SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: CIVIL TERM : PART 60

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In the Matter of the Application of

THE BANK OF NEW YORK MELLON, in its Capacity as Trustee for 278 Residential Mortgage-Backed Securitization Trusts,

Petitioner(s)

INDEX: 150738/2019

For Judicial Instructions Under CPLR Article 77 Concerning the Proper Pass-Through Rate Calculation for CWALT Interest Only Senior Certificates.

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60 Centre Street
New York, New York 10007
April 18, 2019

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THE COURT: On the record. Good afternoon. May have the appearances of counsel at the table.

MR. INGBER: Good afternoon, your Honor. Matthew Ingber for Mayer, Brown, for Bank of New York Mellon.

MR. HOUPT: Good afternoon, your Honor. Christopher Houpt, for Mayer, Brown, for Bank of New York Mellon.

THE COURT: I'm afraid I'm having trouble hearing everyone who has spoken, not your fault.

MR. SHAPIRO: I'm Saul Shapiro, from Patterson, Belknap, Webb and Tyler, on behalf of AIG.

MR. WARNER: Good afternoon, your Honor. Kenneth Warner, 950 Third Avenue, New York, New York. I represent the following institutional investors:

Blackrock Financial Management, Inc., Federal Home Loan Bank of Atlanta, Goldman Sachs Asset Management, LP, Kove Advisors, LP, Pacific Investment Management Company, LLC.

MR. PICKHARDT: Good afternoon, your Honor. Jonathan Pickhardt, Quinn, Emanuel, Urquhart and Sullivan, on behalf of Silian Ventures, LLC. I'm joined by my colleague Blair Adams.

MS. ADAMS: Blair Adams, Quinn, Emanuel, Urquhart and Sullivan, on behalf of Silian Ventures, LLC.

THE COURT: This is the first appearance in this

case since notice has been given to interested parties and I am expecting to hear from the parties about what issues may need to be addressed before merits briefing and proposed scheduling. So why don't we start with the trustee.

MR. INGBER: Your Honor, thank you. Matthew Ingber for the trustee.

There has been some discussion among the parties, the investors, various investor groups and the trustee about what the schedule should be leading up to a final merits hearing. There is agreement that there should be briefing on the issues followed by a hearing.

There is, right now, a dispute between one group of investors and another about whether that briefing should encompass just one brief in response to the papers that have already been filed. Silian can speak for itself, but my understand is that their position is that there should be one round of briefing and those papers should be filed on May 9th.

Other groups of investors have proposed opening briefs, opposition briefs and reply briefs starting at the end of May, two weeks later opposition briefs and two weeks after that reply briefs. It's our position that additional briefing could be beneficial to the Court. The trustee doesn't feel strongly about this issue.

We understand that these issues can be complicated

and ultimately our view is that we will do what's best for the Court. If there's more than one round of briefing, we think there should be some limits on the pages so that you're not getting duplicative briefing and it can ease the Court's burden, but ultimately I think we lean in favor -- I know that we lean in favor of additional briefings for the Court's benefit. Ultimately we defer to your Honor. So that I would say is the first issue that the parties have been back forth on.

THE COURT: Have the parties also discussed whether there will be any request for discovery before the merits briefing?

MR. INGBER: So Pickhardt and I have had a conversation about discovery. Silian will, again, I don't want to -- they can speak for themselves, it is my understanding that they would like to pursue discovery while the parties are briefing these issues, mindful that the Court may be in a position to just rule on the papers.

It's our position that we should brief the issues. The Court should decide whether or not it can rule on the papers, issue a ruling --

THE COURT: Excuse me. Is this the issue about whether the governing agreements are ambiguous or would there be discovery on something else?

MR. INGBER: I'm not quite sure what they want

discovery on. We don't think discovery is necessary at all. We think your Honor can read the contracts, your Honor can consider the undisputed fact that the trustee has been using what we have described as the dynamic method since the inception of these deals and we think that undisputed fact, coupled with the contract which we believe supports the -- our interpretation of the dynamic method is sufficient for your Honor to rule that the trustee acted properly in applying the dynamic method for the last ten or so years and should continue to do so going forward. I think Silion Ventures would like to have discovery into course of dealing. Our view is that course of dealing is undisputed. This is what we did. What we did was made available to investors, in our investor reporting website every month in the form of remittance reports. So it's going to be a lot of work that we think ultimately is going to be unnecessary if your Honor decides, after the parties brief these issues, that there are fact issues and discovery would heed the Court, then we can get into discovery at that point, but we think at this point it would be not the best use of the Court's time and the parties's time.

THE COURT: Are there any other issues that need to be addressed?

MR. INGBER: Not for -- well, let me raise one other issue.

Mr. Pickhardt and I discussed an issue with respect to expedited discovery as to one specific question. I don't want to get into the details of it. We have a dispute about whether it's even at issue in this case or should be at issue in this case, but Mr. Pickhardt asked whether we would agree to expedite a discovery on that specific issue or whether we can agree on a set of facts that would allow the parties to argue based upon that agreed upon set of facts. We told Mr. Pickhardt that the latter option sounds better to us. We think we can reach agreement. We hope that we will be able to reach agreement on that agreed set of facts. Again, we think that what we have been doing should be undisputed, but how we frame it and what language we use is can be the subject of some discussion. I think that, assuming that we reach agreement in the next few weeks on that, that would put to the side the question of whether we need discovery on that issue. So that's the only other related discovery issue that we were discussing.

THE COURT: On this secret issue, will the other investors be privied to the negotiations?

MR. INGBER: Sure. Everyone will be privied to all of the negotiations. The issue -- I'm happy to get into it, your Honor. The issue is with respect to what we think is -- it's the method by which -- it's related to the methodology that the trustee uses to calculate the payments

to the IO certificate holders. It's not an issue that -- it's not an issue that Silion Ventures had raised at all with the trustee in the lead up to their filing in Federal Court. It's not an issue that they teed up in their Federal Court filing. It's therefore not an issue that we squarely teed up in our petition. Their views that it's related to the ultimate merits issue of whether the dynamic method or static method should be used, and so there's -- there are disputes about a whole host of issues, in particular, the relevance of this question, but we might be able to just put this to bed by agreeing on a set of facts that the parties can argue from.

THE COURT: Thank you. Will I hear next from Silion?

MR. PICKHARDT: Yes, your Honor. John Pickhardt on behalf of Silian. I think Mr. Ingber generally fairly characterized the discussions we had and what our position is.

In respect of the discovery, you know, we do think discovery should move forward, but there's only one issue that we think for which discovery is relevant for the initial merits hearing; and that derives from the fact that the way the trustee has structured its petition here, is it has claimed to have engaged in a particular methodology historically for calculating payments to the IO

certificates, which my client holds, and is actually asking from this Court for an order that it should continue performing the calculations in the same way it's been doing it. There actually is a dispute, your Honor, as to whether how they are describing the petition they have done the calculation is in fact how they have done it, and we think quite strongly, we believe, that in fact the attorneys' actual practice in performing that calculation deviates in a very material way from how they've described themselves as having done it. So we think if we're going to go into a hearing where the Court is going to be considering (A) the arguments about, you know, historical, you know, calculations that have been performed and is being asked to take that into account in making a determination as to how they should be performed in the future; and secondly, literally being asked to imbed in an order a direction that the trustee continue with it's same calculations, that it's imperative that we be able to understand exactly how it's been performing those calculations.

I had a discussion with Mr. Ingber, in which he suggested that perhaps we could avoid needing to take, you know, actual discovery of that if they simply give us a very clear statement that is acceptable to us, in detail, with respect to how in fact they have been performing the calculations and we handle that by stipulation.

We are perfectly happy to proceed that way or at least to attempt to proceed that way in the first instance and that may resolve the issues for the initial hearing.

THE COURT: If you can't resolve it by stipulation that would be the only issue on which you would need discovery before the merits briefing?

MR. PICKHARDT: That is correct, your Honor.

THE COURT: All right. Now, I'm not sure I understood from Mr. Ingber's explanation what position you're taking with respect to how the briefing should be done.

MR. PICKHARDT: Yes, your Honor, our position is that the briefing should progress in the same manner that was set forth in the Court's February 1st order. In the Court's February 1st order, paragraph 6, it said that for parties to appear, that they should file a statement of their position, up to 20 pages, with support for that position and even evidence for that position if they wanted to present it. And then in paragraph 11 when it described what would be done at this initial conference, it indicated that there would be a discussion of responses by petitioner interested persons to submissions filed pursuant to paragraph 6 above. So, your Honor, consistent with your order we, on March 8th, filed a 20 page substantive submission setting forth our position and our support for

that. The group of investors that are represented by Mr. Warner did something, you know, similar to that, and the trustees, obviously set forth its position in the petition. So we would like to just stay with the process that was set forth in the Court's order to affix a date for responses to what has been filed so far.

I will also just note, your Honor, you will note in our positions consistently in this proceeding that I do have a client who is very anxious for this to move along expeditiously. As I mentioned at the conference on February 1st, there's about a million and a half dollars each month that is getting paid out, that is going to other certificate holders, when we believe it should be going to the IO certificate holders. So for my client time is of the essence here as well. So we would like to have all of the issues ventilated to the fullest extent that would be helpful for the Court. We do also have a client that is concerned with prejudice as time goes on with respect to the ongoing distributions that are happening.

THE COURT: What is the status, Mr. Pickhardt with respect to the Federal Court action?

MR. PICKHARDT: We have agreed to a stay of that proceeding at this point, which is indefinite. We have advised the Federal Court that we will periodically give reports as to, you know, the status of this proceeding, but

there has been no further filings other than stay applications since the last time we were in front of this Court.

THE COURT: Is there, on another matter, is there still an issue as to escrow?

MR. PICKHARDT: Your Honor, we're not making a formal application for an escrow at this point in time. We think that, in fact, you know, there are -- this issue has actually become more complicated than when we were here in front of you before because the group of investors that are represented by Mr. Warner has actually taken a position in their papers that the IO certificates were over paid, not that they've been under paid. So we have in front of your Honor parties that are arguing kind of both sides and the dollars could be very significant if you were going to talk about an escrow, 100 million dollars or more. So, your Honor, we are concerned that an escrow would be one way to kind of preserve, you know, against prejudice, but so many dollars would need to be set aside that the escrow in and of itself might cause its own prejudice. So we would sort of alternatively encourage, as much as possible, a rapid resolution. We are not making a formal application for escrow.

THE COURT: Would any of the other investors like to be heard?

MR. WARNER: Thank you, your Honor. Ken Warner for the investors I mentioned before. Your Honor, we agree that the briefing should be to the fullest extent that would be helpful to the Court, but one brief is not going to do that and we certainly didn't understand paragraphs 6 and 11 to be a briefing schedule in the Order to Show Cause.

We understood it to be a call for each party to give an overview of what's your position, not get into the weeds about all the nuances, and that is what we did, that's what the other investors did. Actually, I think one of the investors really didn't say much about its position and people spoke in different lengths, but everybody had the position, we look forward to full merits briefing and we put that repeatedly in our overview presentation.

We believe, your Honor, that one brief would be more of a problem than a benefit because undoubtedly new positions are going -- new aspects of everybody's position are going to be set forth and then there will be no response for your Honor. So we think that what will give your Honor the clearest presentation of everybody's position and the responses to those positions would be a briefing schedule in which there's an opening brief, an answering brief and a reply brief. We had suggested a schedule of May 31st, June 14th, and June 28th. That was just our suggestion. I don't want to speak on behalf of the other investors, but I

believe they join in having a full briefing of that kind, which we think gives your Honor the benefit of not only of hearing, you know, articularly worded positions, but the reputation.

THE COURT: Who would author the opening brief?

MR. WARNER: Well, we thought that there could be simultaneous in view of the fact that a lot has been said by, you know, a number of people have set forth enough for everyone to respond simultaneously because if we have three rounds we think that would work but, of course, if your Honor -- I think if we -- I think if one side then the other, it does leave sort of a more open-ended last word whereas if people are joint, probably gives everybody a chance to be heard fully.

THE COURT: Would anyone else like to be heard?

MR. SHAPIRO: Just briefly, your Honor. We agree with Mr. Warner and Mr. Ingber having additional briefing would be helpful and we certainly did not understand the Court's order. We put in, I think, a three page submission just to set forth what our position was. We didn't understand that to be, you know, the time to put in a 20 page brief.

Your Honor, with respect to the schedule that Mr. Warner suggested, we think that makes sense. I mean, if there are particular days that don't work out, whatever the

Court's convenience, but we think several rounds of briefing would be helpful.

We agree also with what the trustee said with respect to discovery. In our view the PSA is quite clear on this issue of dynamic versus the original rate. We don't think that any discovery at all is necessary on that. We think that it's easier for the Court and it makes more sense for the Court to hear what we have to say, decide whether the Court agrees with us that it's unambiguous and can rule without any discovery, but I would say, if you are going to order the discovery that Silion asked for that that discovery should happen before and then we should have the briefing schedule after that so that we can address whatever there is that's revealed in that discovery in our briefing.

Thank you, your Honor.

MR. HOCHMAN: Your Honor, John Hochman, for Tilden Park. What Mr. Shapiro just said goes for us as well. This was our initial submission in totality. We obviously would like the opportunity to say more about it than that and I think at least two rounds or three rounds of briefing would be appropriate.

THE COURT: We are going to take a very brief recess, around five minutes and then I will let you know where I think we should go from there. Thank you.

(Recess taken.)

THE COURT: Back on the record. There may have been an Article 77 proceeding early on in this part, in which we used the initial appearances as the merits briefing, but as we've gotten more experienced we haven't been doing that. We've been having separate merits briefing and I think that that makes sense here.

What I would like to do, though, is avoid unyielding excessive briefing. Anyone who was here on the JP Morgan Article 77 knows what massive papers we had, and in some cases, what duplication we had. So I'm going to ask my law clerk who has been working with me on these Article 77's from the outset to sit with you for a few minutes and see if we can come up with something that looks feasible, that can avoid excessive paper and will be user friendly for all of us in understanding what the arguments are and the differences in position. Part of the problem is that it doesn't -- you're not -- all of the investors are not aligned 100 percent with the trustee and we have some separate arguments. So my hope is that if you talk with Miss Lang you'll be able to work out something that makes sense.

I will expect that Silion and the trustee will meet in order to determine whether a stipulation can be reached on the methodology issue. If you cannot reach a stipulation, you can let me know whether there's going to be

a request for discovery and whether there's an agreement as to the timeline for that. We can do that on a conference call with all appearing parties and we will set the dates on an expedited basis given that pretty much everyone seems to be agreeing to the schedule Mr. Warner proposed seems to be quite expedited to me. It's not as quick as the one Silion wanted, but it's still very reasonable I think, and if we have to move it out a little if there's going to be discovery on the methodology issue, then we can do that, but we should set those dates today.

I'm just going to leave it to you to discuss at least for a few minutes whether you can work out something on the briefing and if you can't, I will do my job.

I will request if we have to go back on the record today, we will, but let me say now that I'm requesting the trustee obtain a copy of the transcript, E-file it and file two hard copies with the clerk of the part. The transcript will not be so ordered until the hard copy is filed with the clerk.

I remind you that I reserve the right to correct errors in the transcript, therefore, if it is needed for any further purpose you should have a copy as so ordered by me and not merely as signed by the Court Reporter.

MR. PICKHARDT: Your Honor, there has also been discussion among the parties about a protocol for

disclosures among the parties as to what their holdings are for purposes of any questions around standing. We had some initial discussions. There are some on-going disputes as to the full extent of those disclosures. We're going to continue trying to work among the parties to resolve that so not to have to burden the Court with what the issues are in dispute. If we do come across a dispute that we can't resolve, we may be presenting that to the Court to seek its assistance.

THE COURT: If there is a problem of that sort or any other sort, initially you should initiate a conference call with all appearing parties and if we think we need a joint letter and that's the best way to proceed we will ask for that on the conference call. I think you should be able to work out the holdings issue though. We did very well with that on the JP Morgan case.

MR. PICKHARDT: We are very, very close to what has been done historically in the Lima case, which we're using as a model, but we think we are very, very close to doing that.

The only other issue, it may have been implicit in what you have already indicated, but are we okay to proceed understanding it's not going to be on an expedited basis with serving any discovery requests with the matter in general at this point. There hasn't been a formal

application for a stay. I know the standard rules are that even on a pending and dispositive motion the parties may proceed with discovery generally. Is that something we may do or would you like for us to hold off on discovery?

MR. INGBER: Your Honor, for the trustee, we suggest holding off. We are confident that your Honor is going to be able to rule on this issue on the papers that the parties submit. Discovery, as you know, can be very time consuming, can be very costly. We think it's unnecessary in this case. If it becomes necessary after the papers have been submitted and your Honor hears argument on the issues, then of course we can proceed with discovery, but we would ask for a stay of discovery at this point.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: I think we need to know more about what discovery would be sought. I was under the impression from the initial go-round today that the only discovery that might be needed before the merits briefing was the methodology issue.

MR. PICKHARDT: I think that is, your Honor, the only discovery that would be needed before the merits briefing, however, your Honor, we are not as sure that your Honor will be able to resolve this case at that stage and we don't think that the discovery in this case is going to be

particularly extensive.

THE COURT: What would the discovery be?

MR. PICKHARDT: The discovery would go to really two issues. One is, again, the trustee's historical conduct around the calculations. Not just how they performed it, but whether this issue is something that they have considered using a modified rate versus using, you know, the original rate; and then secondly, would be, you know, discovery that goes to parole evidence related to the formation of the provisions that are at issue. Even though there's 278 trusts at issue, it won't surprise you that there's near uniformity on the relevant provisions. So we're talking about when those provisions were originally embodied in the agreements in the first place and parole evidence around the formation there. We think that that discovery could be available from the trustee. There may be a small number of third parties.

What we don't think is relevant here is, frankly, any discovery among the investor parties. So we think that also limits the burden. As your Honor is going to be asked to resolve, you know, the meaning of a contract and none of us were involved in forming. We do think that there is a small group of parties that were involved in the formation, in the preparation of the relevant provisions and we would like to be able to at least commence that discovery process,

you know, understanding that if we don't do that and we go however many months it will take in order to get to a ruling from your Honor, and we're just commencing discovery then, then again you're going to hear from me a bit of a broken record, but that the passage of time without even having gotten started on that process will have been to my client's prejudice.

MR. INGBER: So, your Honor, I think there's a little bit of tension in what Mr. Pickhardt said. If discovery is not as straightforward as he suggests, then we can wait and we can do it on a relatively short timetable if your Honor thinks that it's necessary after hearing argument on the issues and ruling on the papers.

I suspect that discovery about what the trustee was saying about these issues, since the inception of these deals in 2006 or so, is going to take a bit more time and is going to cost a bit more money than Mr. Pickhardt is suggesting.

What we know is what the trustee has done over the past 13 years with respect to this calculation. The trustee has used the dynamic method. That is undisputed. That is not -- doesn't have to be the subject of any discovery, and what the trustee was discussing internally at the time about this issue we think is irrelevant and would be a waste of party resources.

I don't agree, I certainly do not agree that if there's discovery in this case it's completely one-sided discovery. I think what -- if we're going to be getting into discovery we, as trustee, if we're going to be digging through our documents disclosing internal communications about what we were thinking about this issue to the extent those documents exist, well then we're going to be posing or presenting discovery requests to investors such as Silion and we're going to be probing questions about the timing of their purchases, and what they were thinking about these contracts, and how they interpreted the contract with respect to the dynamic versus the static issue, and how they modeled these deals. So we think that, yeah, if we go down this path of discovery, it would be very unyielding for the parties and ultimately unnecessary. So we would ask your Honor that a stay be in place for now and then we could always revisit this as the parties brief the issues.

THE COURT: Does anyone else want to be heard on that?

MR. WARNER: We join in that, your Honor.

MR. SHAPIRO: I completely join. I thought we were through with the discovery issue. What they're proposing is, you know, trustee and third party discovery. I mean, I don't see the point of just propounding that discovery, and if that's all they're going to do, then why not wait until

after the briefing; and if we're going do more than that, well that doesn't make any sense because as we said before it makes more sense for your Honor to decide whether or not you read these contracts as cleanly as we do and then there may be no need for discovery. I certainly don't agree with what the trustee said.

MR. WARNER: Especially given the extensiveness of it. It sounds like a huge historical investigation back years and years when your Honor is going to be presented with briefs directly related to the text, and I'm glad that at one point in Mr. Pickhardt's presentation the word parole evidence did emerge because that's what it's all about parole evidence, and parole evidence is not relevant unless your Honor finds ambiguity. So especially since we have a briefing schedule that's going pretty quickly. Why everything should wait until that takes place we don't understand.

THE COURT: Thank you.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: I am going to consider the issue for a few minutes while you're getting started on the briefing. Off the record.

(Discussion held off the record and a recess is taken.)

Proceedings

THE COURT: Back on the record. I have conferred with my law clerk and I'm prepared to approve the following briefing:

Opening brief by the trustee, by Silion and a single opening brief by the various investors, each brief of 20 pages to be served and so received by May 31. The same three opposition briefs of 20 pages to be served, so received by June 14, and the same three reply briefs of five pages to be served so received by June 28. My understanding is that the page limits have been discussed with counsel and these are workable.

In addition, I am going to stay the discovery that has been mentioned on parole evidence. I do call to the parties' attention a decision that I wrote in Lehman Brothers International Europe against AG Financial Products 60 Misc. 3d 1214A Affirmed, 168 AD3d 527.

I discuss custom and practice in that decision and the use of custom and practice in interpreting complex specialized financial instruments, but the discovery I was hearing about was not discovery of that nature. So the discovery I heard about on the record earlier I will stay pending the merits briefing.

All right. If there's nothing further.

MR. WARNER: One more thing, if I may, your Honor, does the Court have a preference for the timing and manner

of pro hac vice applications? I believe we can probably submit one by stipulation.

THE COURT: If you can stipulate and attach a copy of the certificate of good standing that would be preferable. If you have to bring motions or if it's easier for you to bring motions, I will not set in-court return dates for them.

MR. WARNER: Thank you.

THE COURT: All right. I think that's everything then. The record is closed. Thank you.

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CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

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Lynnette Y. Cruz, CRR, RPR
Senior Court Reporter

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