Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
BONITAS LLC, Plaintiff, vs. U.S. BANK NATIONAL ASSOCIATION, Defendants.	Court File No. 27-CV-17-2229 Case Type: Other Civil Hon. Ronald L. Abrams **FIRST AMENDED COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Bonitas LLC ("Bonitas"), for its first amended complaint against Defendant U.S. Bank National Association ("U.S. Bank"), Trustee of the Harborview Mortgage Loan Trust 2005-10 ("Harborview 2005-10" or the "Trust"), hereby alleges as follows:

NATURE OF ACTION

1. This action arises out of U.S. Bank's duties as the Trustee of Harborview Mortgage Loan Trust 2005-10, a residential mortgage-backed securities ("RMBS") trust backed by loans originated by Countrywide Home Loans, Inc. ("Countrywide"). Because an event of default, as defined in the governing documents, has occurred, U.S. Bank, as Trustee, is obligated to conduct itself as a prudent person would in managing his or her own affairs, and it owes fiduciary duties to Trust beneficiaries, including Bonitas.

2. This action is an effort to prevent U.S. Bank from entering into a settlement that will release the Trust's valuable claims against Countrywide and its successors Bank of America Corp. and Bank of America N.A. (together, "Bank of America") for a fraction of their true value, causing Bonitas irreparable injury. No prudent person would settle these valuable litigation claims for the amount reflected in the proposed settlement.

3. Harborview 2005-10 has suffered staggering losses since it closed on August 31,

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

2005. These losses were the result of Countrywide's origination of imprudent loans to borrowers without the ability or willingness to repay their debt because of its systematic abandonment of its underwriting guidelines and quality assurance policies in the run-up to the financial crisis. As these borrowers defaulted or became delinquent on their mortgage payments, the cash flows into the Trust became insufficient to make scheduled principal and interest payments to certificateholders, causing enormous losses to certificateholders.

4. Countrywide and Bank of America are responsible for those losses, under Harborview 2005-10's governing documents, and U.S. Bank, as Trustee, is required under the Trust documents to enforce Countrywide's obligations to make the Trust whole. Furthermore, because the Trust has suffered an "Event of Default" under the applicable contracts, U.S. Bank is required to exercise the care and skill of a prudent person in maintaining Trust assets, and owes fiduciary duties to the beneficiaries of the Trust.

5. To enforce Countrywide's obligations, U.S. Bank filed suit against Countrywide and Bank of America in New York state court, seeking damages for Countrywide's massive contractual breaches. In that litigation, U.S. Bank has made detailed and damning allegations about the shoddy loans that Countrywide originated and that were included in this transaction, as a result of Countrywide's systemic failures. For example, U.S. Bank alleged that Countrywide ignored its mortgage representations in pursuit of profit and market share and that it "purposefully and knowingly: (a) manipulat[ed] the data in the Loan Files in order to facilitate approval of the Loan; (b) blatantly ignor[ed] significant and repeated discrepancies in the Loan Files and Loan applications; [and] (c) fail[ed] to comply with the mandatory checks required by Countrywide's own automated underwriting program." Fourth Am. Compl. ¶¶ 47-49, 53, *U.S. Bank National Association v. Countrywide Home Loans, Inc.*, No. 652388/2011 (N.Y. Sup. Ct.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

N.Y. Cty), NYSCEF # 371. U.S. Bank alleged that a review of loans in the Trust "demonstrate[s] Countrywide's large scale failure to abide by its underwriting guidelines in originating the Loans." *Id.* ¶ 73. U.S. Bank's expert witness in the litigation has conducted loan reunderwriting on a statistically significant random sample of liquidated loans in Harborview 2005-10, and found that a whopping 87% of the loans in the sample breached Countrywide's representations and warranties.

6. Because of the diligent work (to date) of U.S. Bank and the litigation counsel acting on behalf of the Trust, as well as millions of dollars of Trust assets spent over more than five years, the case is in a strong position to return a valuable judgment or settlement for the Trust's beneficiaries, including Bonitas.

7. But U.S. Bank has been asked to surrender this asset in a grossly inadequate settlement proposed by Countrywide and Bank of America. In this proposed settlement, the Trust would release its claims in exchange for a payment of $56.9 million, plus payment for costs and expenses up to a cap of $10 million (the "Proposed Settlement").

8. No prudent person or fiduciary would accept the inadequate Proposed Settlement. Applying the 87% breach rate found by U.S. Bank's own expert to the $368 million in collateral losses suffered by the Trust would yield over $320 million in damages. The Proposed Settlement consideration of $56.9 million is not even 18% of the damages that the Trust would be entitled to recover based on U.S. Bank's own expert's analysis. While litigation entails risks and settlements should reflect those risks, no prudent person managing his or her own affairs would settle an RMBS representation and warranty case with an 87% breach rate and a damages claim of more than $320 million (plus prejudgment interest) for $56.9 million.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

9. U.S. Bank's obligation to behave as a prudent person would requires it to reject the inadequate Proposed Settlement. U.S. Bank disagrees with this proposition, and, since the filing of the initial Complaint, it has already begun a two-pronged process to facilitate the acceptance of the Proposed Settlement. It is doing so even though acceptance of the Proposed Settlement would be devastating to certificateholders, including Bonitas, because (among other things) it would forever release valuable claims against Bank of America and Countrywide in exchange for a plainly inadequate settlement payment.

10. The Proposed Settlement requires U.S. Bank to accept the offer by May 4, 2017. Bonitas files this action seeking a declaratory judgment and an order that U.S. Bank reject the Proposed Settlement or let it lapse, in keeping with U.S. Bank's contractual, statutory, and common law obligations, or, in the alternative, to seek damages to compensate Bonitas for the harm caused by the acceptance of the settlement and release of the Trust's claims against Countrywide and Bank of America.

PARTIES

11. Plaintiff Bonitas is a Delaware limited liability company and a Harborview 2005-10 certificateholder. Bonitas has its principal place of business in New York City.

12. Defendant U.S. Bank is a national banking association, organized and existing under the laws of the United States, with its principal place of business in Minneapolis, Minnesota.

JURISDICTION & VENUE

13. This Court has jurisdiction pursuant to Minn. Stat. § 484.01.

14. Venue is proper under Minn. Stat. § 542.09 because the Defendant's offices are in Hennepin County and this lawsuit was initiated in Hennepin County.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

FACTS

A. The Harborview 2005-10 Trust

15. Harborview 2005-10 is an RMBS trust, initially backed by 4,484 first lien mortgage loans originated by Countrywide, with an aggregate principal balance of approximately $1.75 billion. Like all RMBS transactions, Harborview 2005-10 aggregates a pool of mortgage loans, and issues securities backed by the cash flows from those mortgage loans to investors (known as certificateholders). By purchasing certificates issued by the Trust, certificateholders acquire rights to the cash flow generated by the payments made by borrowers of the mortgage loans. Certificates are divided into classes or tranches, with each class of certificates entitled to a different payment priority.

16. The credit quality and characteristics of the mortgage loans backing the Harborview 2005-10 Trust are of the utmost importance to certificateholders. The quality of the mortgage loans depends on, among other factors, how the loans were originated, the underwriting guidelines used to approve the loans, the originator's compliance with those underwriting guidelines, the quality and value of the mortgaged property, and compliance with applicable laws. To assure the Trustee and investors of the quality and characteristics of the mortgage loans deposited in the securitization, Countrywide made dozens of representations and warranties about the mortgage loans, which U.S. Bank as Trustee is responsible for enforcing.

17. The Harborview 2005-10 Trust is governed by a series of interrelated contracts. First, Countrywide, as seller and servicer, sold and assigned its interest in the mortgage loans to Greenwich Capital Financial Products, Inc. ("GCFP") pursuant to a Master Mortgage Loan

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

Purchase and Servicing Agreement ("MMLPSA"), dated April 1, 2003, as amended on November 1, 2004.[1]

18. In section 7.02 of the MMLPSA, Countrywide made numerous representations and warranties about the loans being assigned (the "Loan-Level Warranties"), including that

- each loan was underwritten generally in accordance with Countrywide's underwriting guidelines in effect at the time of origination;
- no fraud was committed by Countrywide in the origination of the loans and, to the best of Countrywide's knowledge, no fraud was committed by the borrower or any other person involved in the loan's origination;
- the origination practices used by Countrywide "have been in all respects legal, proper, prudent and customary" and Countrywide "ha[d] no knowledge of any circumstances [] or condition" with respect to the loans "that can reasonably be expected to cause the Mortgage Loan to become delinquent"; and
- the information contained in the Mortgage Loan Schedule was "complete, true and correct."

19. In section 7.01 of the MMLPSA, Countrywide made the representation and warranty that "[n]o written statement, report or other document prepared and furnished or to be prepared and furnished by the Seller pursuant to this Agreement or in connection with the transactions contemplated hereby contains any untrue statement of material fact or omits to state a material fact necessary to make the statements contained therein not misleading" (the "No Untrue Statement Warranty").

[1] A copy of the MMLPSA is annexed hereto as **Exhibit 1**.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

20. The MMLPSA creates remedies for Countrywide's breach of any of its representations and warranties. According to § 7.03, if Countrywide discovers or is given notice of a breach of a Loan-Level Warranty that materially and adversely affects the value of the related mortgage loan, and such breach cannot be corrected or cured within 90 days, Countrywide must repurchase the loan at the Repurchase Price specified in the MMLPSA. If a breach involves any representation and warranty set forth in section 7.01 of the MMLPSA, "all of the Mortgage Loans shall, at the Purchaser's option, be repurchased by [Countrywide] at the Repurchase Price."

21. GCFP conveyed a pool of loans acquired under the MMLPSA to Greenwich Capital Acceptance, Inc. (the "Depositor") through a Mortgage Loan Purchase Agreement ("MLPA") dated as of August 1, 2005. The Depositor then conveyed the loans to the Trust through a Pooling Agreement ("PSA") dated as of August 1, 2005 among the Depositor, GCFP and U.S. Bank.[2]

22. Countrywide's representations and warranties, including the No Untrue Statement Warranty and the Loan-Level Warranties, as well as the right to enforce remedies for breach, were assigned to the Trustee for the benefit of the Trust through the MLPA and the PSA.

23. Countrywide's representations and warranties, and its corresponding promise to cure or repurchase breaching loans (and potentially all of the loans) were material to the Trust's formation and material to assessing the risk associated with the mortgage loans backing the certificates.

B. U.S. Bank's Duties as Trustee

[2] A copy of the PSA is annexed hereto as **Exhibit 2**.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

24. U.S. Bank's obligations and duties as Trustee of the Harborview 2005-10 Trust are established under the PSA, New York common law, and the New York Streit Act. In exchange for promising to fulfill these duties, U.S. Bank is compensated under the PSA by receiving a monthly fee.

25. U.S. Bank has an obligation under the PSA to acquire and protect the Trust Fund for the benefit of all certificateholders. In Section 2.02 of the PSA, U.S. Bank declared that it "holds or will hold all other assets included in the definition of 'Trust Fund' in trust for the exclusive use and benefit of all present and future Certificateholders." The Trust Fund's assets include not only the mortgage loans, but also all rights conveyed to the Depositor under the MLPA, including the legal rights to enforce both Countrywide's representations and warranties and its corresponding repurchase obligations.

26. Under the PSA, U.S. Bank has both the authority and the obligation to enforce Countrywide's duty to cure or repurchase loans that breach Countrywide's Loan- Level Warranties, and to repurchase *all* of the mortgage loans if Countrywide has breached the No Untrue Statement Warranty. *See, e.g.*, Ex. 2 (PSA), § 2.03 (upon failure of Countrywide to cure breach, "the Trustee *shall* enforce [Countrywide's obligation under the [MMLPSA] and cause [Countrywide] to repurchase that Mortgage Loan from the Trust Fund").

27. U.S. Bank owes a duty to Trust beneficiaries to carry out its duties under the PSA with due care, including its duty to enforce Countrywide's obligations.

28. When an Event of Default occurs, U.S. Bank assumes heightened duties to act as a prudent person and a fiduciary.

a. According to § 8.01 of the PSA, upon an Event of Default, U.S. Bank is obligated to "exercise such of the rights and powers vested in it by this Agreement, and

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs."

b. Following an event of default, U.S. Bank has a common law obligation to act prudently and owes fiduciary duties to the beneficiaries of the Trust, including Bonitas.

c. The New York Streit Act also imposes obligations on U.S. Bank as the trustee of a trust holding mortgage investments. Under the Streit Act, following an event of default, U.S. Bank is required to "exercise such of the rights and powers vested in the trustee by [the trust] instrument, and to use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs." N.Y. Real Prop. Law § 126(1).

29. The Harborview 2005-10 PSA adopts the definition of Event of Default in the MMLPSA. Under section 14.01(ii) of the MMLPSA, an Event of Default occurs upon the "failure on the part of [Countrywide] duly to observe or perform in any material respect any other of the covenants or agreements on the part of [Countrywide] set forth in this Agreement which continues unremedied for a period of thirty days . . . after the date on which written notice of such failure, requiring the same to be remedied, shall have been given to [Countrywide] by the Purchaser or by the Custodian."

30. Beginning in late 2010, a certificateholder instructed U.S. Bank to request loan files from Countrywide and retained a reunderwriting consultant to review a sample of defaulted loans. The reunderwriting review found breaches of Loan-Level Warranties in 520 of the sampled loans. After receiving these results, U.S. Bank provided written notice to Countrywide of the breaches, including detailed descriptions of each breach.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

31. Beginning on May 6, 2011, U.S. Bank sent Countrywide a number of written demands to repurchase breaching mortgage loans in accordance with Countrywide's obligations under section 7.02 of the MMLPSA. The 90-day period afforded Countrywide under the MMLPSA to cure the breach or repurchase the mortgage loans from the Trust has now elapsed on each of U.S. Bank's demands. Countrywide has therefore failed to "duly to observe or perform in [a] material respect" a "covenant[] or agreement[]" of Countrywide under the MMLPSA.

32. U.S. Bank has given Countrywide repeated written notice that it has failed to comply with its obligations under the MMLPSA, through correspondence and its pleadings in the action it commenced on August 29, 2011 (see below). Countrywide, however, has not repurchased all the loans in the Trust, nor has it repurchased any specific loans U.S. Bank has called to its attention. Accordingly, an Event of Default under the MMLPSA and PSA has existed since at least 2011 and remains unremedied through today. U.S. Bank and its Responsible Officers, as defined in the PSA, have actual knowledge of the occurrence and continuance of the Event of Default, having themselves put Countrywide on notice of the breaches and litigated Countrywide's failure to repurchase.

33. On information and belief, another Event of Default occurred even before the foregoing notices of breach. U.S. Bank had an obligation under the PSA to "review each Mortgage File delivered to it" and to issue an interim and final certification accompanied by a document exception report. The exceptions were to include certain missing documents essential to proving ownership of the note and mortgage and to otherwise protecting title. Documents of this kind required by the PSA to be in mortgage files were in fact missing. If U.S. Bank gave notice of the deficiencies, Countrywide failed to cure or repurchase the loans with deficient files,

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

and there was an Event of Default on that basis. If U.S. Bank did not provide the required notice, there was still an Event of Default, because U.S. Bank cannot claim the absence of an Event of Default because of its own failure to perform a precondition.

C. The Countrywide Litigation

34. On August 29, 2011, U.S. Bank, as Trustee of Harborview 2005-10, filed suit in New York Supreme Court against Countrywide, Bank of America Financial Corporation, Countrywide Financial Corporation, Bank of America, N.A. and NB Holdings Corporation, commencing *U.S. Bank National Association v. Countrywide Home Loans, Inc.*, No. 652388/2011 (N.Y. Sup. Ct. N.Y. Cty) (the "New York Action"). The Complaint alleged that Countrywide had breached both the No Untrue Statement Warranty and numerous Loan-Level Warranties, and that Bank of America is secondarily liable for Countrywide's breaches. U.S. Bank has had actual knowledge of an Event of Default since at least the date it filed the New York Action.

35. U.S. Bank has now filed several amendments to the initial Complaint, and the current operative Complaint is the Fourth Amended Complaint.

36. On June 13, 2016, the Trustee served another breach notice that identified 842 breaching loans (including the loans identified in the 2011 breach notices) and, based on a finding of a breach rate of 87% in a representative sample of liquidated loans, demanded that Countrywide compensate the Trust for 87% of all previously unidentified liquidated loans. As of the date of the Fourth Amended Complaint (September 20, 2016), Countrywide had not repurchased the loans identified in U.S. Bank's breach notices.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

37. U.S. Bank also alleged that, independent of receiving breach notices, Countrywide had discovered breaches of Loan-Level Warranties through its origination and review of the securitized loans.

38. Following a number of rulings in this case and other similar or related cases, the New York Action is in a strong position. For example, the court has denied Countrywide's motion to dismiss based on the argument that the complaint failed to state the breach of Loan-Level Warranties with particularity, and also ruled that "allegations that Countrywide discovered breaches on its own trigger the repurchase requirement and obviate any requirement that Plaintiff provide notice of any breach," permitting U.S. Bank to present proof on loans where Countrywide had discovered the breaches, even if they were not specifically identified in breach notices. In addition, the judge presiding over the New York Action has allowed a similar successor liability claim against Bank of America to proceed in a related action, denying Bank of America's motion for summary judgment on that issue.

39. Especially significant is a ruling from the New York Appellate Division in *Nomura Home Equity Loan, Inc. v. Nomura Credit and Capital*, 133 A.D.3d 96 (1st Dep't 2015), which is currently on appeal to the New York Court of Appeals (New York's highest court). The Appellate Division held that an RMBS trustee may pursue claims under a provision analogous to the No Untrue Statement Warranty and seek repurchase of all loans in the Trust, whether they are individually in breach or not. If the Court of Appeals affirms, U.S. Bank will have the opportunity to seek reinstatement of its claim based on the No Untrue Statement Warranty, further strengthening the Trust's claims.

40. Fact discovery is now complete in the New York Action, and the parties exchanged expert reports on reunderwriting in 2016. The parties agreed to delay exchanging

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

expert reports on successor liability until the Appellate Division rules on successor liability issues between Bank of America and Countrywide in the related case mentioned above.

D. The Inadequate Proposed Settlement.

41. On December 16, 2016, U.S. Bank distributed a notice to certificateholders informing them that on December 7, 2016, it had received a written offer of settlement (the "Proposed Settlement") from Countrywide and Bank of America.[3] U.S. Bank received the Proposed Settlement from a group of certificateholders referred to as the Initiating Parties. On February 16, 2017, U.S. Bank distributed a further notice to certificateholders disclosing amended terms of the Proposed Settlement.[4]

42. As amended, the Proposed Settlement provides for Bank of America and/or Countrywide to pay the Trust $56.9 million, which the Initiating Parties represented to be equal to 15% of the estimated lifetime losses of the Countrywide loans in the Trust. (As of February 21, 2017, the most recent Trust remittance report, the Trust has suffered cumulative realized losses of $368 million.) In addition, the Proposed Settlement provides that the Trust will be reimbursed for costs and expenses incurred in connection with the New York Action up to a cap of $10 million (even though the actual litigation costs and expenses have exceeded that by nearly $1 million). In exchange, U.S. Bank, on behalf of all Trust beneficiaries, would be required to release all claims arising out of the mortgage loans against Countrywide and Bank of America, and to dismiss the New York Action with prejudice.

[3] A copy of the December 16, 2016 notice is attached as **Exhibit 3** hereto. The notice includes a copy of the Proposed Settlement, prior to amendment, at Appendix 1, Exhibit A.

[4] A copy of the February 16, 2017 notice is attached as **Exhibit 4** hereto. The February 16, 2017 notice includes a copy of the Proposed Settlement as amended at Appendix 1.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

43. The Proposed Settlement was negotiated and provided to U.S. Bank by counsel to the Initiating Parties, a group consisting of the National Credit Union Administration, the Bank of New York Mellon, solely in its capacity as indenture trustee for the NCUA Guaranteed Notes Trust 2010-R3, Athene Annuity & Life Assurance Company and Athene Annuity & Life Assurance Company of New York. Prior to receiving the settlement agreement, according to the first holder notice, U.S. Bank "had not been previously advised of the negotiations leading up to" the Proposed Settlement and had no knowledge of "the basis on which the Initiating Parties had agreed to its terms."

44. The Proposed Settlement was reached after a mediation between the Initiating Parties, Bank of America, and Countrywide. Absent from the process was the one party with a duty to certificateholders: U.S. Bank, the only party charged with protecting the interests of the Trust as a whole. While the Initiating Parties would naturally have an incentive to negotiate a settlement that maximizes recovery to their class of certificates without regard to other classes, U.S. Bank must protect the assets of the Trust for the benefit of *all* certificateholders, not just the interests of any particular class of certificateholders. And it must exercise that obligation according to a "prudent person" standard.

45. The consideration in the Proposed Settlement is woefully inadequate. As part of the New York Action, U.S. Bank retained an expert to reunderwrite a statistically significant random sample of loans in the Trust. That expert found a staggering ***87%*** of all liquidated loans breached Countrywide's representations and warranties. This breach rate is consistent with the evidence that Countrywide systemically abandoned its underwriting guidelines as well as principles of prudent underwriting during the period when the Trust loans were originated.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

46. In an RMBS representation and warranty litigation, the breach rate typically serves as the basis for damages and, therefore, is a necessary component in evaluating a settlement offer against the range of likely outcomes in litigation. No prudent person would agree to a settlement that represents only 15% of lifetime collateral losses after having found a breach rate of 87%. This is especially true where U.S. Bank's reunderwriting expert found that breach rate after having the opportunity to review the defendants' rebuttal expert report which presumably contested that rate. All litigation presents some uncertainty, which must be accounted for in evaluating a settlement. But no reasonable assessment of the uncertainty and cost of litigation could justify a trustee operating as a fiduciary and as a prudent person in accepting a settlement that compensates for only 15% of the Trust's losses under such circumstances. Comparable settlements of RMBS representation and warranty claims confirm the settlement's inadequacy.

47. Unlike many RMBS claims against now-defunct mortgage companies, there is no risk of U.S. Bank being unable to collect a judgment against Bank of America and Countrywide. Bank of America has already booked more than $70 billion in expenses related to resolving claims of misconduct in the origination and/or securitization of mortgage loans, most of it arising out of Countrywide's conduct, living up to its CEO Brian Moynihan's pledge to "clean up" for Countrywide's liabilities. And U.S. Bank has strong claims that Bank of America is legally obligated to pay for any judgment against Countrywide, particularly given that the judge presiding over the New York Action has already issued favorable rulings on analogous claims.

48. U.S. Bank has been urged to reject the Proposed Settlement. Indeed, on January 20, 2017, one Trust beneficiary brought an action for an injunction ordering substantially that

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

relief: *Ambac Assurance Corp., et al. v. U.S. Bank Nat'l Ass'n*, No. 17-cv-00446(SHS) (S.D.N.Y.) (the "*Ambac* Action").

49. U.S. Bank, however, has refused to exercise its obligation to turn the Proposed Settlement down. Instead, U.S. Bank has begun a two-pronged strategy to facilitate the acceptance of the Proposed Settlement.

50. First, on March 6, 2017, U.S. Bank filed a Petition with this Court purporting to begin a trust instruction proceeding pursuant to Minn. Stat. § 501C.0201 *et seq.*, styled *In the Matter of HarborView Mortgage Loan Trust 2005-10*, File No. 27-TR-CV-17-32 (the "Purported TIP").[5] However, the Purported TIP, while claiming to seek instruction from the Court, does not actually seek any instruction and is admittedly simply informing the Court about steps that U.S. Bank is planning to take regardless of the Court's action, as well as its intention to file some future amended petition.

51. The Purported TIP is both improper and unnecessary. The Minnesota Trust Instruction Proceeding statute creates a robust mechanism for a trustee to seek various types of instruction from the Court, with 24 enumerated permissible subjects listed in Minn. Stat. § 501C.0202. But nowhere does Minnesota law authorize a proceeding like the Purported TIP, which simply (a) informs the court of actions the trustee is taking, regardless of whether the court approves them and (b) serves as a placeholder for a future amended petition.

52. In addition to being improper, the Purported TIP is unnecessary. If U.S. Bank exercised its duties as trustee properly, it would reject the Proposed Settlement for the reasons set forth above, and no trust instruction proceeding would be necessary. The Purported TIP only is

[5] A copy of the petition, minus exhibits, is attached as **Exhibit 5** hereto.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

necessary from U.S. Bank's perspective to pave the way for its eventual acceptance of the Proposed Settlement, as well as to gain a tactical advantage in this case and the *Ambac* Action.

53. Second, on March 7, 2017, U.S. Bank sent certificateholders a "CERTICATEHOLDER SOLICITATION REGARDING PROPOSED TRUST SETTLEMENT AGREEMENT" (the "Solicitation").[6] The Solicitation requires certificateholders to sign a binding "Letter of Direction" by April 7, 2017 either (a) directing acceptance of the Proposed Settlement or (b) directing rejection of the Proposed Settlement. But as a condition of the right to vote, each certificateholder is required to release certain claims against U.S. Bank: "The undersigned (on behalf of itself and its successors and assigns) hereby completely, unconditionally, and forever waives, releases and holds harmless the Trustee as to all actions, claims, damages, and liabilities (of any kind or nature, without regard to amount, known or unknown, accrued or unaccrued) arising from or relating to the direction being given by the undersigned herein and any reliance thereon or acceptance thereof (except with respect to, and to the extent of, claims arising from the Trustee's negligence or willful misconduct, and for which it may otherwise be liable under, and subject to, the terms of the Pooling Agreement)."

54. All of this is simply a shirking of U.S. Bank's fiduciary responsibility. The Proposed Settlement is inadequate in regard to the Trust as a whole, whatever the results of a certificateholder vote may be. A fiduciary discharging its obligation to act as a prudent person does not take a poll, but decides what a prudent person would do, knowing (as only the Trustee does) all of the circumstances. In any case, a vote is problematic for at least three reasons.

55. First, the Solicitation attempts to coerce a release from certificateholders in exchange for their exercise of voting rights. This is particularly inappropriate under these

[6] A copy of the March 7, 2007 notice is attached as **Exhibit 6** hereto.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

circumstances, where U.S. Bank is subject to heightened standards as a result of the ongoing Events of Default. Among other things, such a solicitation both seeks input and simultaneously discourages certificateholders from providing it.

56. Second, it is well known that Bank of America itself owns certificates; its votes are tainted by its inherent conflict of interest, and U.S. Bank equivocates in the Purported TIP about the counting of these conflicted votes.

57. Third, the tremendous losses in the Trust have caused lower-seniority certificates to be written down to a zero value. When that happens, the certificates lose certain voting rights, per the PSA. U.S. Bank has not said how it will count certificates that have suffered that level of loss in either the Purported TIP or the Solicitation. Bonitas' experience with U.S. Bank and other trustees, however, reasonably leads it to believe that U.S. Bank will dismiss the views expressed by holders of certificates that have lost their PSA voting rights; indeed, in the Puported TIP, U.S. Bank appears to lay the groundwork for doing this. But in a litigation recovery, those lower-seniority certificates would benefit (they would be "written up" as the recovery increased); and in a rescission-type recovery based on the No Untrue Statement Warranty, they would benefit even more. The Solicitation does not recognize these circumstances and threatens to penalize the very certificateholders who suffered the most from the conduct that gave rise to the New York Action in the first place.

58. In the same vein, the Proposed Settlement as amended improperly favors certificateholders of higher seniority. The "Distribution of Payment" section of the Proposed Settlement was amended to accomplish this: it now provides that distribution will be made to the holders of certificates that have a positive balance, *after* which the zero-balance certificates will be written up. Nor does the "Distribution of Payment" section take into account the allocation of

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

the rescission-type recovery referenced above; this failure likewise favors senior certificateholders improperly. U.S. Bank should reject the Proposed Settlement on these grounds alone, but it has not done so.

59. The Proposed Settlement sets an acceptance deadline of May 4, 2017. Bonitas therefore reasonably believes that U.S. Bank has begun a process designed to lead to acceptance of the Proposed Settlement, rather than rejecting the Proposed Settlement as it should. As soon as the Proposed Settlement is accepted, the Trust will irrevocably release claims worth hundreds of millions of dollars for grossly inadequate consideration.

60. Once the Trust's claims are released and the New York Action dismissed with prejudice, the Trust will have lost the opportunity to see their claims through the court system or to negotiate a settlement that reflects the true value of the Trusts' claims. Moreover, there can be no assurance that a recovery of money damages against U.S. Bank after the fact will be sufficient to compensate Bonitas because U.S. Bank is the subject of scores of lawsuits alleging billions of dollars in damages brought by RMBS certificateholders on other trusts, and its ability to satisfy all such claims is uncertain.

61. Moreover, once the claims at issue in the New York Action are released, Bonitas will be forced to essentially re-litigate those causes of action in order to establish damages against U.S. Bank, but it will be forced to do so in a suit to which Countrywide and Bank of America are not parties. This "case within a case" poses a substantial additional burden that would significantly prejudice Bonitas. Instead of litigating a case directly against Countrywide and Bank of America, Bonitas would have to seek document and deposition discovery from Countrywide and Bank of America as non-parties and would face the uncertainty of having to prove what the recovery would have been in the underlying case if the claims had not been

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

prematurely released. The dismissal of the New York Action at this key juncture would cause Bonitas irreparable injury.

COUNT I – DECLARATORY JUDGMENT

62. Bonitas realleges and incorporates by reference the foregoing paragraphs of this Complaint.

63. The PSA adopts the definition of Event of Default in the MMLPSA, which provides that an Event of Default occurs upon the "failure on the part of [Countrywide] duly to observe or perform in any material respect any other of the covenants or agreements on the part of [Countrywide] set forth in this Agreement which continues unremedied for a period of thirty days . . . after the date on which written notice of such failure, requiring the same to be remedied, shall have been given to [Countrywide] by the Purchaser or by the Custodian."

64. U.S. Bank gave Countrywide notice that numerous loans in Harborview 2005-10 breached Countrywide's representations and warranties made under the MMLPSA, as reconstituted by the RSA, and demanded that Countrywide cure or repurchase those loans within the applicable 90-day period. Countrywide failed to cure or repurchase the loans identified by U.S. Bank.

65. Countrywide also independently discovered breaches of its representations and warranties under the MMLPSA, as reconstituted by the RSA, obligating it to cure or repurchase breaching loans with 90 days. Countrywide failed to do so.

66. Through its Complaint, filed on August 29, 2011, subsequent Amended Complaints, and its expert reunderwriting report submitted in the New York Action, U.S. Bank gave Countrywide notice that its breaches of the MMLPSA had been unremedied for 30 days. To date, Countrywide has not remedied its breaches of the MMLPSA.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

67. A real and justiciable controversy exists over whether these events resulted in the occurrence and continuance of an Event of Default as defined by the PSA.

68. Accordingly, Bonitas requests a declaration that (i) an Event of Default occurred under the PSA, (ii) such Event of Default has continued to the present, and (iii) U.S. Bank has actual knowledge of the occurrence and continuance of such Event of Default.

COUNT II – DECLARATORY JUDGMENT

69. Bonitas realleges and incorporates by reference the foregoing paragraphs of this Complaint. Because an Event of Default has occurred and is continuing, U.S. Bank owes fiduciary duties to the Harborview 2005-10 Trust and its beneficiaries, including Bonitas, to act as a prudent person would in the conduct of such person's own affairs, and to comply with the Streit Act.

70. Under the PSA, upon an Event of Default and while an Event of Default continues uncured, U.S. Bank must exercise the rights and powers vested in it under the PSA, and shall exercise the same degree of care and skill in its exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

71. Under New York law, after the occurrence of an Event of Default, U.S. Bank owed a fiduciary duty to the Trust and to all certificateholders. This fiduciary duty includes an obligation to exercise all contractually conferred rights and powers in good faith and for the benefit of certificateholders to preserve the assets of the Trust.

72. Under section 126(1) of the Streit Act, upon an event of default, the trustee must exercise such of the rights and powers vested in the trustee by the trust instrument, and must use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

73. U.S. Bank has been presented with a Proposed Settlement with an acceptance deadline of May 4, 2017. U.S. Bank has an obligation to reject the Proposed Settlement, but has not done so, and does not agree that it has an obligation to do so.

74. A real and justiciable controversy exists over U.S. Bank's obligations to the Trust and its beneficiaries in connection with the Proposed Settlement. Bonitas therefore seeks a declaration that U.S. Bank's acceptance of the Proposed Settlement would constitute a breach of U.S. Bank's duties under the PSA, its fiduciary duties, and its obligations under the Streit Act.

COUNT III – BREACH OF CONTRACT

75. Bonitas realleges and incorporates by reference the foregoing paragraphs of this Complaint.

76. The PSA is a valid contract that establishes U.S. Bank's contractual duties and obligations, in its capacity as Trustee, to the Trust and to certificateholders, including Bonitas.

77. Under the PSA, upon an Event of Default and while an Event of Default continues uncured, U.S. Bank must exercise the rights and powers vested in it under the PSA, and shall exercise the same degree of care and skill in its exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

78. An Event of Default occurred at least as early as August 29, 2011, and remains uncured through the present. U.S. Bank had and continues to have actual knowledge that an Event of Default occurred and is continuing.

79. Notwithstanding its heightened duties following an Event of Default, U.S. Bank is contemplating accepting an unreasonably low settlement with Bank of America and Countrywide on the Trust's behalf, releasing the Trust's valuable claims against Bank of America and Countrywide in exchange for grossly inadequate compensation. No prudent person

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

managing its own affairs would agree to the settlement proposed by Bank of America and Countrywide.

80. U.S. Bank's material breaches of the PSA in accepting a plainly inadequate settlement will directly and proximately cause damage to the Trust and to Bonitas by depriving the Trust of valuable claims and remedies, and by squandering hundreds of millions of dollars in Trust assets, which would otherwise benefit certificateholders, including Bonitas.

COUNT IV – BREACH OF FIDUCIARY DUTY

81. Bonitas realleges and incorporates by reference the foregoing paragraphs of this Complaint.

82. Under New York law, after the occurrence of an Event of Default, U.S. Bank owed a fiduciary duty to the Trust and to all certificateholders. This fiduciary duty includes an obligation to exercise all contractually conferred rights and powers in good faith and for the benefit of certificateholders to preserve the assets of the Trust.

83. An Event of Default occurred at least as early as August 29, 2011, and remains uncured through the present. U.S. Bank and its Responsible Officers had and continue to have actual knowledge that an Event of Default occurred and is continuing.

84. U.S. Bank will breach its fiduciary duty by failing to protect the rights of the Trust and of certificateholders if it does not reject a settlement that gives inadequate compensation for the Trust's claims.

85. U.S. Bank's breaches of fiduciary duty in accepting a plainly inadequate settlement will directly and proximately cause damage to the Trust and to Bonitas by depriving the Trust of valuable claims and remedies.

COUNT V – STREIT ACT

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

86. Bonitas realleges and incorporates by reference the foregoing paragraphs of this Complaint.

87. The Harborview 2005-10 certificates are "mortgage investments," the PSA underlying and establishing the Trust is an "indenture," and U.S. Bank is a "trustee" under the Streit Act. *See* N.Y. Real Prop. Law § 125(1), (3).

88. Section 126(1) of the Streit Act requires that upon an event of default, the indenture trustee must exercise such of the rights and powers vested in the trustee by such instrument, and must use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

89. As set forth above, U.S. Bank will have failed to exercise its rights and powers under the PSA in the manner a prudent person would have done under the circumstances in the conduct of his own affairs if it fails to reject an inadequate settlement.

90. U.S. Bank's violation of the Streit Act in accepting a plainly inadequate settlement will directly and proximately cause damage to the Trust and to Bonitas by depriving the Trust of valuable claims and remedies, and by squandering hundreds of millions of dollars in Trust assets.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment of the Court against Defendant for the following relief:

A. A declaration that (i) an Event of Default occurred under the PSA, (ii) such Event of Default has continued to the present, and (iii) U.S. Bank has actual knowledge of the occurrence and continuance of such Event of Default.

B. A declaration that U.S. Bank's failure to reject the Proposed Settlement would constitute a breach of U.S. Bank's duties under the PSA, its fiduciary duties, and its obligations under the Streit Act.

C. A preliminary and permanent injunction ordering U.S. Bank either to reject the Proposed Settlement or to let the time period for acceptance lapse.

D. In the alternative, an award of all appropriate damages in favor of Bonitas and against U.S. Bank for damages sustained as a result of U.S. Bank's wrongdoing, in an amount to be determined at trial, including any applicable pre- and post-judgment interest; and

E. Any other relief that the Court deems just and proper.

JURY DEMAND

Plaintiff demands a jury trial on all issues properly triable to a jury.

Filed in Fourth Judicial District Court
3/15/2017 5:15:59 PM
Hennepin County, MN

Dated: March 15, 2017

ROSS & ORENSTEIN LLC

By: /s/ John B. Orenstein
John B. Orenstein (#20903X)
Harry N. Niska (#0391325)
222 South Ninth Street, Suite 470
Minneapolis, MN 55402
Tel. (612) 436-9802
Fax (612) 436-9819
Email: jorenstein@rossbizlaw.com
hniska@rossbizlaw.com

Attorneys for Plaintiff

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded, pursuant to Minn. Stat. § 549.211, to the parties against whom the allegations in this complaint are asserted.

/s/ John B. Orenstein
John B. Orenstein