UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BLACKROCK ALLOCATION TARGET SHARES: SERIES S PORTFOLIO, *et al.*,

Plaintiffs,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION, *et al.*,

Defendants.

14 Civ. 9371 (KPF) (SN)

OPINION AND ORDER

ROYAL PARK INVESTMENTS SA/NV, *Individually and on Behalf of all Others Similarly Situated,*

Plaintiffs,

v.

WELLS FARGO BANK, N.A, *as Trustee*,

Defendant.

14 Civ. 9764 (KPF) (SN)

NATIONAL CREDIT UNION ADMINISTRATION BOARD, *as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union,*

Plaintiff,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Defendant.

14 Civ. 10067 (KPF) (SN)

and	:	
	:	
NCUA GUARANTEED NOTES TRUST 2010-R1, NCUA GUARANTEED NOTES TRUST 2010-R2, NCUA GUARANTEED NOTES TRUST 2010-R3, NCUA GUARANTEED NOTES TRUST 2011-R2, NCUA GUARANTEED NOTES TRUST 2011-R4, NCUA GUARANTEED NOTES TRUST 2011-R5, and NCUA GUARANTEED NOTES TRUST 2011-M1,	:	
	:	
Nominal Defendants.	:	
	:	
----------X		
	:	
PHOENIX LIGHT SF LIMITED, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	;	14 Civ. 10102 (KPF) (SN)
	:	
	:	
WELLS FARGO BANK, N.A.,	:	
	:	
Defendant.	:	
	:	
----------X		
	:	
COMMERZBANK AG,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	15 Civ. 10033 (KPF) (SN)
	;	
WELLS FARGO BANK N.A.,	:	
	:	
Defendant.	:	
	:	
----------X		

KATHERINE POLK FAILLA, District Judge:

Pending before the Court are multiple motions, several discovery-related and others responsive to the Court's March 30, 2017 Opinion and Order (the

"March 30 Opinion"). The Court here resolves three of them, listed in the order in which they were filed:

> (i) The Rule 72 Objections to and Motion to Vacate Magistrate Judge Netburn's Opinion and Order Concerning Sampling (the "Sampling Motion"), filed by Plaintiffs Blackrock Allocation Target Shares: Series S Portfolio (the "BlackRock Plaintiffs"), Royal Park Investments SA/NV, Phoenix Light SF Limited, National Credit Union Administration Board, as liquidating agent (the "NCUAB"), and Commerzbank AG (collectively with the other Plaintiffs, the "Coordinated Plaintiffs");
>
> (ii) The Motion of the NCUAB, as liquidating agent for five corporate credit unions, and Graeme W. Bush, as Separate Trustee of the NGN Trusts, for Leave to File a Supplemental Complaint and Substitute the Separate Trustee as Plaintiff for NGN-Related Claims (the "Motion to Supplement and Substitute"); and
>
> (iii) The Blackrock Plaintiffs' Rule 72 Objections to and Motion to Vacate Magistrate Judge Netburn's Order Concerning Topics for Defendant's Rule 30(b)(6) Depositions (the "30(b)(6) Motion").

For the reasons outlined in the remainder of this Opinion, the Coordinated Plaintiffs' Sampling Motion is denied and their objections overruled; the NCUAB's Motion to Supplement and Substitute is granted; and the BlackRock Plaintiffs' 30(b)(6) Motion is denied and their objections overruled.

BACKGROUND[1]

The Court presumes familiarity with the factual and procedural background of these related cases, which background has been described in

---

[1] Except where otherwise specified, the docket citations in this Opinion are to Case No. 14 Civ. 10067. For clarity, the Court will not cite to duplicative entries on each of the five relevant dockets. (*See also* Dkt. #296, at 3 n.1 (Coordinated Plaintiffs adopting the same practice in briefing related to the Sampling Motion)).

With regard to the Sampling Motion, the Court will refer to the parties' briefing in the following manner: the Coordinated Plaintiffs' memorandum of law in support of the

detail in the March 30 Opinion (Dkt. #281) and in Judge Netburn's March 10, 2017 Opinion & Order (the "Sampling Opinion" (Dkt. #263)). *See BlackRock Allocation Target Shares: Series S. Portfolio* v. *Wells Fargo Bank, Nat'l Ass'n*, No. 14 Civ. 9371 (KPF) (SN), 2017 WL 1194683, at *2-6 (S.D.N.Y. Mar. 30, 2017) ("*BlackRock DJ Opinion*"); *BlackRock Allocation Target Shares* v. *Wells Fargo Bank, Nat'l Ass'n*, No. 14 Civ. 9371 (KPF) (SN), 2017 WL 953550, at *1-3 (S.D.N.Y. Mar. 10, 2017) ("*BlackRock MJ Opinion*"). The Court hereby incorporates those factual statements by reference, and will focus its attention in this section on the developments in these cases that are of particular relevance to the three motions resolved in this Opinion. Because of the interrelationship of certain of the motions, the Court will set forth the relevant facts for all three motions before proceeding to its analysis.

Sampling Motion as "Pl. Sampling Br." (Dkt #296); Defendant's memorandum of law in opposition as "Def. Sampling Opp." (Dkt. #314); and the Coordinated Plaintiffs' reply memorandum as "Pl. Sampling Reply" (Dkt. #317).

With regard to the Motion to Supplement and Substitute, the Court will refer to the parties' briefing similarly: the NCUAB and Separate Trustee's memorandum of law in support of the Motion to Supplement and Substitute as "Pl. Supp. & Sub. Br." (Dkt. #309); Defendant's memorandum of law in opposition as "Def Supp. & Sub. Opp." (Dkt. #322); and the NCUAB and Separate Trustee's reply memorandum as "Pl. Supp. & Sub. Reply" (Dkt. #324).

The same with regard to the 30(b)(6) Motion: the BlackRock Plaintiffs' memorandum of law in support of the 30(b)(6) Motion will be referred to as "Pl. 30(b)(6) Br." (14 Civ. 9371 Dkt. #433); Defendant's memorandum of law in opposition as "Def. 30(b)(6) Opp." (14 Civ. 9371 Dkt. #485); and the BlackRock Plaintiffs' reply memorandum as "Pl. 30(b)(6) Reply" (14 Civ. 9371 Dkt. #499). Defendant's letter motion to strike the exhibits filed with the BlackRock Plaintiffs' 30(b)(6) reply will be referred to as "Def. Str. Letter" (Dkt. #504) and its sur-reply as "Def. 30(b)(6) Sur-Reply" (Dkt. #512).

The affidavits filed in support of the parties' briefing will be referred to by the name of the affiant, and, as needed, the name of the brief with which it is associated. For example: "Attaway Sampling Decl." (Dkt. #297), "Lovitt Sampling Opp. Decl." (Dkt. #315), and "Attaway Sampling Reply Decl." (Dkt. #318).

A. The Sampling Motion

On September 17, 2015, these related cases were referred to the Honorable Sarah Netburn, United States Magistrate Judge, for the purposes of managing discovery. (Dkt. #53). Judge Netburn instituted a schedule for expert discovery on July 22, 2016, that directed the parties to "work diligently and cooperatively in advance of the expert discovery period to develop a loan re-underwriting protocol," and to propose a joint proposed protocol to the Court. (Dkt. #130).

Perhaps unsurprisingly, the parties could not agree on such a protocol. In a letter filed on August 11, 2016, Wells Fargo expressed its belief that "[r]equiring the parties to commence the re-underwriting process at [that] juncture of the litigation [was] inefficient and illogical." (Dkt. #143, at 1). Wells Fargo proposed that non-underwriting discovery continue to progress, but that "underwriting efforts be held in abeyance until a later stage of the case." (*Id.* at 2). The Coordinated Plaintiffs responded by letter filed on August 16, 2016, in which they urged the Court to reject Wells Fargo's bifurcated-discovery proposal. (Dkt. #147). Each side also proposed its own re-underwriting protocol. (*Compare id.*, *with* Dkt. #143).

On October 28, 2016, the parties appeared before Judge Netburn for a discovery conference to discuss issues regarding the mortgage loan re-underwriting sampling process. (*See* Dkt. #169). Judge Netburn "ordered the parties to brief the issue of whether sampling, in the context of re-underwriting mortgage loans, can be used to support or challenge any claim or defense in

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.