

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

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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 : INDEX NO. 657387/2017
YORK MELLON TRUST COMPANY, N.A., :
WILMINGTON TRUST, NATIONAL ASSOCIATION, : Motion Seq. No. 7
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 :
Administration and Distribution of a Settlement Payment. :
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**ASO ATLANTIC FUND LLC'S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR LEAVE TO APPEAR AND PARTICIPATE**

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TABLE OF CONTENTS

| | Page |
|---|-------------|
| STATEMENT OF FACTS | 1 |
| ARGUMENT | 4 |
| I. ASO SHOULD BE GRANTED LEAVE TO APPEAR AND PARTICIPATE IN THE PROCEEDING..... | 4 |
| A. ASO’s Motion for Leave to Appear is Supported by Good Cause..... | 4 |
| B. ASO’s Appearance Does Not Prejudice the Parties | 7 |
| II. ASO’S STATEMENT OF GROUNDS FOR APPEARANCE..... | 8 |
| CONCLUSION..... | 8 |

TABLE OF AUTHORITIES

Page(s)

Cases

Argento v. Wal-Mart Stores, Inc., 66 A.D.3d 930 (2d Dep’t 2009) 4, 5

Brian Maloney M.D., P.C. v. Maloney, 140 Misc. 2d 852 (Sup. Ct. Richmond Cnty. 1988) 5

Kritzer v. Ventura Ins. Brokerage, Inc., 50 Misc. 3d 832 (Sup. Ct. N.Y. Cnty. 2015) 5

Statutes

CPLR § 2004..... 4, 5, 7

ASO Atlantic Fund LLC (“ASO”), an Interested Person, as defined by the Court’s order entered on December 19, 2017 (NYSCEF Doc. No. 30) (the “December 19 Order”), respectfully submits this memorandum of law in support of its motion pursuant to the December 19 Order, and upon good cause shown, for leave to appear in this proceeding and be heard regarding the merits of the questions presented by the Petition dated December 15, 2017 (the “Petition”) regarding a single Settlement Trust—Bear Stearns Asset Backed Securities I Trust 2006-HE1 (“BSABS 2006-HE1”).¹

STATEMENT OF FACTS

ASO directly owns certificates issued by BSABS 2006-HE1, which is a Settlement Trust that is the subject of the Settlement Agreement dated as of November 15, 2013 and modified as of July 29, 2014, by and among JP Morgan Chase & Co. and its direct and indirect subsidiaries and a group of institutional investors (the “Settlement Agreement”). *See* Affidavit of Xing Wei dated March 28, 2018 (“Wei Aff.”) ¶ 3. BSABS 2006-HE1 is also the subject of the Petition. (*See, e.g.*, Pet. Exs. A, G.) U.S. Bank National Association (“U.S. Bank”) is the securitization trustee of BSABS 2006-HE1. Accordingly, ASO is an Interested Person under the Court’s December 19 Order. As an Interested Person, ASO seeks leave to appear and participate in this proceeding and the Final Hearing with regard to a single issue raised by the Petition concerning the write-up and distribution of the Settlement Payments to certificateholders of BSABS 2006-HE1. Specifically, ASO seeks to be heard with regard to how U.S. Bank should interpret the Retired Class Provision set forth in BSABS 2006-HE1. *See* Wei Aff. ¶ 4.

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Petition and/or the December 19 Order.

The December 19 Order directed that “any Interested Person who wishes to be heard on the merits of the questions presented by the Petition may appear . . . at the Final Hearing and present such evidence or argument as may be proper and relevant; provided” they notify the Court by January 29, 2018 of their intent to participate and be heard with regard to the Settlement Trusts. The December 19 Order further states that, “except for good cause shown, no Interested Person shall be heard and nothing submitted by any Interested Person shall be considered by the Court unless such Interested Person serves an answer to the Petition . . . on or before January 29, 2018” NYSCEF Doc. No. 30 at ¶ 9.

ASO did not indicate to the Court its intent to appear in this proceeding in order to be heard with regard to BSABS 2006-HE1 by January 29, 2018 because it believed that various other investors would participate in the proceeding in order to address how the Trustees should interpret the Retired Class Provision—a straightforward question of contractual interpretation that did not require its participation—and that *only* the Court could issue a binding ruling. *See* Wei Aff. ¶ 5. Based on ASO’s reading of the Petition and the December 19 Order, ASO assumed that the various issues in question, including those pertaining to the Retired Class Provision, would be presented to the Court and that the Trustees would apply the Court’s ruling consistently across all of the Settlement Trusts. *Id.* That there is only one Article 77 proceeding where the Court will determine the issues pertaining to *all* of the Settlement Trusts supports ASO’s belief that the Court would render a decision that the Trustees would apply consistently across all Settlement Trusts. As a result of ASO’s belief that the Court would address and rule on the issues in dispute, and the potentially significant fees that ASO would incur to represent its interest in a single Settlement Trust, ASO did not notify the Court of its intent to appear and participate in this proceeding by the January 29 deadline. *Id.*

The December 19 Order, however, was silent with regard to the ability of Interested Persons who had appeared by the January 29 deadline to sever specific Settlement Trusts from this proceeding and to agree among themselves with regard to how the Settlement Payment should be distributed for that Settlement Trust. *See* NYSCEF Doc. No. 30.

On February 13, 2018, the Court entered a Scheduling Order vacating all future dates in the December 19 Order and setting further deadlines. NYSCEF Doc. No. 194 (the “Scheduling Order”). For the first time, the Scheduling Order outlined the procedure by which parties that “have appeared to take a position” on certain Settlement Trusts and among whom “there is no disagreement regarding the method for distributing the Settlement Payment” could submit “to the Court an agreed proposed judgement and severance order concerning the manner of distribution of the Settlement Payment.” *Id.* at ¶ 3. The Scheduling Order further notes that “such order shall state that it is without prejudice to and shall have no precedential effect on any argument of any party concerning . . . the appropriate distribution of the Settlement Payment where there is a dispute among the parties regarding how the payment should be distributed” *Id.* Only upon a close review of the Scheduling Order could one have understood that the *parties—and not the Court*—could agree on a proposed final, binding decision on the pending matters, without the Court’s review or adjudication of the merits relating to the issues in dispute. *Wei Aff.* ¶ 6. Indeed, the Court’s recent approval of the Severance Orders and Partial Final Judgments (the “Severance Orders”), including one relating to ninety-one Settlement Trusts submitted, on consent, by several Respondents and others where no other certificateholder expressed its intent to be heard with regard to certain Settlement Trusts, reinforce the concern that has led ASO to now believe that it needs to participate in this proceeding in order to ensure that the

straightforward contractual interpretation is applied to BSABS 2006-HE1. *See* NYSCEF Docs. No. 282–83, 285.

Not only has ASO demonstrated good cause as to why the Court should allow it to appear and be heard with regard to the limited issue of the Retired Class Provision as it applies to BSABS 2006-HE1, but Respondents will not be prejudiced in any way by ASO’s appearance. Specifically, ASO is seeking to appear with regard to a single trust that is already a Disputed Trust and where the Retired Class Provision is already at issue, (*see* NYSCEF Doc. No. 231); ASO is not subject to the motions seeking to limit the standing of certain Respondents that are currently being briefed; and this proceeding is at a preliminary stage with regard to the merits of the issues in dispute with no dates set for briefing on the relevant issues or for a Final Hearing.

ARGUMENT

I. ASO SHOULD BE GRANTED LEAVE TO APPEAR AND PARTICIPATE IN THE PROCEEDING

A. ASO’s Motion for Leave to Appear is Supported by Good Cause

The Court should allow ASO to appear in this proceeding because ASO has demonstrated “good cause,” as required by the December 19 Order, for not indicating its intent to appear and be heard by the January 29 deadline. The December 19 Order does not define the standard for such “good cause.” Accordingly, the Court’s determination of “good cause” is guided by Section 2004 of the Civil Practice Law and Rules (“CPLR”), which grants trial courts discretion to “extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” Civ. Prac. L. R. § 2004; *see, e.g., Argento v. Wal-Mart Stores, Inc.*, 66 A.D.3d 930, 932 (2d Dep’t 2009) (stating that the Court has discretion, pursuant to CPLR § 2004, to extend the deadline set forth by the CPLR).

In such context, courts have held that the good-faith misapprehension of the proceedings' deadlines may provide sufficient cause to warrant an extension and excuse untimeliness. *See, e.g., Argento*, 66 A.D.3d at 933 (finding that the trial court should have “exercised its discretion” under CPLR § 2004 to deem plaintiff’s motion for class certification timely made in light of the plaintiff’s “misapprehension” that its motion could be made upon the completion of discovery and “good-faith belief” that such motion would have been timely); *Kritzer v. Ventura Ins. Brokerage, Inc.*, 50 Misc. 3d 832, 837 (Sup. Ct. N.Y. Cnty. 2015) (holding that the mistake or inadvertence of the defendant’s attorney in believing that a longer deadline had been set for dispositive motions amounted to a “reasonable, acceptable excuse” for a delay that had “caused no discernable prejudice to the plaintiffs”). A change in a party’s circumstances previously informing its decision *not* to act within the prescribed period may also provide cause to extend an expired deadline. *See generally Brian Maloney M.D., P.C. v. Maloney*, 140 Misc. 2d 852, 855 (Sup. Ct. Richmond Cnty. 1988) (extending the 15 day timeframe within which a debtor must move to vacate an income execution where the alleged debtor deliberately had not made a prior attempt to vacate it, and it was “only when his support obligation was satisfied [that] he question[ed]” its continued effect).

ASO’s request for leave to appear and participate in this proceeding despite its failure to inform the Court of its intent to do so by January 29, 2018 is supported by good cause. As set forth in the Wei Affidavit, ASO did not appear in the Proceeding because of its good-faith belief that the Court alone would consider and decide how the Trustees should interpret and apply the Retired Class Provision and that the Court’s interpretation would apply to all of the Settlement Trusts listed in Exhibit G. *See Wei Aff.* ¶ 5.

ASO's misunderstanding was reasonable under the circumstances, as there was no indication prior to the Court's entry of the Scheduling Order that the Respondents who had appeared would have the ability to sever Settlement Trusts from this proceeding and agree among themselves how to resolve the issues presented to the Court on a trust-by-trust basis, which could permit inconsistent applications of the distribution and write-up provisions at issue, including the Retired Class Provision. Indeed, any such resolution could be made based on the parties' own interests or bargains, rather than on the interpretation of the provision at issue. Therefore, given the inconsistency among the parties' interpretations of the Retired Class Provision, it is possible for Respondents who agree among themselves as to how to allocate the Settlement Payment for a specific Settlement Trust and to sever that trust from this proceeding to reach an outcome that would differ from that which the Court may eventually reach. In fact, the Court's Scheduling Order stating that agreed judgment and severance orders will be "without prejudice to and shall have no precedential effect on any argument of any party concerning . . . the appropriate distribution of the Settlement Payment where there is a dispute . . ." explicitly contemplates that possibility. *See* NYSCEF Doc. No. 194 at ¶ 3. Moreover, the Court's recent Severance Orders relating to BSABS 2007-AC2, BSMF 2007-SL2, and SACO 2005-6 (*see* NYSCEF Doc. Nos. 282–83) illustrate the inconsistent results that may occur among the various Settlement Trusts as it relates to the Retired Class Provision, which according to the Petition appears to be uniform across the relevant Settlement Trusts (Pet. ¶ 54). Specifically, despite that the largely uniform language of the Retired Class Provision across the Settlement Trusts, the Severance Orders direct the relevant Trustees to take different approaches with regard to the application of the provision. *See* NYSCEF Doc. No. 282 at 5; NYSCEF Doc. No. 283 at 6.

As further attested to in the Wei Affidavit, ASO promptly sought to appear in this proceeding upon gaining a proper understanding that it could be bound by a decision rendered by the Respondents, and not the Court. Wei Aff. ¶ 7. Accordingly, ASO has demonstrated good cause as to why it should be permitted to appear and participate in this proceeding.

B. ASO's Appearance Does Not Prejudice the Parties

Although neither the December 19 Order nor CPLR § 2004 requires that ASO demonstrate that the Court granting it leave to participate in this proceeding will not prejudice Respondents, the Court should take the lack of any prejudice into consideration in rendering a decision on ASO's request. First, ASO's appearance will not disturb or delay the proceeding or any current schedules. The parties are currently briefing the matter of standing of certain Respondents, with such briefing scheduled to be completed by April 26, 2018. NYSCEF Doc. No. 243. By contrast to the Respondents whose standing is being challenged, ASO owns its certificates directly. *See* Wei Aff. ¶ 3. Thus, ASO's standing will not be at issue and its appearance will neither interrupt nor impact the current schedule or the arguments that have been raised. Moreover, the Court has yet to schedule briefing on the merits relating to the issues raised by the Petition, including the proper interpretation of the Retired Class Provision or the date of the Final Hearing. ASO's appearance will also not introduce any new issue or dispute with regard to BSABS 2006-HE1 since there currently is already a dispute among several Respondents with regard to the interpretation of the Retired Class Provision in that Settlement Trust. *See* NYSCEF Doc. No. 231. Finally, to the extent any prejudice arising from ASO's appearance exists (and none exists), such prejudice is far outweighed by the prejudicial impact on ASO if it is not permitted to participate in this proceeding.

II. ASO'S STATEMENT OF GROUNDS FOR APPEARANCE

In the event the Court grants ASO leave to appear and participate in this proceeding, ASO sets forth herein its statement of grounds for seeking to appear. As discussed above, ASO asserts that it seeks to participate in this proceeding and at the Final Hearing in order to be heard with regard to how U.S. Bank should interpret the Retired Class Provision in BSABS 2006-HE1. ASO generally contends that pursuant to the plain and unequivocal terms of the Pooling and Servicing Agreement governing BSABS 2006-HE1, classes of certificates whose principal balance has been reduced to zero only because of increasing amounts of realized losses should not be considered "Retired Classes." That designation should be construed to be limited to those certificate classes whose principal balance has been reduced to zero because of the repayment of principal in the ordinary course.²

CONCLUSION

For the reasons provided herein, ASO respectfully submits that its motion for leave to appear and answer the Petition upon a showing of good cause should be granted.

DATED: New York, New York
March 28, 2018

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² ASO joins in the arguments of other Respondents who have similarly argued that the Retired Class Provision does not apply in instances where classes of certificates have been reduced to zero as a result of increasing amounts of realized losses. *See, e.g.*, NYSCEF Doc. No. 191.