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

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UMB BANK, N.A., AS TRUSTEE FOR THE 8% SENIOR CASH PAY NOTES DUE 2021 AND FOR THE 8.750%/ 9.500% SENIOR PIK TOGGLE NOTES DUE 2021,

Plaintiff,

-against-

NEIMAN MARCUS GROUP, INC.; MARIPOSA INTERMEDIATE HOLDINGS LLC; NEIMAN MARCUS GROUP LTD, LLC; MYT PARENT CO.; MYT HOLDING CO.; THE NEIMAN MARCUS GROUP LLC; ARES PARTNERS HOLDCO LLC; ACOF OPERATING MANAGER III, LLC; ACOF OPERATING MANAGER IV, LLC; ARES CORPORATE OPPORTUNITIES FUND III, L.P.; ARES CORPORATE OPPORTUNITIES FUND IV, L.P.; ACOF MARIPOSA HOLDINGS LLC; and JOHN DOES 1-10,

Defendants.

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Index No.: 654509/2019

Motion Seq. #001

Hon. Jennifer Schecter, J.S.C.

BRIEF OF THE AMERICAN BANKERS ASSOCIATION ("ABA") AS *AMICUS CURIAE* IN OPPOSITION TO THE NEIMAN MARCUS DEFENDANT'S MOTION TO DISMISS

Amicus Curiae, the American Bankers Association ("ABA"), is the principal and largest trade organization of the financial services industry in the United States. ABA's membership includes community banks, regional and money center banks, savings associations, mutual savings banks, and trust companies located in all fifty states, the District of Columbia, and Puerto Rico. In addition to providing general banking and financial services for their customers, certain ABA members perform corporate trust services and serve as Indenture Trustees, with members of the ABA's Corporate Trust Committee providing more than 90 percent of the corporate trust services in the U.S.

In general terms, when a company issues debt, the services of an indenture trustee are generally required statutorily or otherwise, particularly for publicly issued bonds, notes, and other debt securities. Such services are provided pursuant to the terms of governing indentures or trust agreements, as they may be supplemented by relevant laws and regulations. ABA members who provide corporate trust services -- as well as the capital markets and holders of debt issued pursuant to indentures -- rely on the exercise and clear delineation of the range and nature of services, duties and rights expected of and reposed in indenture trustees as they provide services for holders and issuers of corporate and municipal debt. The ABA regularly appears in litigation, either as a party or *amicus curiae*, when issues arise of particular significance to and/or requiring legal clarity for the banking industry and its members, including bank corporate trustees, as here.

ABA INTEREST IN THE CASE

To be clear, the ABA is not taking a position regarding the ultimate causes of action (sounding largely in New York fraudulent conveyance law) brought by UMB Bank, N.A. (the "Trustee"), as indenture trustee for certain Unsecured Notes issued under Unsecured Note Indentures.[1]

Rather, the ABA is concerned about and wishes to solely address what seems to be a *per se* rule argued for by the Neiman Marcus Defendants [2] insofar as it would absolutely prohibit indenture trustees under relatively typical corporate debt indentures from asserting on behalf of noteholders any pre-Event of Default causes of actions, even if those causes of action were justiciable whether or not an Event of Default existed.

[1] The "Unsecured Note Indentures" means, together, the Cash Pay Note Indenture Dated as of October 21, 2013, as amended and the PIK Note Indenture Dated as of October 21, 2013, as amended, under which certain Cash Pay Notes and PIK Notes (collectively, the "Unsecured Notes") were issued.

[2] Defendants Neiman Marcus Group, LTD, LLC; Neiman Marcus Group, Inc.; Mariposa Intermediate Holdings, LLC; MYT Parent Co. and MYT Holding, Co. (collectively "Neiman Marcus" or "Neiman Marcus Defendants").

In this case, the cause of action is a state law (New York) fraudulent conveyance action which a majority of the Unsecured Noteholders, pursuant to Section 6.5 of the Unsecured Note Indentures in issue, directed the Trustee to bring and which the Trustee concluded it should (and did) bring to protect the interests of all of the Unsecured Noteholders.

The Neiman Marcus Defendants argue that the Trustee can only bring a lawsuit or seek any remedies upon the occurrence and continuation of an Event of Default, as narrowly defined in the Unsecured Note Indentures. *See Neiman Marcus' Memorandum of Law in Support of Its Motion to Dismiss Pursuant to CPLR 3211(a)(1) and (a)(7)*, § III. In particular, the Neiman Marcus Defendants argue that, because two sections of the Indenture -- Sections 6.2 and 6.3 -- expressly allow the Trustee to accelerate and/or bring remedial action upon an Event of Default, the Trustee can only bring or seek remedial action if an Event of Default exists. The Neiman Marcus Defendants further argue that insofar as these are the only sections they contend expressly authorize specific remedial actions by the Trustee, they are the Trustee's exclusive authority to bring any remedial actions and, in fact, deny the Trustee standing and prohibit the Trustee to "bring any action or pursue any remedy unless an 'Event of Default' has occured and is continuing", even though no express terms of the Unsecured Note Indentures say that.[3]

The Neiman Marcus Defendants' argument, if accepted, would severely limit, or even straight-jacket, an indenture trustee's ability to act on behalf of all of the noteholders under an indenture, even at the direction of the requisite amount of noteholders provided in the indenture. The Trustee's brief argues in detail against this *per se* approach under the Unsecured Note Indentures at issue here. In particular, the Trustee's brief emphasizes that Section 6.5 of the

[3] The first sentences of the Neiman Marcus Defendants Memorandum state: "The Trustee lacks standing to bring this action as a matter of law. Under the express terms of the Indentures, the Trustee cannot "bring any action or pursue any remedy unless an 'Event of Default' has occurred and is continuing." However, no Indenture term expressly says that.

Unsecured Note Indentures provide authority for the Trustee, without reference to Events of Default, to bring actions at the direction of the holders of a majority of outstanding Unsecured Notes.

The ABA submits this amicus brief to underscore, from an industry perspective, certain other legal and policy issues and problems raised by the approach urged by the Neiman Marcus Defendants. In particular, and among the most significant such issues, the Neiman Marcus Defendants argument:

1. Would contradict and fly in the face of the common understanding and custom in the corporate trust industry as to the role and powers of an indenture trustee, particularly when directed by a majority or even higher requisite percentage of its debt holders, pursuant to a specific indenture term;
2. Would seem to clash with or at least severely constrain the systemic goal favoring or even mandating indenture trustee facilitation of collective (as opposed to individual) debt holder action equally benefitting all debt holders, as for example expressed in the Trust Indenture Act of 1939 (the "TIA"); and
3. Would inevitably put indenture trustees in the untenable (and potentially exposed) position of rejecting the direction of their holders when an action protecting all noteholders seems justiciable, even compelling.

The ABA submits this Amicus now because the Neiman Marcus Defendants' argument seems to raise an issue of first impression. The ABA is unaware of any case where an indenture trustee was prohibited from bringing an action on behalf of all its noteholders, because there was not an Event of Default pleaded or otherwise, particularly where the indenture trustee was specifically directed to do so in accordance with majority noteholder direction such as that under Section 6.5 of the Unsecured Note Indentures.

ARGUMENT

A cornerstone of the American capital markets system, as reflected in the TIA, is the interposition of indenture trustees with the abilities and goals of servicing, representing, and protecting noteholders as a group. *See* TIA Section 302, 15 U.S.C. 77bbb(a)(1) (declaring that the use of indenture trustees is "to protect and enforce the rights and to represent the interests of such investors"). In doing so, an indenture trustee facilitates fair and equal representation and treatment of all noteholders as a collective group, with the indenture trustee serving as their "collective action" agent. In this regard, it has been the common understanding and custom in the corporate trust industry that, while an indenture trustee might not have the obligation to bring a specific cause of action on behalf of all of its noteholders, it certainly has the right to do such for the benefit of existing outstanding noteholders if it were to become aware of causes of action which it determined should be brought (and perhaps can only be brought) by the indenture trustee to protect all noteholders' interests as a group. This is particularly the case when the indenture trustee is, as here, duly directed to do such by a majority in principal amount of noteholders, pursuant to a specific indenture provision (here, Section 6.5).

Contrary to this understanding and good policy, the Neiman Marcus Defendants' proposed bright-line *per se* rule would prohibit an indenture trustee from seeking any such pre-Event of Default relief, even when the indenture trustee believes there is a justiciable -- even compelling -- claim on behalf of all noteholders and is directed by the appropriate amount of noteholders under the applicable indenture to proceed with such an action.

I. Section 6.5 of the Unsecured Note Indentures Recognizes and Provides Authority for the Trustee to Commence Actions at the Direction of Requisite Noteholders, Without Reference to the Existence of an Event of Default.

While the Neiman Marcus Defendants' argument is predicated on exclusive reference to Sections 6.2 and 6.3 of the Unsecured Note Indentures, the Trustee points to Section 6.5 -- a typical corporate debt indenture provision -- as independent authority for bringing its Complaint and that Section 6.5 is not predicated on the existence of an Event of Default.

Section 6.5 of each of the Unsecured Note Indentures provide:

> The Holders of a majority in principal amount of the then outstanding Notes may direct the time, method and place of conducting any proceeding for **any remedy available** to the Trustee or of exercising any trust or power conferred on the Trustee. The Trustee, however, may refuse to follow any direction that conflicts with law or this Indenture or that the Trustee determines is unduly prejudicial to the rights of any other Holder or that would involve the Trustee in personal liability unless such Holders have offered to the Trustee security and indemnity satisfactory to it against any loss, liability or expense. Prior to taking any action under this Indenture, the Trustee will be entitled to security or indemnification satisfactory to it in its sole discretion against all losses, liabilities and expenses that may be caused by taking or not taking such action. (Emphasis supplied.)

The phrase "any remedy available" includes "all remedies available at law and in equity." *Cortlandt St. Recovery Group v. Bonderman*, 31 N.Y.3d 30, 40 (2018). As such, the plain meaning of Section 6.5 clearly authorizes the Trustee, upon the direction of a majority of the then outstanding Unsecured Notes, to pursue any lawful means of enforcing the Unsecured Noteholders' rights, subject to the Trustee's discretion, and without reference to the existence of an Event of Default. Indenture trustees have so read and accepted (without objection to the ABA's knowledge) such language as Section 6.5 as providing them authority to bring duly directed actions.

II. The Neiman Marcus Defendants' Argument Is Inconsistent With the Policy Favoring Collective Action Through Indenture Trustees For the Benefit of All Noteholders on a *Pro Rata* Basis.

The derivative standing of an indenture trustee to bring an action on behalf of noteholders is well recognized as consistent with the favored policy of benefitting all noteholders as a group. *See, e.g.*, *Cortlandt St. Recovery Corp. v. Hellas Telecom., S.A.R.L.*, 142 A.D.3d 833, 833-34 (1st Dep't 2016) (noting that the indenture trustee had standing to bring its causes of action for claims that are not particular injuries unique to individual noteholders); *Feldbaum v. McCrory Corp.*, 1992 Del. Ch. LEXIS 113, at *27-28 (Del. Ch. June 1, 1992) ("Given the derivative character of these [fraudulent conveyance] claims, it is clear that they can be prosecuted by the trustees representing the bondholders as a group"). Indeed, this jurisdiction has noted that an indenture trustee "is appointed to act as a type of agent on behalf of the [securities-holders] collectively." *Cortlandt*, 31 N.Y.3d at 39 (*citing* Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, 59 Ala L Rev. 1037, 1038 (2008)).

Prohibiting indenture trustees from bringing actions on behalf of all noteholders would result in justiciable actions not being brought, or, alternatively, such actions being brought by individual noteholders for their own benefit or individual recovery to the disadvantage or exclusion of other noteholders. This would be contrary to the policy expressed in such typical indentures as the Unsecured Notes Indentures and case law interpreting similar indentures. For example, after reciting the date of, and parties to, the Unsecured Note Indentures, the very first substantive clauses of such Unsecured Note Indentures both state that "[e]ach party agrees as follows for the benefit of the other parties and **for the equal and ratable benefit of the Holders (as defined herein) of the Notes (as defined herein)** . . ." *See* Unsecured Notes Indentures, at p. 1 (emphasis supplied). Courts have recognized this policy goal of exercising remedies to benefit all noteholders equally and ratably. *See, e.g., Murray v. U.S. Bank Trust Nat. Ass'n*, 365 F.3d

1284, 1289 n.9 (11th Cir. 2004) (noting that the "no action clause" of an indenture is meant "to ensure that any litigation will inure for the equal and ratable benefit of all bondholders") (citation omitted). Similarly, at least one of the authoritative treatises in this area, American Bar Foundation, COMMENTARIES ON INDENTURES, § 5-7, recognizes that it is implicit in an indenture that "all rights and remedies of the indenture are for the equal and ratable benefit of all of the holders." To hold as the Neiman Marcus Defendants argue would undercut the policy of fostering "equal and ratable" benefit of all noteholders.

III. The Neiman Marcus Defendants' Argument Is Inconsistent With the Indenture Trustee's Rights or Standing to Litigate the Same Causes of Action or Legal Theories in Other Contexts as a Primary Party of Interest.

The Neiman Marcus Defendants' position precluding an indenture trustee from bringing any pre-Event of Default causes of action seems particularly incongruous insofar as the Issuer would be permitted to bring against the indenture trustee its own declaratory or other actions on the same causes of action and legal theories.[4] Indeed, issuers have sought declaratory relief to determine whether debt holders are entitled to certain relief (including for fraudulent conveyances). *See, e.g.*, *In re Caesars Entertainment* Operating *Company, Inc.*, Case No. 15-01145 (ABG), Docket No. 670 (Bankr. N.D. Ill. Mar. 11, 2015) (the issuer-debtors sought

[4] Another disconnect with the Neiman Marcus Defendants' argument is that it seems to conflict with and even eviscerate the Trustee's standing to commence declaratory judgment proceedings under New York law. Article 77 of the New York Civil Practice Law and Rules authorizes a special proceeding "to determine a matter relating to any express trust …" N.Y.C.P.L.R. 7701. Permissible uses of Article 77 are "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." *BlackRock Fin. Mgmt. Inc. v. Segregated Account of AMBAC Assur. Corp.*, 673 F.3d 169, 174 (2nd Cir. 2012) (citing *Greene v. Greene (In re Greene)*, 88 A.D.2d 547 (1st Dep't 1982); *see also, e.g., Sterling Fed. Bank, F.S.B. v. Countrywide Fin. Corp.*, 2012 U.S. Dist. LEXIS 86282, at *18 (N.D. Ill. June 21, 2012) (noting that Article 77 authorizes a special proceeding to determine a matter relating to any express trust); *Matter of U.S. Bank N.A.*, 2018 N.Y. Misc. LEXIS 5314, at * 7-8 (Sup. Ct. New York County Nov. 9, 2018) (same). Courts have recognized that Article 77 proceedings are "used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents." *Id.* (involving a proceeding filed by an indenture trustee pursuant to Article 77). The Neiman Marcus Defendants' position thereby conflicts with the absolute right of indenture trustees to file proceedings under Article 77 -- which are not predicated on the occurrence of an Event of Default. An indenture governed under New York law (as here) presumably cannot trump specific New York law, such as Article 77.

declaratory and injunctive relief regarding fraudulent transfer actions and alleged breaches under applicable note indentures asserted by, among others, indenture trustees against debtors and non-debtors); *Travelport Limited v. The Bank of Nova Scotia Trust Company of New York,* 11 Civ. 7704 (KBE) (S.D.N.Y. filed 11/03/11) (company filed a declaratory judgment action seeking a declaration that alleged restructuring transactions did not violate certain terms of the relevant indentures; the indenture trustee counterclaimed for a declaratory judgment declaring that the transactions constituted fraudulent transfers and that declaring an Event of Default would be appropriate); *In re Energy Future Holdings Corp.*, Case No 14-10979 (CSS), Docket No. 3039 (Bankr. D. Del. Dec. 16, 2014) (certain issuer-debtors sought a declaratory judgment regarding an indenture trustee's claim to a "makewhole" premium under the PIK notes); *J.C. Penney Company, Inc. v. U.S. Bank National Association,* Case No. 8276 (Del. Ch.) (issuer sought, among other things, declaratory judgment that it was not in default under the operative indenture); *Liberty Media Corp. v. Bank of N.Y.*, Case No. 5702-VCL (Del. Ch.) (issuer sought declaratory and injunctive relief against the indenture trustee regarding the proposed split-off of certain assets from the issuer and such impact under the operative indenture); *YRC Worldwide Inc. v. Deutsche Bank Trust Company Americas,* Case No. 10-2106-JWL (D. Kan.) (issuer filed a complaint seeking declaratory judgment that the indenture trustee was required to sign supplemental indentures that omit certain provisions from the original indentures).

Thus, under the approach urged by the Neiman Marcus Defendants, while the debtors could commence an action and seek pre-Event of Default relief, an indenture trustee could not. It simply cannot be the intent of the Unsecured Note Indentures, the TIA, or Article 77 to permit an indenture trustee to be sued by an issuer absent an Event of Default, but not permit an indenture trustee to sue an issuer in the same circumstance.

IV. The Neiman Marcus Defendants' Argument Would Foster Artificial Gamesmanship, Potentially Counterproductive to Issuers, Indenture Trustees and Noteholders.

If the Neiman Marcus Defendants' bright-line rule were adopted, indenture trustees might be encouraged or compelled to search for and assert an Event of Default in order to file an action under the applicable indenture, including a declaratory judgment action, rather than just asserting the specific cause of action really at issue (such as a fraudulent conveyance action). This could invariably result in indenture trustees asserting arguable Events of Default protectively to maintain that they have the necessary standing to bring their primary causes of action. Not only would such seem artificial and wasteful, including giving rise to additional litigation related to proving whether an Event of Default actually occurred, but should an Event of Default be proved, it can cause acceleration on the notes' principal and interest, as well as potential cross-defaults on other Issuer debt, with potentially more dire financial consequences than would otherwise be necessary.

For example in addition to enumerated Defaults or Events of Default in the Unsecured Note Indentures, and whether or not indenture covenants have been stripped, New York law provides for an implied non-waivable covenant of good faith and fair dealing. *See, e.g.*, *Elmhurst Dairy, Inc. v. Bartlett Diary, Inc.*, 97 A.D.3d 781, 784 (2d Dep't 2015) (stating that "[i]mplicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included"); *Gutierr*ez *v. Government Empls. Ins. Co.*, 136 A.D.3d 975, 976 (2d Dep't 2016) (stating that a cause of action for breach of the implied covenant of good faith and fair dealing is not necessarily duplicative of a cause of action alleging breach of contract).

This covenant presumably could be argued for or asserted to be violated in almost any situation of alleged issuer wrongdoing (such as a fraudulent conveyance), and thereby

constitute a Default which could turn into an Event of Default, which could trigger the type of otherwise unnecessarily negative consequences for the Issuer (and other constituencies) enumerated above. *See Elmhurst Dairy*, 97 A.D.3d at 784 (noting that even if a party is not in breach of its express contractual obligations, that party "may be in breach of the implied duty of good faith and fair dealing … when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit (or benefit) of its bargain." (citing *Marion Scott Real Estate, Inc. v. Rochdale Vil., Inc.*, 23 Misc 3d 1129[A], 886 NYS2d 68, 2009 NY Slip Op 50997[U], *8 (Sup. Ct. Queens County 2009))).

V. The Neiman Marcus Defendants' Argument Would Block or Defer the Ability of Indenture Trustees to Respond to Defaults and Other Imminent and Otherwise Actionable Impediments to Noteholders.

Events of Default generally do not come into existence, if at all, until some potentially significant amount of time after the occurrence of a default (including cure periods and notice requirements).[5] Thus, the Neiman Marcus Defendants' argument would preclude an indenture trustee from responding to or taking any action to protect Noteholders upon a default, even if the indenture trustee determined that it was appropriate -- even necessary -- to commence an action after a default, but prior to an Event of Default crystallizing.

By way of a stark example, taken to its logical conclusion, the Neiman Marcus Defendants' argument would seem unreasonably to prohibit an indenture trustee from bringing a collection action for an overdue interest payment for all noteholders no matter how long the cure period under the indenture is, insofar as the nonpayment thereby had not yet turned into an Event of Default.

[5] Eg., Under the subject Unsecured Note Indentures (Section 1.1) "'Default' means any event, which but for the giving of notice, lapse of time or both, would be, an Event of Default."

* * * * *

For the above legal, practical and policy reasons, and because, as explained in the Trustee's brief, the Neiman Marcus Defendants' interpretation of sections 6.2 and 6.3 of the Unsecured Note Indentures as the exclusive basis for Trustee action is incorrect -- this Court should reject the Neiman Marcus Defendants' absolute position that an indenture trustee can only bring a lawsuit or seek remedies upon an Event of Default.

CONCLUSION

For the forgoing reasons, the ABA respectfully requests that this Court deny the Neiman Marcus Defendants' Motion to Dismiss the Trustee's Complaint for lack of standing.

Dated: New York, New York
December 13, 2019

Respectfully submitted,

FOLEY & LARDNER LLP

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CERTIFICATE OF COMPLIANCE WITH COMMERCIAL DIVISION RULE 17

BARRY G. FELDER certifies that this brief complies with the word count limitation under Rule 17 in that it contains 3665 words, exclusive of the portions of the brief not subject to counting pursuant to Rule 17.

s/Barry G. Felder
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