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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

Assigned to: Friedman, J.

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE NATIONAL CREDIT UNION ADMINISTRATION BOARD AS LIQUIDATING AGENT SHOULD NOT BE ENTITLED TO INTERVENE

Pursuant to the Court's October 9, 2014 Order to Show Cause, proposed-intervenor the National Credit Union Administration Board as Liquidating Agent for 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 (collectively, the "Liquidating Agents") submits this memorandum of law in support of its Order to Show Cause Why the National Credit Union Administration Board as Liquidating

Agent Should Not Be Allowed to Intervene pursuant to CPLR 401, 1012, 103, and 7701.

I. BACKGROUND

A. The Liquidating Agents Have an Interest in the Settlement

The National Credit Union Administration ("NCUA") is an independent agency of the Executive Branch of the United States Government that, among other things, charters and regulates federal credit unions and operates and manages the National Credit Union Share Insurance Fund ("NCUSIF"). The NCUSIF insures the deposits of account holders in all federal credit unions and the majority of state-chartered credit unions. The NCUA Board manages the NCUA. *See* Federal Credit Union Act ("FCU Act"), 12 U.S.C. §§ 1751, 1752a(a). Pursuant to 12 U.S.C. § 1787(a) and (b)(2)(A), the NCUA Board, in specified circumstances and in a distinct capacity, may close an insured credit union and appoint itself the Liquidating Agent for such credit union. As Liquidating Agent, the NCUA Board succeeds to all rights, titles, powers, and privileges of the credit union, its members, accountholders, officers, and directors.

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 (collectively the "Credit Unions") purchased certificates in various RMBS at issue in this proposed settlement. In total, the Credit Unions purchased certificates in 96 of the trusts with an original total par value of approximately $6.3 billion. In October 2010, the

NCUA Board placed the Credit Unions into liquidation and appointed itself Liquidating Agent for each of the Credit Unions. Although the Liquidating Agents resecuritized many of the RMBS certificates at issue in 2010 and 2011, they retained various rights and interests associated with the resecuritized certificates due to their role as holders of residual interests. The Liquidating Agents are also still the registered holders of some of the RMBS at issue. As such, the Liquidating Agents have a significant interest in the proposed settlement because they are both direct holders of several certificates at issue and also retain certain rights and interests associated with a much larger number of certificates.

B. The Proposed Settlement

JPMorgan Chase & Co. ("JPMorgan"), either directly or through its affiliates, securitized millions of mortgage loans between 2005 and 2007 and sold interests in those pools of loans to investors in the form of RMBS certificates. JPMorgan made numerous representations and warranties about the loans backing the RMBS at issue in the agreements governing the transactions. For example, JP Morgan made assurances that the mortgage loans were originated in accordance with applicable underwriting criteria, in addition to other representations about the characteristics of mortgage borrowers and the collateral for the mortgage loans. JPMorgan also promised that the loans would be prudently serviced. If there was a breach of the representations and warranties, JPMorgan agreed to repurchase any loans that did not comply with the representations and warranties.

In August 2014, The Bank Of New York Mellon, The Bank Of New York Mellon Trust Company, N.A., Deutsche Bank National Trust Co., HSBC Bank USA,

N.A., Law Debenture Trust Co. Of New York, U.S. Bank, N.A., Wells Fargo Bank, N.A., and Wilmington Trust, N.A., as trustees (the "Trustees") filed a petition in this Court seeking approval of a proposed settlement with JPMorgan pursuant to Article 77 of the New York Civil Practice Law and Rules. The $4.5 billion proposed settlement with JPMorgan seeks to resolve hundreds of billions of dollars of claims against JPMorgan for breaches of representations and warranties in the governing documents and servicing issues. The settlement was the product of confidential negotiations between JPMorgan and 21 institutional investors represented by Gibbs & Bruns, LLP (the "Institutional Investors"). Neither the Liquidating Agents nor most other investors in the RMBS trusts at issue were privy to those discussions.

The Trustees allege the proposed settlement is fair and reasonable and urge this Court to approve it. If approved, the settlement will extinguish any repurchase and servicing claims against JPMorgan for all certificateholders in all of the 312 accepting trusts. The Liquidating Agents seek an order pursuant to CPLR 401, 1012, and 1013 to intervene as respondents in this proceeding in order to gather information they needs to evaluate the proposed settlement, to exercise "the right to examine the trustees, under oath . . . as to any matter relating to their administration of the trust" as provided by CPLR 7701, and generally to protect their interests in this proceeding.[1]

[1] The Liquidating Agents are concurrently filing their Notice of Intent to Appear and Object to the Proposed Settlement.

II. ARGUMENT

Under CPLR 1012(a), a party may intervene in an action as of right if "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment" or if "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." In addition, under CPLR 1013 a party may intervene with the permission of the Court if "the person's claim or defense and the main action have a common question of law or fact . . . [and] the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party."

"As a general matter, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Bernstein v. Feiner*, 842 N.Y.S. 2d 556 (App. Div. 2007); *see also Yuppie Puppy Pet Prods., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010) ("Intervention is liberally allowed by the courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action."). Here, the Court should permit the Liquidating Agents to intervene because they qualify as intervenors under any of these standards.

A. The Article 77 Proceeding Will Directly Affect The Liquidating Agents' Property Interests

Again, a party may intervene as of right where "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." CPLR 1012(a).

The Liquidating Agents have an interest in 96 of the trusts with an original total par value of approximately $6.3 billion. The Liquidating Agents are directly affected by the claims against JPMorgan that are subject to the settlement. Those claims could be much more valuable than the settlement. However, if the settlement is approved, it would forever release all claims those trusts have against JPMorgan and all claims the Liquidating Agents may have against the Trustees. Because the settlement could adversely affect the Liquidating Agents interests and claims, the Liquidating Agents fit the definition of interested parties and should be permitted to intervene as of right in this proceeding under CPLR 1012(a).

B. The Liquidating Agents' Interests May Not Be Adequately Protected in the Article 77 Proceeding

CPLR 1012(a) also permits intervention as of right where "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." To satisfy CPLR 1012(a), the Liquidating Agents do need not show that the Trustees' representation *will* be inadequate, but instead it is sufficient to show that the Trustees' representation *may* be inadequate. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).

The Trustees are required to protect all certificateholders' interests, but here they have acknowledged that certificateholders may have conflicting views about whether the settlement is reasonable. In fact, the Trustees:

> [R]ecognize that different groups of certificateholders may wish to pursue remedies for the alleged breaches in different ways, creating the potential for disagreements among certificateholders within the same trusts. For example, the Institutional Investors have requested that the Trustees accept the settlement on behalf of all of the Trusts.

> Other groups of certificateholders have requested that the Trustees not accept the settlement and file (or continue) lawsuits on behalf of particular Trusts.

See Trustees' Petition ¶18. Consequently, the Trustees may not have adequately protected the Liquidating Agents' interests when they evaluated the settlement, and they may not do so in this proceeding.

In addition, the Institutional Investors may not adequately protect the Liquidating Agents' interests. As an initial matter, the Liquidating Agents' interests in the settlement are unique and likely differ from the Institutional Investors' interests. Moreover, § 2.03(d) of the settlement agreement obligates the Accepting Trustees, JPMorgan, and the Institutional Investors to use their reasonable best efforts to obtain Final Court Approval of the Settlement, even if "any Party discovers facts that are additional to, inconsistent with, or different from those which they knew at the time they entered into this Settlement Agreement." Since the Institutional Investors are bound to support the settlement even if subsequently discovered facts indicate it is unfair, it is unlikely that they will protect the interests of other certificateholders.

Finally, there is no question that the Liquidating Agents will be bound by the settlement. As a result, all of the elements of CPLR 1012(a)(2) are satisfied and the Liquidating Agents are entitled to intervene in the proceedings.

C. The Liquidating Agents Also Qualify for Intervention Under CPLR 1013

The Liquidating Agents also satisfy CPLR 1013's requirements for discretionary intervention. Under CPLR 1013, the Court has discretion to permit a

party to intervene when "the person's claim or defense and the main action have a common question of law or fact." To determine whether the requirements for discretionary intervention have been met, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." *Wells Fargo Bank, Nat'l Assn. v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010).

The questions that the Liquidating Agents will raise are identical to the questions of law and fact that are before this Court. That is, the Liquidating Agents seek to ensure that the Court will be presented with a balanced evaluation of the settlement so that it can determine whether the settlement's terms are fair and reasonable to all interested parties. Moreover, the Liquidating Agents' intervention will not unduly delay the action or prejudice the rights of any party. The Trustees and the Institutional Investors are already represented and permitting the Liquidating Agents to intervene will simply serve to guarantee that their interests are adequately protected as well. In addition, the Liquidating Agents filed their request to intervene in a timely manner within the deadline for parties to file a written notice of intention to appear and object. Doc. No. 68 at ¶ 7.

IV. CONCLUSION

The Liquidating Agents respectfully request that the Court grant its Order to Show Cause and add them as intervenor-respondents in this Article 77 proceeding.

Dated: November 3, 2014

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

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