SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

In the Matter of the Application of WELLS FARGO BANK, NATIONAL ASSOCIATION, 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, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts), *Petitioners*, For Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment.	Index No. 657387/2017 (Friedman, J.) **Motion Sequence No. 007**

HBK MASTER FUND L.P.'S MEMORANDUM OF LAW IN OPPOSITION TO ASO ATLANTIC FUND LLC'S MOTION TO APPEAR

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Respondent HBK Master Fund L.P. ("HBK"), by its undersigned counsel, submits this memorandum of law, together with the Affirmation of John M. Lundin and the exhibits attached thereto ("Lundin Affirm."), in opposition to the motion by ASO Atlantic Fund LLC ("ASO") to appear in this proceeding two months after the deadline for appearance set by the Court.

PRELIMINARY STATEMENT

ASO's motion should be denied. After receiving due notice of this proceeding, ASO made a tactical decision not to appear based on, among other things, the hope that other parties would bear the expense of appearing and advancing the positions that ASO thought were most advantageous to it. And indeed, four groups of investors, including a 16-member group of institutional investors, appeared and took positions regarding BSABS 2006-HE1, the only trust regarding which ASO seeks to be heard. There is no evident point to ASO's participation in this matter, because the position it seeks to advance in this proceeding already is being argued by sophisticated counsel for a similarly aligned respondent (a respondent that obeyed the Court's order (which ASO does not deny seeing timely) to appear by January 29, 2018, if it wished to be heard). ASO made a choice to free-ride on the work of investors who chose to appear, and should not now be allowed to appear because it has second thoughts about its decision.

ASO's argument that its failure timely to appear in this proceeding should be excused because it had no way of knowing that the Court might allow respondents to settle their disputes regarding certain trusts and then sever and enter judgment regarding the uncontested trusts should carry no weight. The procedure the Court is following was used in an earlier RMBS trustee Article 77 proceeding, and in any event, ASO took the risk that the Court would adopt a procedure with which it disagrees without input from ASO when it decided not to appear in this proceeding by the deadline set by the Court. Indeed, this too was a judgment call (or a

misjudgment), as it is obvious that a party who does not participate in a proceeding may well be excluded from settlement negotiations.

ASO will suffer no undue prejudice. ASO decided not to appear despite knowing full well what the deadline was. It is not the victim of a faulty notice process, a lack of understanding of what was at issue or law office failure. And there already is a sophisticated investor advancing the same argument regarding the same trust that ASO wants to make.

This is not a situation where ASO tried to be heard and circumstances or a procedural barrier prevented it. It could have appeared, chose not to, and now regrets that decision. That is not good cause to ignore the deadline set by the Court.

FACTUAL BACKGROUND

On December 15, 2017, the trustees of the Settlement Trusts brought this proceeding to ask the Court for guidance on several questions relating to distribution the Settlement Funds. On December 19, 2017, the Court imposed a notice program and set a schedule for the trustees to provide notice of this proceeding to any "Interested Person." The Court also ordered that "any Interested Person who wishes to be heard on the merits of the questions presented by the Petition may appear by counsel" but that "**nothing** submitted by any Interested Person shall be **considered by the Court** unless such Interested Person serves an answer to the Petition" by January 29, 2018. (Emphasis added).

ASO did not file a Notice of Appearance in this proceeding. Nor did it file an Answer in this proceeding by the January 29, 2018, deadline set by the Court. However, four groups of respondents timely answered regarding BSABS 2006-HE1, the sole trust regarding which ASO seeks to be heard: HBK, Nover Ventures, LLC, Prophet Mortgage Opportunities L.P., Poetic Holdings VI LLC and Poetic Holdings VII LLC, and a large group of institutional investors.

Almost two months after the Court-set deadline—March 28, 2018—ASO filed the present motion for leave to appear in this proceeding.

ASO does not deny that it received notice of this proceeding and the Court's deadline for answering and appearing. Rather, it admits that it chose not to appear because it believed that other investors would participate in the proceeding and address how the trustees should interpret the Retired Class Provision—what ASO views as a straightforward question of contractual interpretation. ASO also claims that it believed that only the Court would adjudicate and rule on the interpretation of the Retired Class Provision, and that the Trustees would apply such a ruling consistently across all the Settlement Trusts. (Wei Aff. ¶ 5.) According to ASO, it was not until the Court entered its February 13, 2018, scheduling order that it became apparent that the Court was prepared to sever and enter judgment for trusts regarding which "there is no disagreement regarding the method for distributing the Settlement Payment." (Br. at 3.) ASO does not explain why it was not until March 28, 2018—a month and a half after the scheduling order was entered—that it moved to appear.

ARGUMENT

ASO's motion should be denied. ASO made a tactical decision not to appear based on, among other things, the hope that other parties would bear the expense of appearing and advancing the positions that ASO thought were most advantageous to it. And it took the risk that the Court would adopt procedures—such as the severance of, and entering judgment regarding, uncontested trusts—that ASO did not like. That ASO now regrets this decision is no reason to allow it to escape its consequences. This is particularly so because there already is a respondent arguing the same substantive position regarding the trust at issue. Thus, ASO will still be heard even if its motion is denied.

I. ASO SHOULD NOT BE EXCUSED FROM THE CONSEQUENCES OF ITS CONSIDERED DECISIONS

Even though the position ASO seeks to advance in this proceeding is being argued by sophisticated counsel for a respondent that obeyed the Court's order to appear by January 29, 2018, if it wished to be heard, ASO belatedly wants to be heard as well. ASO made a choice to free-ride on the work of investors who chose to appear, and should not now be allowed to appear because it has second thoughts about its decision.

ASO seeks to excuse its failure to appear by claiming that it had no idea the Court would allow investors in trusts regarding which there is no dispute to sever those trusts and obtain judgment regarding them.

First, ASO's claim to have been surprised by the possibility that issues regarding trusts could be severed and resolved by the interested parties should be accorded little weight. In an earlier RMBS Article 77 proceeding—*The Matter of the Application of the Bank of New York Mellon for Judicial Instructions Under CPLR Article 77 on the Distribution of a Settlement Payment*, Index No. 150973/2016 (the BoNY Article 77 Proceeding"), Justice Scarpulla severed and entered judgment regarding 512 of the 530 trusts at issue in that proceeding by agreement of the parties. (*See* Lundin Affirm. Ex. 1.) Later, she severed and entered judgment regarding three more trusts because they were "uncontested," and the only certificateholders "to **appear** in the proceeding" "**were in agreement** in the manner in which the Trustee should be directed" to distribute the settlement funds. (*Id.* Ex. 2 (emphasis added).) Thus, it should not have come as any surprise to ASO that trusts regarding which the respondents that had appeared had come to agreement could be severed and judgment entered regarding the manner of payment to the severed trusts.

Second, even if there were not clear precedent for severing and entering judgment, ASO does not argue that such a procedure is beyond the power of the Court. By deciding not to appear in this proceeding by the deadline set by the Court, ASO assumed the risk that the Court later would adopt procedures ASO did not like. Having taken that risk in apparent hopes that it could free-ride on others' efforts, ASO should not be relieved of the consequences of its choice because it now does not like the result.

II. ASO WILL SUFFER NO PREJUDICE IF IT IS NOT ALLOWED BELATEDLY TO INTERVENE

First, there already are four respondent groups advancing arguments regarding BSABS 2006-HE1, including a respondent advancing the very argument (do not enforce the retired class provisions of that trust's PSA) that ASO wants to advance. Regardless of whether ASO appears in this proceeding, the Court will have presented to it the argument ASO favors. The question before the Court would be a much harder one if its faced a situation where ASO was being deprived of a right to have its concerns heard by the Court, but that is not the situation here.

Second, HBK is not arguing that a party cannot amend its pleadings or that circumstances might not require one party to substitute in for another. Any entity that timely appeared as the Court ordered should be allowed to follow whatever procedural paths are open to it. But allowing ASO the appear for the first time, after making a reasoned decision not to appear, just because it now wishes it had made another decision, is not reasonable and should not be allowed.

ASO also is wrong that allowing it a do-over of its decision not to appear will not prejudice the parties that appeared. If the Court allows ASO to appear in this action long after the deadline for appearing has passed, it will have set a precedent for every investor that has second thoughts about how the proceeding is progressing. This proceeding will take

significantly longer—depriving the investors who timely appeared of the relief sought in their answers—if the Court's deadline for appearing is now to be ignored.

ASO will suffer no **undue** prejudice. ASO it is not the victim of a faulty notice process, a lack of understanding of what was at issue or law office failure. And there already is a sophisticated investor advancing the same argument regarding the same trust that ASO wants to make. This is not a situation where ASO tried to be heard and circumstances or a procedural barrier prevented it. It could have appeared, chose not to, and now regrets that decision. That is not good cause to ignore the deadline set by the Court.

CONCLUSION

For the foregoing reasons, ASO's motion to appear in this proceeding should be denied.

Dated: New York, New York
April 6, 2018

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