

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

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instruction.

Index No. 652382/2014

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE COURT NOT SHOULD EXTEND DEADLINES

I. INTRODUCTION

Pursuant to CPLR 2004, proposed-intervenor the Federal Home Loan Bank of Boston (“FHLB Boston” or the “Bank”) submits this memorandum of law in support of its Order to Show Cause Why the Court Should Not Extend Deadlines established by the Court in its October 9, 2014 Order to Show Cause.

II. BACKGROUND

This Article 77 proceeding was initiated by the Trustees in order to obtain approval of a Settlement that purports to resolve all repurchase and servicing claims against JP Morgan & Chase Co. (“JP Morgan”) for 330 separate residential mortgage backed securities they issued between 2005-2007. The 330 Trusts that are at issue in this proceeding have a combined original

face value of approximately \$ 295 billion dollars, and—according to the Trustees’ own expert—estimated total lifetime losses of approximately \$60 billion.¹

Neither the Bank nor thousands of other Certificateholders whose rights will be extinguished if the Settlement is approved had any role in the negotiations that led to the terms of the Settlement. In addition, the Trustees did not initiate the investigation leading to the Settlement, or participate in the negotiation process. Instead, it appears that the Institutional Investors presented the Settlement to the Trustees for independent evaluation. Pursuant to the terms of the Settlement, the Trustees’ evaluation is paid for by JP Morgan. Settlement Agreement ¶ 2.06.

In their petition, the Trustees request a declaration that they accepted the Settlement based on a “thorough and reasonable investigation,” and made their “settlement decision in good faith.” Amended Petition ¶ 75-76. The Trustees also seek an order barring certificateholders from asserting claims against any Trustee with respect to its “evaluation and acceptance” or “implementation” of the Settlement. *Id.* ¶ 78.

In its October 9, 2014 Order, the Court held that any potentially interested person who wishes to be heard in support of or opposition to the Settlement and/or the Amended Petition must first file a “written notice of intention to appear along with a statement of such person’s objection to any matters before the Court and the grounds therefor, as well as all documents such person desires the Court to consider” by November 3, 2014. Doc. No. 68. at ¶ 7. The Court also held that any request for leave to formally intervene “shall be made by order to show cause, not by separate petition.” *Id.*, ¶ 17. Consistent with the Court’s Order, FHLB Boston filed an Order

¹ FHLB Boston understands that as of today’s date, the Trustees request that the Court approve the Settlement on behalf of 314 of the 330 JP Morgan Trusts at issue in this proceeding.

to Show Cause to intervene on October 13, 2014, in which it explained that it needed further information to evaluate whether the Settlement was in its best interests. Doc. No. 71.

On October 21, FHLB Boston submitted a letter to the Court stating that it could not determine from the limited information made available by the Trustees whether the Settlement was adequate and in its best interests. FHLB Boston requested that the Court provide a three month extension of the objection and hearing deadline so that FHLB Boston, and any other certificateholder that intervenes, could obtain additional information necessary to fully and fairly evaluate the Settlement.

Accordingly, FHLB Boston now moves for a three months extension of the objection deadline and hearing date as set forth in this Court's October 9, 2014 Show Cause Order.

III. ARGUMENT

Pursuant to CPLR 2004, “the court may extend the time fixed by any statute, rule or order . . . upon such terms as may be just and upon good cause shown[.]” The decision to grant an extension rests upon the sound discretion of the court. *See Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 11-12 (1989) (“CPLR 2004 vests the trial court with discretion to extend the time to perform any act[.]”). Such discretion may be applied in granting an extension of the court's own prior order, as is the case here. *See Grandinetti v. Metropolitan Transp. Auth.*, 74 N.Y.2d 785, 786 (1989).

Here, there is good cause for the Court to extend the deadlines set forth in its October 9, 2014 Order. The Settlement concerns billions of dollars of liability relating to 330 separate JP Morgan Trusts. Yet, little is known about the negotiations that produced the Settlement – indeed, the Trustees' own expert, Mr. Fischel, states that he “lack[s] adequate information about the process by which the Proposed Settlement was negotiated.” Expert Report of Daniel R. Fischel, July 17, 2004 (“Fischel Report”), ¶ 56.

Moreover, to date the only information made available by the Trustees concerning their evaluation of the Settlement are the reports of the five experts hired by the Trustees (at JP Morgan's expense) after the Settlement amount was negotiated by the Institutional Investors. These reports do not provide sufficient information to determine if the Settlement is in FHLB Boston's best interests, or if the Trustees acted loyally and without a conflict of interest when evaluating the settlement. Indeed, the Expert Report of Faten Sabry, PhD, National Economic Research Associates, Inc. ("NERA"), dated July 17, 2014 ("Sabry Report") is so heavily redacted that the bases for her conclusions cannot be assessed at all. This is particularly concerning because Dr. Sabry's conclusions are difficult to reconcile with evidence developed in litigation against JP Morgan documenting extremely high breach rates for loans backing the Trust – evidence that Dr. Sabry appears to have ignored. *See, e.g.*, Doc. No. 71 at 4-5 (detailing defect rates between 79% and 98% in JP Morgan trusts). Moreover, Dr. Sabry concludes that the total repurchase liability for the 314 Trusts is only \$1.7 to \$4.5 billion, and thus, by her account, the Settlement recovers between 100% and 260% of the total repurchase liability faced by JP Morgan for the trusts. Lacking any ability to assess Dr. Sabry's conclusions (both because the report is redacted, and because none of the materials she relied on have been produced), certificateholders are asked to accept at face value her report concluding that JP Morgan volunteered to not just pay the entire repurchase liability, but as much as 2.6 times this amount. Yet, at the same time, Mr. Fischel concludes that the "Settlement is below that of other Settlements involving similar issues." Fischel Report at ¶ 35.

Without additional information, FHLB Boston cannot determine whether the Trustees engaged in a reasonable investigation or acted in good faith. Instead, all FHLB Boston can determine is that the Trustees hired experts who prepared reports that were relied on by the

Trustees. On the other hand, with targeted discovery regarding the *bases* for the experts' conclusions, FHLB Boston believes it will be in a position to evaluate the Settlement and form a reasoned opinion on whether it makes sense to resolve billions of dollars of liability for an amount that the Trustees' expert acknowledges is just 7.1 % of the Trusts' losses. Fischel Report at ¶ 36.

Given the need to obtain more information regarding the Settlement, good cause exists to extend the objection and hearing deadlines by a period of not less than three months. While it will be difficult to collect and analyze all the necessary information in this amount of time, FHLB Boston is committed to attempting to do so in order to avoid any unnecessary delay.² FHLB Boston has already sought to expedite discovery by providing the Trustees with a draft protective order, as well as a copy of the discovery requests that it will serve if authorized to do so by the Court. Moreover, in the event that other entities intervene and intend to seek discovery as well, the FHLB Boston will coordinate with them to ensure that discovery is conducted in an organized and efficient manner.

The Trustees oppose FHLB Boston's request on the grounds that the proposed Settlement has been publicly available on their website since November 2013 and the expert reports supporting the Settlement publicly available since July 2014. Doc. No. 80 (October 27, 2014 Trustees' Letter). This misses the point of the requested extension. As set forth above, the Settlement and the Expert Reports (which provide the only available information for evaluating the Settlement) raise significant questions that cannot be answered based on the limited

² FHLB Boston's proposed schedule is premised on the assumption that the Trustees timely respond to the Bank's specific discovery requests that the Bank will submit as soon as the Court allows it intervene as a party in these proceedings. To the extent the Trustees delay production of the requested discovery, the FHLB Boston reserves the right to seek a further extension if necessary.

information that has been made available. The requested extension is necessary so that the Trustees can provide additional information and investors can file “a statement of such person’s objection to any matters before the Court and the grounds therefor, as well as documents such person desires the Court to consider[.]” Doc. No. 68, ¶ 7. After reviewing this information, FHLB Boston may choose not to object with respect to some or all of the Trusts for which it owns interests as a Certificateholder. In the event that it is necessary for FHLB Boston to object, this information will be important in enabling FHLB Boston to specify the grounds or the documents the Court should consider when evaluating the Settlement.

IV. CONCLUSION

For the reasons set forth herein, FHLB Boston respectfully requests that the Court extend the deadline to object to the Settlement to February 3, 2015, and set the final hearing for March 16, 2015. There is a tremendous amount at stake in these proceedings, and, more information is necessary in order to determine whether the Proposed Settlement—which will be binding on FHLB Boston and thousands of other certificateholders even though they had no say in its negotiation is—is adequate.

DATED: October 27, 2014

KELLER ROHRBACK L.L.P.

By /s/ David S. Preminger

David S. Preminger
dpreminger@kellerrohrback.com
1140 Avenue of the Americas, 9th Floor
New York, New York 10036
Telephone: (646) 380-6690
Facsimile: (646) 380-6692

Derek W. Loeser
dloeser@kellerrohrback.com
David J. Ko
dko@kellerrohrback.com
1201 Third Avenue, Suite 3200
Seattle, Washington 98101-3052
Telephone: (206) 623-1900
Facsimile: (206) 623-3384

Gary A. Gotto
ggotto@kellerrohrback.com
3101 North Central Avenue, Suite 1400
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Facsimile: (602) 248-2822

***Attorneys for the Federal Home Loan Bank
of Boston***