SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

U.S. BANK NATIONAL ASSOCIATION, not in its individual capacity, but as trustee for MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM4 and MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM5,	:	Index No. 654403/12
Plaintiff,	:	DECISION AND ORDER
-against-	:	Motion Sequence No. 003
MERRILL LYNCH MORTGAGE LENDING, INC., MERRILL LYNCH MORTGAGE INVESTORS, INC. and BANK OF AMERICA, NATIONAL ASSOCIATION,	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is a motion by U.S. Bank National Association (U.S. Bank) to compel the production of documents from Merrill Lynch Mortgage Lending, Inc. (Merrill Lynch) and Bank of America, National Association (Bank of America).

I. Standard of review

New York favors "open and far-reaching pretrial discovery." *Kavanagh v Ogden Allied Maint. Corp.*, 92 NY2d 952, 954 (1998). This principle is enshrined in CPLR 3101, which provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." N.Y. CPLR 3101(a). "The test is one of usefulness and reason," and "require[s] disclosure, upon request, of any facts bearing on the controversy which will assist [in] preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v Crowell-Collier* 21 NY2d 403 (1968). Disclosure should be permitted as long as the

information sought "bears on the controversy and will assist in the preparation for trial." *Hall v 130-10 Food Corp.*, 677 NYS2d 923 (1998).

II. Documents related to Merrill's internal assessments and generally-applicable policies and procedures

The first category of documents that U.S. Bank seeks are those concerning (1) Merrill's internal assessment of its repurchase liability with respect to the ResMAE loans that collateralize the two trusts (Trusts) at issue, and (2) Merrill's generally-applicable policies and procedures for repurchasing securitized loans since 2005.

Merrill's internal assessments of its own liability are highly relevant within the context of the current dispute, and these documents are discoverable and must be produced by Merrill. In determining the nature and extent of the Guaranty Provision of the Sales Agreement between U.S. Bank and Merrill, whether or not Merrill believed that it was liable for the repurchase of the loans at issue bears directly on the controversy and will serve to clarify what the parties intended by their agreement. *See e.g. HEMT*, 2013 WL 6037308 ("[w]hat [Defendant] . . . knew about the Loans and when they knew it is highly relevant to determining if and when [Defendant] breached its obligation to repurchase Loans that violate the Representations and Warranties"); *MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, Index No. 603751/2009, Dkt. 230 (Sup Ct NY Cnty May 18, 2012) (compelling production of repurchase requests because they "relate to the quality of the loans securitized in the [t]ransaction, which plaintiff alleges were pervasively defective and breached contractual warranties").

Merrill claims that it has produced enough, pointing to its production of a "reasonable set of responsive, non-privileged documents." As U.S. Bank points out, the standard for discovery

does not allow for what one party deems a "reasonable" selection of relevant documents. CPLR requires "full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." CPLR 3101 (a). Merrill must produce *all* responsive documents, not just limited extracts from the CLAIMS and DOCS databases.

In terms of Merrill's generally applicable policies and procedures regarding the repurchase of securitized loans, Merrill contends that such documents are irrelevant in this case because the dispute is purely contractual in nature. Merrill claims to have relied solely on its own legal interpretations of the Sales Agreement, and that any general policies or procedures were not implicated and should not be discoverable. U.S. Bank is not required to take Merrill at its word in terms of what Merrill relied on and what it did not in deciding against repurchasing the loans – quite the opposite, in fact. U.S. Bank is entitled to test the assertions of Merrill, and the means to that end is through the discovery process in which the parties are presently engaged. The fact that these documents are sought in good-faith and present more than a mere possibility that relevant evidence will arise, along with the lack of precedent cited by Merrill in supporting its proposition that policies and procedures are irrelevant in a contractual dispute, persuade the court to compel production of the requested general policies and procedures.

III. Expert reports from previous litigations

The second category of documents that U.S. Bank requests from Merrill are deposition transcripts and expert reports from two previous litigations involving the same trusts that are at the center of the dispute in this case.[1] Since U.S. Bank filed its motion to compel production of

[1] *Federal Housing Finance Agency, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation v. Merrill Lynch & Co., Inc., et al.*, No. 1:11-cv-06202 (SDNY) (*FHFA*); and *Allstate Insurance Company, et al. v. Merrill Lynch & Co., et al.*, Index No. 650559/2011 (Sup Ct NY Cnty) ("*Allstate*").

these documents, the parties have come to an understanding regarding the deposition transcripts in both litigations, and the expert reports in the *Allstate* case. The issue that remains is whether U.S. Bank is entitled to all of the expert reports from the *FHFA* litigation, or just those that explicitly include reference to ResMAE-originated loans.

Requested expert reports need not directly involve any ResMAE-originated loans in order to be discoverable. If the expert reports are documents from "investigations of broader practices or issues that are not explicitly tied to loans in this case but are nevertheless pertinent," then these documents should be produced "even if that investigation focused entirely on other loans[.]" *Fort Worth Emps.' Ret. Fund, Inc.*, 297 F.R.D. at 111 (SDNY 2013). The expert reports that U.S. Bank requests concern similar loans as those in the instant action. It is not unreasonable to presume that the "broader practices or issues" discussed in these other expert reports will shed light on the Guaranty Provision of the Sales Agreement, as well as other disputed issues in this case.

The court finds Merrill's attempts to distinguish *Fort Worth* unpersuasive. The fact that the instant action involves two trusts and a single originator, as opposed to eleven trusts and "various" originators, does not diminish the applicability of the analysis. Further bolstering the case for production of all relevant *FHFA* expert reports is the fact that compliance with the request will not result in any undue burden on Merrill. The court compels production of the requested documents in a timely manner.

IV. Documents from past government investigations

The dispute involving the third category of documents requested by U.S. Bank is whether or not the U.S. Bank's request for certain documents from past government investigations is

sufficiently "narrow". Merrill claims that U.S. Bank is demanding "complete, cloned re-production of literally hundreds of millions of documents previously produced" in various government agency investigations related to Merrill's RMBS policies and practices. U.S. Bank counters that its requests are narrowly-tailored and would only implicate documents that match the previously agreed upon search terms that are already being applied to Merrill's centrally-maintained ESI.

The court has held that past government investigations into the same or similar transactions, mortgage loans, origination, and security practices are relevant in later civil cases. *See Home Equity Mortg. Trust v. DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2013 WL 6037308 (Sup Ct NY Cnty Nov. 8, 2013) ("*HEMT I*"). In *HEMT I*, the court found that documents produced to government investigators that implicated the due diligence and quality control practices during a specific timeframe "directly affected the loans at issue [t]here and [we]re therefore discoverable." *Id.* It is important to note that *HEMT I* involved a contractual dispute not unlike the dispute in the case at hand.

Recognizing that documents involved in past government investigations are relevant and discoverable, the question remains as to whether the U.S. Bank's request in this case is too broad. The court finds that it is not, and that U.S. Bank has sufficiently tailored its requests so as to compel production. Merrill has identified eight relevant government investigations involving five separate government agencies. Within these eight investigations, U.S. Bank requests that Merrill produce the documents captured by running the parties' agreed-upon search terms. While Merrill and its affiliates may have produced roughly 60 million pages of documents in a New York Attorney General investigation, and 120 million in a separate Department of Justice

investigation, it is important to note that U.S. Bank is not requesting all, or even most, of these documents. As the many cases that Merrill cites indicate, to do so would be for U.S. Bank to overreach. But nothing in these cases pushes against the notion that a more narrowly-tailored search satisfies the requirements of CPRL 3101. In fact, at least one case cited by Merrill stands for the very proposition that Merrill is attempting to debunk. *Capital Ventures International v J.P. Morgan Mortgage Acquisition Corp.*, No. 12-cv-10085, 2014 WL 1431124 (D Mass April 14, 2014) ("Defendants have offered to run agreed-upon search terms over their productions to the SEC and New York Attorney General, which should be sufficient to capture materials relevant to the issues in this case.")

In this case, U.S. Bank seek three categories of documents from previous government investigations: (1) Merrill's repurchase policies and practices since 2005, (2) Merrill's securitization policies and practices from 2005 to 2007, and (3) Merrill's diligence policies and practices from 2005 to 2007. The court finds that to apply the previously agreed-upon search terms to the government investigation documents in search of those falling into the three aforementioned categories would not place an undue burden on Merrill. The court compels production of these documents in a timely manner.

V. Representative securitization deals

U.S. Bank also requests four categories of documents related to 15 representative securitization deals for which Merrill and its affiliates acted as both sponsor and depositor. These four categories include documents concerning the repurchase of specific loans or obligations and whether and how much to reserve for repurchase liability, as well as drafts and redlines of relevant Sale Agreements. In light of the Appellate Division's June decision, holding

that the terms of the relevant contract provision are ambiguous, these similar, Merrill-sponsored RMBS documents are certainly highly relevant. This is far from a fishing expedition, but a limited probe into documentation and related communications dealing with Merrill's degree of liability in mortgage put-back transactions. The scope of the request is appropriately tailored, and will place no undue burden on Merrill.

Merrill seeks to block production by tying its own refusal to produce documents to the U.S. Bank's refusal to produce similar documents concerning seven trusts for which U.S. Bank served as trustee. The key issue in this case is the proper interpretation of the Guaranty Provision in the Sale Agreement between Merrill and the certificate holders. U.S. Bank was not a party to this Agreement, and it is unclear why documents from a third-party to the Agreement, many of which are likely privileged, would help clarify the intentions of the two contracting parties. The court said as much in *Home Equity Mortgage Trust, Series 2006-5 v. DLJ Mortgage Capital, Inc.*, No. 653787/2012 (Sup. Ct. N.Y. Cnty. July 31, 2014) ("[a]s non-parties to the events underlying the claims and defenses in this case, the Directing Certificateholders' internal thoughts and beliefs are irrelevant for determining defendants' liability in this action.") Merrill has failed to distinguish the current facts from *Home Equity*, and thus its request for production is denied.

The court compels production of these documents in a timely manner.

U.S. Bank has a number of issues with the specific search terms to be used in finding these documents. The first is that Merrill should include the term "rep* OR warrant*" in the first search string, as opposed to relying only on the terms "backstop" and "guaranty" to find relevant documents. As the transacting parties and rating agencies routinely use the terms

"representation" or "warranty" to describe the guaranty at issue here, Merrill should include "rep* OR warrant*" in its search terms. Second, Merrill seeks to limit the Deal-Name search string to those documents containing terms such as "draft" or "redline". As this limitation could exclude relevant communications with rating agencies or certain internal communications, Merrill is directed to refrain from so limiting its search results. Third, U.S. Bank seeks to search within a single representative deal for the string "'Affirmative Notice' OR rating*". The court agrees with U.S. Bank that such a search could produce relevant documents. Fourth, Merrill has used a 15-word proximity delimiter for the Deal-Name search string. U.S. Bank complains that this is too restrictive, and seeks, at minimum, a 30-word proximity delimiter. That request is granted, as deal names are often found at the beginning of a document or in the subject line of an email, whereas key subject-matter terms typically do not appear until much later in the document or email. Finally, Merrill is not permitted to condition its acceptance of a search string on U.S. Bank's agreement not to seek additional 'representative deal' search strings in the future.

Merrill is ordered to run the search strings identified in the Second Supplemental Annex A of U.S. Bank's Reply to Defendant's Sur-Reply across each custodian's documents until the filing of the Complaint on December 18, 2012, the agreed-upon prior productions, and all centrally-maintained files likely to contain documents for any of the 15 representative deals.

VI. Date range for search of custodial documents

U.S. Bank raises an issue with the proposed end date for Merrill's search of custodial documents. Merrill initially proposed an end date of November 23, 2006, one month after the MLMI 2006-RM5 securitization's closing. U.S. Bank responded with a request that Merrill either represent that there are unlikely to exist responsive documents after this proposed end date,

or propose an expanded date range. Merrill complied with U.S. Bank's request, extending the end date to December 31, 2007. U.S. Bank continues to claim that the end date should be extended to the day that the Complaint in this case was filed (December 18, 2012).

U.S. Bank cites the fact that Merrill's sampling method only included one custodian and one month in 2008, and thus does not show that there are unlikely to be responsive documents post-2008. The court does not find Merrill's methods faulty. For example, the reason only one custodian was included in the sample was because the parties had already reached an agreement to extend the remaining custodians' search end dates. However, the fact that the end dates for searches of other custodian documents were extended to December 18, 2012 suggests that to extend the end date of the remaining custodian(s) to December 18, 2012 would not hoist an undue burden upon Merrill, and could lead to the discovery of relevant documents that U.S. Bank is entitled to. Merrill is ordered to search each custodian's documents until the filing of the Complaint on December 18, 2012.

VII. Mootness of certain requests to produce

Merrill contends that U.S. Bank's demands for the production of documents concerning Merrill's evaluation of ResMAE's loan origination practices and loss reserves are moot. U.S. Bank, in turn, asserts that Merrill has been "vague" and "evasive" in responding to U.S. Bank's requests for these documents. It appears that Merrill has agreed to produce all responsive, non-privileged, centrally-maintained documents concerning Merrill's evaluation of ResMAE's loan origination practices during 2005 and 2006. In terms of the loss reserves, Merrill clearly states in its sur-reply that it will produce non-privileged, centrally maintained

documents either reflecting or concerning Merrill's decision not to take loss reserves on the Trusts. These issues are moot.

VIII. Corporate witnesses

Finally, U.S. Bank seeks a corporate witness for deposition regarding two matters: 1) potential documents and custodians for the 15 representative securitization deals discussed above, and 2) potential documents and custodians concerning Merrill's servicing and breach notification policies. U.S. Bank is entitled to depose representatives of Merrill with knowledge of the location of relevant documents and the identities of relevant custodians. Merrill must designate a corporate witness for each of these matters.

ORDERED that the motion to compel the production of documents is granted.

Dated: November 13, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER