them, and legal interpretations of certain PSA provisions," and because the Agreements "discuss in detail how litigation is to be funded, which has direct practical implications for legal strategy and tactics." (Mot. Seq. No. 16 Memo. In Supp., at 6.) The Trustee does not, however, identify any specific provision in the Sample C&I in support of these contentions. The Trustee also does not cite any authority which has held that C&I Agreements, or particular provisions of these Agreements, are protected from disclosure by the attorney-client privilege or work product doctrine. To the contrary, the authority cited by Nomura and identified by the court in its own research further supports the Special Master's ruling that the C&I Agreements are not protected from disclosure. (See Mot. Seq. No. 16 Memo. In Opp., at 9 [NYSCEF Doc. No. 571]; 7/29/2018 Nomura Letter Br., at 1, 3; see also Fewer v GFI Group Inc., 78 AD3d 412, 412-413 [1st Dept 2010] [joint defense agreement not protected from disclosure by attorney-client privilege]; Competitive Enterp. Inst. v Attorney Gen. of N.Y., 161 AD3d 1283, 1286-1287 [3d Dept 2018] [common interest agreement "prepared by respondent's counsel in anticipation of state investigations and

legal actions," which respondent alleged "reflects the legal theories under which such actions are likely to proceed," not protected from disclosure by work product doctrine].) The court concludes that, under any of the applicable standards of review, the Special Master's ruling that the C&I Agreements are not privileged should be affirmed.

The court turns to Nomura's claim that the Special Master erred in permitting redactions of the C&I Agreements. The Special Master reasoned that the C&I Agreements "are only relevant to the extent they relate to HSBC's prospective claims for its attorneys' fees and costs in these Actions." (11/16/2019 Order, at 3.) The Special Master therefore concluded that the C&I Agreements may be redacted except as to the provisions of the Agreements that "reasonably relate to and/or are plausibly relevant to those prospective claims . . . ." (Id.) In ruling on Nomura's request for clarification of the November Order, the Special Master adhered to this holding, stating:

> "(1) Nomura requested the C&I Agreements specifically because they were alleged to contain information related to HSBC's indemnification for the attorney's fees and costs that it (now) seeks from Nomura related to this litigation; and (2) the Special Master determined that the C&I Agreements have at best 'tangential relevance' to these Actions, and only to the limited 'extent they relate to HSBC's prospective claims for its attorneys' fees and costs in these Actions.'"

(12/16/19 Order, at 1.)

Nomura initially sought before the Special Master to compel production of the C&I Agreements on the ground that the Trustee has withheld the Agreements based on an improper claim of privilege. (7/29/19 Nomura Letter Br., at 1.) The Trustee in response disputed Nomura's privilege challenge and argued, in the alternative, that the C&I Agreements are not relevant. (8/5/19 Trustee Letter Br., at 2-3 [NYSCEF Doc. No. 539].) In reply, Nomura addressed the Trustee's relevance argument, stating: "The documents relate to the very loans and trusts at issue, as well as to among other things HSBC's repurchase demands, 'failure-to-

notify' claims, and purported attorneys' fees claims." (8/12/19 Nomura Letter Br., at 1 n 2 [NYSCEF Doc. No. 540].) Thus, contrary to the Trustee's contention, Nomura does not "assert[], for the first time and without explanation [on this appeal], that the C&I Agreements are relevant to 'HSBC's failure-to-notify claims, HSBC's own contractual obligations with respect to providing notice, and the timing of HSBC's awareness of alleged breaches, as well as causation and damages'. . . ." (Mot. Seq. No. 15 Memo. In Opp., at 3 [NYSCEF Doc. No. 568].)

Based on review of the briefing before the Special Master, the court holds that Nomura did not waive its claim that the C&I Agreements are relevant not only to the Trustee's prospective claim for attorney's fees, but also to other issues in this litigation, including the Trustee's failure to notify claims. Significantly also, in a prior appeal from an Order of the Special Master, this court specifically held that various categories of certificateholder documents, including certificateholders' directions to and indemnification of the Trustee in connection with litigation against a securitizer (i.e., documents such as C&I Agreements), are not categorically irrelevant to various claims in this litigation. (In re Part 60 RMBS Put-Back Litigation, 2018 NY Slip Op 30161[U], 2018 WL 587137, at *3-4 [Sup Ct, NY County January 29, 2018].)[2] As discussed in the decision on the prior appeal, these documents may be relevant, for example, to the Trustee's failure to notify claims against Nomura and the Trustee's own potential obligation to commence litigation against Nomura based on Nomura's alleged breaches of representations and warranties. (Id.) The court adheres to the reasoning of this decision here.

Under any of the applicable standards of review, the court holds that the Special Master's Orders must be reversed to the limited extent that they permitted redactions to the C&I Agreements. The court holds that the C&I Agreements must be produced in their entirety.

[2] This appeal was taken in one of the seven Nomura actions now before the court, Index No. 652842/2014.

As noted above, in holding that the C&I Agreements could be redacted, the Special Master found that Nomura had requested these Agreements based on their relevance to the Trustee's "prospective claims for its attorneys' fees and costs." (11/16/19 Order, at 3.) The Special Master should, however, have considered the additional bases for relevance raised by Nomura in its submissions to the Special Master and this court's January 2018 decision addressing the relevance of certificateholder documents.

Common Interest Doctrine

In Motion Sequence No. 15, Nomura appeals the Special Master's ruling, based on the common interest doctrine, that the Trustee properly withheld documents related to the C&I Agreements, including "drafts of the C&I Agreements, and communications with Fir Tree, other certificateholders, servicers and master servicers." (11/11/19 Order, at 3; Mot. Seq. No. 15 Memo. In Supp., at 7.) Nomura contends that the Special Master misapplied the common interest doctrine and improperly declined to conduct an in camera review of these documents. (Id., at 10.)

In the November Order, the Special Master relied on two of his prior rulings concerning application of the common interest doctrine in Part 60 putback actions—an Order, dated July 17, 2017, in Natixis Real Estate Capital Trust 2007-HE2, by Computershare Trust Co., N.A. v Natixis Real Estate Capital, Inc., Index No. 153945/2013 (Natixis Order) and an Order, dated July 13, 2018, in Merrill Lynch Alternative Note Asset Trust, Series 2007-A3, by HSBC Bank USA, N.A. v Merrill Lynch Mtge. Lending, Inc., Index No. 652727/2014 (Merrill Order). (NYSCEF Doc. Nos. 531, 532; see 11/11/19 Order, at 3.)

The Special Master's prior Orders correctly set forth the standard for application of the common interest doctrine and the policy reasons for the doctrine. As explained by the Court of Appeals and noted by the Special Master:

> "As an exception to the general rule that communications made in the presence of or to a third party are not protected by the attorney-client privilege, our current formulation of the common interest doctrine is limited to situations where the benefit and the necessity of shared communications are at their highest, and the potential for misuse is minimal. Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that the counsel of each is in effect the counsel of all. When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited."

(Ambac Assur. Corp. v Countrywide Home Loans, Inc., 27 NY3d 616, 628 [2018] [internal citation and quotation marks omitted]; Natixis Order, at 4 [quoting same]; Merrill Order, at 7 [quoting same].)

In Natixis, the Special Master addressed the application of the common interest doctrine to privileged documents and communications exchanged between the securities administrator and certificateholders, including one such document concerning "amendments to the Direction and Indemnity from the noteholders originally sent prior to the appointment." (Natixis Order, at 3.)[3] The Special Master also addressed privileged documents and communications exchanged between the securities administrator and the separate securities administrator. (Id., at 4.) The

[3] In Natixis, the claims were brought on behalf of the trust at issue by the securities administrator, a role that was later assigned to a separate securities administrator. Thus, the securities administrator and separate securities administrator in Natixis had a role substantially analogous to that of the Trustee here with respect to repurchase litigation.

Special Master concluded that both categories were protected by the common interest doctrine because the documents were exchanged "during a circumscribed period of time when all three plainly shared a common legal interest – i.e., a 'joint desire to put back defective loans'." (Id., at 4, 5, quoting ACE Secs. Corp. v. DB Structured Prods., Inc., 55 Misc 3d 544, 562 [Sup Ct, NY County 2016].)[4] In denying the appeal of the Order, this court adopted the reasoning of the Special Master. (See August 23, 2017 Decision on the Record, at Tr. 29-30 [Index No. 153945/2013, NYSCEF Doc. No. 319].) The Appellate Division affirmed the court's decision, reasoning:

> ". . . . [T]he allegedly injured certificateholders may not directly pursue their claims, and must rely on the securities administrator and separate securities administrator to litigate on behalf of the trust. Within this limited context, we find that the standard articulated in [Ambac Assur. Corp. (27 NY3d at 628)] concerning the application of the common interest privilege, is met.
>
> Moreover, the documents were exchanged at a time when the parties shared their common interest of pursuing the put-back claims, and were made in furtherance of that common interest."

(161 AD3d 436, 437-438 [1st Dept 2018], citing ACE Secs. Corp., 55 Misc 3d at 561-563.)

In Merrill, following an in camera review, the Special Master applied the same standard in determining that "documents that represent communications with loan servicers related to foreclosure litigation" and "documents that represent communications involving certificate holders generally related to repurchase claims," including documents regarding negotiation of an indemnification agreement, were appropriately withheld by the trustee pursuant to the common interest doctrine. (Merrill Order, at 8.)

Here, the Special Master concluded that the documents challenged by Nomura are analogous to the categories of documents addressed in the Natixis and Merrill Orders—namely,

[4] In Natixis, the Special Master's Order does not indicate that he conducted an in camera review of any documents at issue.

"communications between HSBC and certificateholders 'generally related to repurchase claims', communications between HSBC and outside counsel regarding 'the negotiation of an indemnity agreement', and communications related to the 'coordination of repurchase litigation'." (11/11/19 Order, at 3.) The Special Master accordingly held that " for all of the reasons previously expressed in the [Natixis and Merrill Orders], HSBC's withholding of the additional documents and communications related to the C&I Agreements appears consistent with relevant New York law." (Id., at 4.)

The Special Master further stated that "a sample-based in camera review" would be necessary in order to "depart from the guidance previously established" by his prior Orders, but declined to undertake such a review. (Id., at 4.) The Special Master cited his determination that the "C&I Agreements are – at best – tangentially relevant to HSBC's prospective claims for attorneys' fees and costs in these Action." (Id.) He then concluded that the minimal relevance of the related withheld documents did not support the burden and expense of an in camera review. (Id.)

The court holds as a matter of law that the categories of withheld documents that Nomura identifies are protected from disclosure by the common interest doctrine. These documents concern repurchase demands, repurchase litigation, and the negotiation of the related C&I Agreements. As discussed above, the Appellate Division has directly addressed the application of the common interest doctrine to such documents. (See In re Part 60 Put-Back Litigation, 161 AD3d at 437-438.) That decision is controlling here. As discussed below, Nomura fails to make any showing that the documents at issue here are distinguishable from those at issue in Natixis or Merrill. Nomura also fails to raise any issue of fact as to the application of the common interest doctrine.

Nomura appears to contend that the Special Master misstated the standard for the common interest doctrine. Nomura argues that "it is not enough that there be an 'interlocking relationship'—as the Special Master found—if there is no privileged content to begin with, or if the information is disclosed to a third party other than in furtherance of a common legal interest." (Mot. Seq. No. 15 Memo. In Supp., at 7.) Nomura, however, provides no support for its suggestion that the Special Master determined the application of the common interest doctrine solely on the basis of an "interlocking relationship" or ignored the requirement that there must be a valid underlying assertion of privilege for the doctrine to apply. The November Order relied upon the Natixis and Merrill Orders, which set forth at length the applicable standard. (11/11/19 Order, at 3; Natixis Order, at 4; Merrill Order, at 7.) The Special Master's editorial decision to refer to his prior Orders without fully restating the standard is not an error.

Nomura also fails to identify any error in the Special Master's application of the common interest standard to the categories of withheld documents challenged by Nomura. Nomura asserts generally that the Special Master "failed to hold HSBC to its burden to establish that privilege and the common interest doctrine apply for hundreds of communications with Fir Tree and other hedge funds and certificateholders, as well as with various other entities, including servicers like Wells Fargo and Ocwen, who are third-party defendants in the Nomura Actions." (Mot. Seq. No. 15 Memo. In Supp., at 9.) Nomura does not support this broad assertion with necessary factual detail.

Commercial Division Rule 11-b directs parties to meet and confer regarding the form and substance of privilege designations, including "the amount of information to be set out in the privilege log." Under Rule 11-b, the producing party must also support categorical privilege designations with a certification "setting forth with specificity those facts supporting the

privileged or protected status of the information included within the category" and "describ[ing] the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed." Nomura does not argue that the Trustee failed to comply with the requirements of Rule 11-b or any related agreement of the parties regarding the form and substance of the privilege log. Significantly, as discussed in more detail below, while the Trustee has the ultimate burden of establishing privilege, Nomura fails to cite any information from the Trustee's privilege log or any accompanying certification that raises a question as to whether the documents in specific categories may have been improperly withheld. Nomura therefore fails to identify an issue of fact that could be resolved by an in camera review.

The court also rejects Nomura's contention that in camera review of withheld documents regarding repurchase demands is required because these documents may concern non-privileged "normal trust administration activities." (Mot. Seq. No. 15 Memo. In Supp, at 10.) While the Trustee's administrative responsibilities may include acts with respect to repurchase demands, these responsibilities do not render otherwise privileged communications subject to disclosure. Nomura also does not cite any information from the privilege log that raises a question as to whether any of the withheld documents solely concern administrative responsibilities.

Nomura further argues that certificateholder communications concerning the C&I Agreements cannot be subject to the common interest doctrine because the certificateholders and the Trustee negotiated those Agreements as counterparties.[5] Nomura asserts that ". . . HSBC's

[5] The Trustee argues in opposition to Motion Sequence No. 15 that "[t]he waiver of privilege between Fir Tree and the Trustee with respect to certain specific documents filed in the Virginia action does not waive the protection of their entire common interest relationship concerning the [] actions [relating to the same trusts], as Nomura argues." (Mot. Seq. No. 15 Memo. In Opp., at 8.) Nomura addresses the waiver issue in a footnote on this appeal, stating :

> "HSBC's disclosure of the C&I Agreement was knowing and deliberate, as were HSBC's and Fir Tree's numerous statements in the Fir Tree litigation regarding their negotiations. These public

Fir Tree litigation reveals that these negotiations were not in furtherance of any common purpose. As Fir Tree alleged, until the C&I Agreement was signed, HSBC 'acted entirely in its own self-interest' . . ." (Mot. 15 Memo. In Supp, at 10.) This argument was previously rejected by the Special Master on the grounds, among others, that the communications related to anticipated litigation in which the parties shared a common legal interest. (Merrill Order, at 9, 9 n 6.) That reasoning is equally applicable here. The privilege is not vitiated simply because the Trustee and the certificateholders may have been at odds with respect to other issues involving direction and indemnification of the Trustee in connection with the repurchase litigation. (See ACE Secs. Corp., 55 Misc 3d at 562.)

Nomura otherwise fails to distinguish the challenged withheld documents from categories of documents previously addressed by the Special Master and this court in Part 60 putback actions. It bears emphasis that, although Nomura has the Trustee's privilege log, it does not cite any information from the log that would raise an inference that the documents may not be subject to the common interest doctrine. For example, Nomura argues that the communications at issue in Natixis are distinguishable because they were "communications made through outside counsel around the time the parties involved were drafting a complaint (and an initial direction and indemnity letter had apparently already been executed)." (Mot. Seq. No. 15 Memo. In Supp., at 8.) Nomura does not, however, refer to any information from the privilege log, such as

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> filings make clear that, if there ever was any privilege, it was waived when the content of these communications was deliberately disclosed."

(Mot. Seq. No. 15 Memo. In Supp., at 9 n 12.) This footnote sets forth Nomura's entire argument on the waiver issue on this appeal. Nomura does not clarify whether its waiver argument is limited to the two trusts at issue in the Fir Tree litigation which are also at issue here, or whether it applies to all of the trusts at issue here. Nomura also does not identify any publicly filed documents other than the C&I Agreement, addressed separately above. More important, Nomura fails to address the extensive body of law on waiver. Under these circumstances, the court declines to determine whether the Trustee has waived any privilege.

information about the date range or recipients of the documents at issue here, to support its contention that the Natixis documents are distinguishable.

The court accordingly concludes, based on the record submitted on these motions, that the common interest doctrine applies as a matter of law.[6] In addition, an in camera review of the challenged documents is not required, as Nomura has not raised an issue of fact with respect to the application of the common interest doctrine.[7] Under any applicable standard of review, the Special Master's ruling should be affirmed.

Expert Depositions

In Motion Sequence No. 17, the Trustee appeals the Special Master's ruling granting Nomura additional time to depose two of the Trustee's reunderwriting experts, Richard Payne and Robert Hunter. (12/16/2019 Deposition Order, at 2.) The Special Master determined that "the proposed extensions are reasonable, generally supported by good cause, and comparatively proportional to the uniform protocol for the depositions of Nomura's witnesses . . ." (Id.) In support of this holding, the Special Master cited the reasons given by Nomura for requesting additional time, which include: the scope of the reunderwiting reports "that contain loan-level allegations regarding alleged breaches for well over 1,000 mortgage loans"; the need to question

[6] In its opposition to Motion Sequence No. 15, the Trustee also argues that it has properly withheld documents concerning borrower litigation pursuant to the common interest doctrine. (Mot. Seq., No. 15 Memo In Opp., at 8.) The court does not address this category of documents, as it does not appear that Nomura raises this issue in its appeal.

[7] As noted above, the Special Master's ruling with respect to the in camera review was based, in part, on his ruling that the C&I Agreements are only tangentially relevant. (11/11/19 Order, at 4.) He reasoned that documents related to the C&I Agreements are accordingly only minimally relevant, and concluded that the burden and expense of an in camera review was not justified. (Id.) In this decision, this court reaches a different determination as to the relevance of the C&I Agreements. Nevertheless, reversal of the Special Master's denial of an in camera review is not warranted, as the court has also held that Nomura fails to raise any issue of fact as to the application of the common interest doctrine to any document or category of documents.

the experts on their replies to Nomura rebuttal expert reports; and "the time that must be spent by Nomura's Counsel during the deposition related to foundational background questioning." (Id.)

The Special Master's Order also rejected the Trustee's claim that "if Nomura's present request is granted, commensurate adjustments to the duration of other depositions must be made." The Special Master stated that he was "not persuaded that good cause has been established or plausibly exists to alter the uniform protocol for the depositions of Nomura's witnesses based upon the relief granted herein." (Id.)

The Trustee argues that the resulting "expert deposition regime is manifestly unfair" and "requests that the Court cure this inequity by either increasing the amount of deposition time for [Nomura's reunderwriting expert] to equal the additional time Judge Katz allotted for Nomura to depose Mr. Hunter and Mr. Payne or reducing the amount of deposition time for Mr. Hunter." (Mot. Seq. No. 17 Memo. In Supp, at 1-2 [NYSCEF Doc. No. 550].)

The court affirms the Special Master's Order on this procedural matter, which is subject to review for abuse of discretion. In a reasoned decision, the Special Master determined that the rulings were supported by good cause and were consistent with prior procedural orders issued by the Special Master for the governance of expert depositions in these actions. Moreover, the Trustee does not set forth any facts or law in support of its claim that it will be prejudiced by the Order or that it is "manifestly unfair." Put another way, the Trustee's objection to the Order reduces to the difference in the number of deposition hours allotted for the parties' respective experts, without any showing that the difference is unreasonable under the circumstances.

This court's order will not prevent the parties from working together to accommodate reasonable requests for extensions of deposition time. The court is confident that they will do so.

ORDER

It is accordingly hereby ORDERED that the motions of defendant Nomura Credit & Capital, Inc. (Nomura) appealing the Orders of Special Discovery Master Theodore H. Katz, dated November 11, 2019 and December 16, 2019 regarding Nomura's motion to compel production of C&I Agreements and the common interest doctrine (Index No. 652619/2012, Mot. Seq. No. 16; Index No. 653390/2012, Mot. Seq. No. 15; Index No. 653783/2012, Mot. Seq. No. 16; Index No. 652614/2012, Mot. Seq. No. 15; Index No. 651124/2013, Mot. Seq. No. 16; Index No. 650037/2013, Mot. Seq. No. 15; Index No. 652842/2014, Mot. Seq. No. 8) are granted solely to the extent that plaintiff HSBC Bank USA, N.A., solely in its capacity as Trustee of NAAC 2006-S3, NAAC 2006-S4, NHELI 2006-FM2, NAAC 2006-AF2, NHELI 2007-3, NHELI 2007-2, and NAAC 2007-1 (HSBC, as Trustee of the Trusts) shall produce the C&I Agreements in their entirety and without redactions. The motions are otherwise denied in their entirety; and it is further

ORDERED that the motions of plaintiff HSBC, as Trustee of the Trusts appealing the Orders of Special Discovery Master Theodore H. Katz, dated November 11, 2019 and December 16, 2019, regarding Nomura's motion to compel production of C&I Agreements and the common interest doctrine (Index No. 652619/2012, Mot. Seq. No. 17; Index No. 653390/2012, Mot. Seq. No. 16; Index No. 653783/2012, Mot. Seq. No. 17; Index No. 652614/2012, Mot. Seq. No. 16; Index No. 651124/2013, Mot. Seq. No. 17; Index No. 650037/2013, Mot. Seq. No. 16; Index No. 652842/2014, Mot. Seq. No. 9) are denied in their entirety;

ORDERED that the motions of plaintiff HSBC, as Trustee of the Trusts appealing the Order of Special Discovery Master Theodore H. Katz, dated December 16, 2019, regarding expert deposition hours (Index No. 652619/2012, Mot. Seq. No. 18; Index No. 653390/2012,

Mot. Seq. No. 17; Index No. 653783/2012, Mot. Seq. No. 18; Index No. 652614/2012, Mot. Seq. No. 17; Index No. 651124/2013, Mot. Seq. No. 18; Index No. 650037/2013, Mot. Seq. No. 17; Index No. 652842/2014, Mot. Seq. No. 10) are denied in their entirety.

This constitutes the decision and order of the court.

11/24/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE