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DOCKET
in 09 MD 2017
and 08 Civ. 6762

BY HAND

March 29, 2010

Re: *In re: Lehman Brothers Mortgage-Backed Securities Litigation*, No. 08 Civ. 6762 (LAK)

Honorable Lewis A. Kaplan
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Dear Judge Kaplan:

We represent the Individual Defendants in this action (the "MBS Action"), as well as certain defendants in *In re Lehman Brothers Equity/Debt Securities Litigation*, 08 Civ. 5523 (LAK) (the "Debt/Equity Action") and *In re Lehman Bros. ERISA Litigation*, 08 Civ. 5598 (LAK) (the "ERISA Action"). We write in response to the letter dated March 26, 2010 from counsel for plaintiffs in the MBS Action ("Plaintiffs"), which asks the Court to lift for the MBS Action only the stay of discovery imposed in the consolidated and coordinated actions under Pre-Trial Order 1 ("PTO 1").[1] Plaintiffs' request should be denied because there is no need for discovery to begin immediately, and a partial lifting of the stay would be inefficient due to the overlap in allegations in the MBS and Debt/Equity Actions.

First, the discovery sought by Plaintiffs would not be "discrete and distinct from the discovery which may be taken in any of the other consolidated Lehman actions," as Plaintiffs contend. Many of the surviving allegations in the MBS Action also were made in Second Amended Complaint in the Debt/Equity Action ("SAC") and presumably will be included in the Third Amended Complaint to be filed on April 23, 2010 ("TAC"). As a result, there will be considerable overlap in discovery. For example, Plaintiffs state that they

[1] The ERISA Action plaintiffs and defendants agreed to very limited ERISA-specific discovery, such as production of ERISA Plan documents. This agreement is reflected in PTO 1. Pursuant to that agreement, the ERISA Action defendants produced 68 documents prior to the dismissal of that action.

will seek discovery from Aurora Loan Services LLC ("Aurora"), a Lehman-affiliated mortgage originator, and various third-party mortgage originators concerning their mortgage underwriting practices. Similarly, a principal allegation in the Debt/Equity SAC is that "The Offering Materials [for Debt/Equity securities] Failed To Disclose Lehman's High-Risk Residential Mortgage Lending Practice." SAC at 20. The Debt/Equity SAC then sets forth nine pages and 25 paragraphs of allegations that concern the quality of the loans originated through Aurora and other Lehman affiliates or purchased from third-party originators, and the underwriting practices used in originating those loans. For example:

- "As a direct result of Lehman's undisclosed high-risk residential mortgage lending practices, loans that Lehman either originated through wholly-owned subsidiaries or purchased from third party loan originators experienced alarming levels of payment delinquencies and mortgage defaults." SAC, ¶ 96. *Compare with* Consolidated Securities Class Action Complaint in the MBS Action ("MBS Complaint"), ¶ 70 ("pervasive underwriting failures in the origination of the collateral . . . ultimately led to widespread and deep downgrades of most of the Certificate classes.").

- ". . . Aurora's Alt-A mortgage loans were of poor quality and suffered from an increasing level of delinquencies and defaults . . . ." SAC, ¶ 98. *Compare with* MBS Complaint, ¶ 75 ("Following issuance of the Certificates collateralized by mortgages principally originated by Aurora and LBB, the delinquency rates on those underlying loans skyrocketed . . . .").

- ". . . Aurora bought mortgages from thousands of brokers and originators around the country, including from certain 'strategic partners' who produced high volume loans of lesser quality. Even though Aurora had a Quality Control unit, Quality Control only spot checked a small percentage of the loans." SAC, ¶ 104. *Compare with* MBS Complaint, ¶ 193 ("Aurora's background check of correspondents was extremely limited and opened the door for the acquisition of mortgage loans from brokers who did very little, if any, verification of the borrower's ability to repay the loans. Aurora's controls were inadequate to prevent it from acquiring suspect loans which were sure to default absent rapid, significant price appreciation of the underlying property.").

Plaintiffs also indicate they will seek discovery regarding "insurance coverage applicable to the MBS Action." However, the same directors and officers insurance policies are potentially applicable to the claims in MBS Action, Debt/Equity Action and certain of the other consolidated and coordinated actions.

Second, plaintiffs in the MBS Action, Debt/Equity Action and other consolidated and coordinated actions certainly will seek discovery of documents that are in the exclusive possession of the Lehman bankruptcy estate. Indeed, the Plaintiffs joined in a motion made before Your Honor by the Debt/Equity Action plaintiffs to lift the automatic stay under the PSLRA and a motion to the Bankruptcy Court to lift the automatic

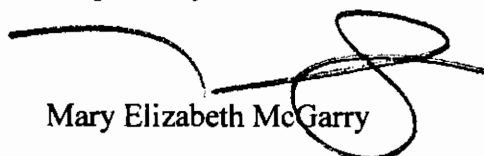
bankruptcy stay, both of which motions were denied. It would unnecessarily burden the debtors to respond to piecemeal and duplicative discovery requests. It also would waste the proceeds of the insurance policies being depleted in the defense of the MBS, Debt/Equity and other actions.

Third, Plaintiffs' request is premature in light of the motion to intervene in the MBS Action filed on March 18, 2010 by certain alleged purchasers of securities that were not purchased by the Plaintiffs. The Individual Defendants intend to oppose the motion to intervene. However, if it granted, that intervention – as well as other intervention motions by still other purchasers that very likely would follow – will alter the scope of discovery.[2] No discovery should take place *at least* until it is determined which named plaintiffs, which securities offerings, and as a result of inclusion of those offerings which mortgage originators, are involved in the case.

* * *

The various Lehman actions were centralized by the Judicial Panel on Multidistrict Litigation in order to "eliminate duplicative discovery . . . and conserve the resources of the parties, their counsel and the judiciary." *In re Lehman Bros. Holdings, Inc., Secs. & Employee Ret. Income Sec. Act (ERISA) Litig.*, 598 F. Supp. 2d 1362, 1364 (J.P.M.L. 2009). These considerations continue to militate strongly in favor of keeping the discovery stay in place until all actions are prepared to go forward on the same track, with document production and deposition testimony coordinated. Given the modest delay required for resolution of motions to dismiss the forthcoming TAC in the Debt/Equity Action, Plaintiffs' vague concern that "the passage of time might impair [their] ability . . . to obtain relevant discovery" – an argument also made unsuccessfully in support of lifting the PSLRA and automatic bankruptcy stays – is unwarranted. Accordingly, the Individual Defendants respectfully request that the Court deny Plaintiffs' request to lift the discovery stay.

Respectfully,



Mary Elizabeth McGarry

cc: All Counsel (by e-mail)

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[2] The proposed intervenors' claims implicate two mortgage originators – First Franklin Financial Ltd. and First National Bank of Nevada – that are not implicated by the existing Plaintiffs' claims.