UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNION CENTRAL LIFE INSURANCE COMPANY, AMERITAS LIFE INSURANCE CORP. and ACACIA LIFE INSURANCE COMPANY, Plaintiffs, vs. CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., et al., Defendants.	Case No: 11-cv-2890-GBD-JCF ECF CASE

OPPOSITION TO PLAINTIFFS' MOTION TO COMMENCE DISCOVERY FROM DEFENDANT WASHINGTON MUTUAL

PRELIMINARY STATEMENT

Defendants Washington Mutual Mortgage Securities Corp. ("WMMSC") and WaMu Capital Corp. ("WCC", together with WMMSC, "WaMu") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Motion to Commence Discovery from the Defendants. WaMu joins the Memorandum of Law in Opposition to Plaintiffs' Motion to Commence Discovery, filed concurrently by defendants UBS AG and Mortgage Asset Securitization Transactions, Inc. (the "Joint Memorandum"), and all arguments in the Joint Memorandum are fully incorporated herein by reference. WaMu submits this joinder to set forth certain facts and circumstances specific to WaMu.

ARGUMENT

I. BECAUSE THE COST OF COMPLYING WITH PLAINTIFFS' DISCOVERY REQUESTS IS OUT OF PROPORTION TO PLAINTIFFS' POTENTIAL RECOVERY FROM WAMU, THE DISCOVERY REQUESTS ARE COERCIVE.

As described in the Joint Memorandum, "The purpose of the statutory stay is to prevent abusive, expensive discovery . . . by postponing discovery until 'after the Court has sustained the legal sufficiency of the complaint.'" In re Salomon Analyst Litig., 373 F. Supp. 2d 252, 254 (S.D.N.Y. 2005) (quoting S. Rep. No. 104-98, at 14 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 693). As a result, before making a finding that proceeding with discovery before a motion to dismiss is consistent with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), courts must find that the requested discovery is not likely to coerce defendants into a premature settlement. See Tobias Holdings, Inc. v. Bank United Corp., 177 F. Supp. 2d 162, 166–68 (S.D.N.Y. 2001). The pre-motion-to-dismiss discovery Plaintiffs seek from WaMu is coercive.

Given the breadth of Plaintiffs' discovery requests, the costs of collecting and producing the requested documents would approach if not exceed Plaintiffs' maximum damages.

Plaintiffs invested in public mortgage-backed securities from the WMALT 2005-3 offering, which "was a $533 million deal comprising 2,448 fixed rate mortgages with mostly 30-year terms." (Am. Compl. ¶187.) Plaintiffs' document requests seek essentially all information anywhere at WaMu regarding each one of those 2,448 loans. (See Wood Decl., Ex. D at Req. No. 7 ("All documents and communications concerning or identifying any Subject Loan."); Req. No. 42 ("All loan files, loan tapes and any other documents concerning any Subject Loan.").) And because Plaintiffs are requesting loan-to-value (LTV) ratios and appraisal values for each loan in the WMALT 2005-3 offering, Plaintiffs are essentially requesting discovery regarding 2,448 unique subjects. (See Wood Decl. Ex. D at Req. No. 9 ("All documents and communications concerning the LTV ratios of any Subject Loan."); id. at Req. No. 36 ("All documents concerning whether the property underlying any Subject Loan had any appraisal that conformed, or failed to conform, to Uniform Standards of Professional Appraisal Practice and/or Fannie Mae or Freddie Mac standards, including, but not limited to, all communications concerning the above.").) Moreover, Plaintiffs' requested discovery goes beyond the 2,448 loans at issue and extends to all loans in WaMu's inventory that were included in any WaMu offering—not just the WMALT 2005-3 offering—over a three-year period. (Id. at Req. No. 24 ("All documents concerning WaMu's decision making relating to which loans in inventory would be subject to securitization during the period January 1, 2003 through December 31, 2005.").) In short, the discovery burden in this litigation will be enormous. If recent cases regarding mortgage-backed securities are any indication, the costs of document discovery will quickly reach seven figures.

By contrast, Plaintiffs' potential damages will be low. Plaintiffs allege that "Union Central purchased a Certificate sponsored by WaMu on April 29, 2005, representing an

investment of approximately $4.3 million." (See Am. Compl. ¶186.) In no event could Plaintiffs recover damages exceeding that initial investment. Moreover, actual damages will be only a fraction of that amount. Plaintiffs' investment entitled them to receive regular income streams from homeowners paying down their mortgages (see Am. Compl. ¶¶78–85), and four years worth of such income would necessarily reduce Plaintiffs' damages. Plaintiffs' damages would also be reduced by any evidence that Plaintiffs' alleged losses were caused by events other than Defendants' conduct, including evidence that Plaintiffs' investment losses are attributable to the recession.

Given Plaintiffs' expansive document requests and the relatively small claim against WaMu, the costs of the pre-motion-to-dismiss discovery that Plaintiffs seek would approach if not exceed Plaintiffs' maximum potential damages. Thus, if such discovery were allowed to proceed, WaMu could be coerced to settle the case, even if the allegations were unfounded and legally deficient, such that they would not survive a motion to dismiss.

Under the circumstances, Plaintiffs' discovery requests implicate the very abuses of the judicial system that Congress enacted the PSLRA discovery stay to prevent. Even the Tobias case relied on by Plaintiffs emphasized this rationale behind the PSLRA. See Tobias, 177 F. Supp. 2d at 166. The court in Tobias, in allowing discovery to proceed, explicitly stated that there was no reason to believe that the requested discovery was coercive. See id. Here, as described above, the requested discovery is coercive.

II. DISCOVERY BEFORE A RULING ON A MOTION TO DISMISS IS INAPPROPRIATE BECAUSE THE COMPLAINT IS DEFICIENT ON ITS FACE.

As an independent reason for denying Plaintiffs' motion, the allegations against WaMu in the Amended Complaint are fundamentally flawed, and WaMu deserves an opportunity to seek dismissal before engaging in discovery. Before ruling that proceeding with

discovery before a motion to dismiss is consistent with the PSLRA, courts must first find that the requested discovery is not a "fishing expedition to find a sustainable claim". Tobias, 177 F. Supp. 2d at 166–68. Here, Plaintiffs seek discovery from WaMu to fill in obvious shortcomings in their complaint, which is exactly what the PSLRA is designed to prevent.

Plaintiffs allege that the mortgage loans underlying the WaMu security at issue were not originated in accordance with Washington Mutual Bank's underwriting guidelines. (See Am. Compl. ¶¶189–92.) As "support" for that allegation, Plaintiffs point to various accusations about Washington Mutual Bank's underwriting practices. (See Am. Compl. ¶¶203–60.) But Plaintiffs allege no facts that plausibly suggest that Washington Mutual Bank originated any of the loans at issue here. Plaintiffs do not allege any facts identifying the actual originator of the mortgages at issue. Nor do Plaintiffs allege any facts that plausibly suggest that those anonymous originators failed to comply with any particular set of underwriting standards. Therefore, even if every single allegation regarding WaMu's own underwriting standards were true, there would still be no suggestion that the origination of the actual loans in this case was inadequate in any way. See Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I, No. 08 CV 1713(ERK)(WDW), 2012 WL 601448, at *12 (E.D.N.Y. Feb. 23, 2012) (dismissing mortgage-backed securities claims where plaintiffs failed to plead facts regarding the originator that issued the loans underlying the securities because the "claims turn[ed] on whether the underlying loan originators' conduct was different than described by the Certificates' Offering Documents").

Plaintiffs—aware of this deficiency in their allegations and seeking colorable claims not already pleaded—have demanded extensive discovery from WaMu regarding the third-party originators of the loans at issue here. (See, e.g., Wood Decl. Ex. D at Req. No. 8

("All documents identifying the Originator(s) of all the Subject Loans."); Req. No. 11 ("All documents received or generated by WaMu concerning the 2005-3 Trust, including, but not limited to, all underwriting guidelines used by any Originator of any Subject Loan and appraisal standards used in connection with any Subject Loan."); Req. No. 12 ("All documents and communications concerning any Originator's Origination Practices in connection with any Subject Loan."); Req. No. 13 ("All documents related to the negotiations between WaMu and any Originator concerning the purchase or acquisition of any Subject Loan.").) But Plaintiffs cannot use the discovery process to correct flaws in their pleading before WaMu has had a chance to test the legal sufficiency of that pleading. Podany v. Robertson Stephens, Inc., 350 F. Supp. 2d 375, 378 (S.D.N.Y. 2004). As a result, Plaintiffs' motion should be denied.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Joint Memorandum, WaMu respectfully requests that the Court not lift or modify the mandatory automatic stay of discovery in place under the PSLRA pending this Court's ruling on Defendants' motions to dismiss, or, if the Court finds that the PSLRA stay does not apply to Plaintiffs' state law claims against Defendants, WaMu respectfully requests that the Court grant a stay of discovery pursuant to Rule 26(c) of the Federal Rules of Civil Procedure pending the disposition of Defendants' motions to dismiss.

Dated: June 29, 2012
New York, New York

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by

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