

MBIA Ins. Corp. v Credit Suisse Secs (USA) LLC

2014 NY Slip Op 32025(U)

July 31, 2014

Supreme Court, New York County

Docket Number: 603751/2009

Judge: Shirley Werner Kornreich

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SHIRLEY WERNER KORNREICH
J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MBIA INSURANCE CORPORATION,

Index No.: 603751/2009

Plaintiff,

DECISION & ORDER

-against-

CREDIT SUISSE SECURITIES (USA) LLC,
DLJ MORTGAGE CAPITAL, INC., and
SELECT PORTFOLIO SERVICING, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff MBIA Insurance Corporation (MBIA) moves by order to show cause, pursuant to CPLR 3124, to compel testimony and the production of documents from non-party McKinsey & Company (McKinsey). McKinsey and defendants (collectively, Credit Suisse) oppose the motion. MBIA's motion is granted to the extent set forth in the following decision.¹

The subject RMBS transaction closed in April 2007. In the summer of 2007, Credit Suisse retained McKinsey to conduct a review of its mortgage operations. A major impetus of the review was Credit Suisse's acquisition of a sub-prime mortgage originator (Lime). While the integration of Lime into Credit Suisse was a major focus of McKinsey's retention, McKinsey's analysis also addressed Credit Suisse's overall mortgage department structure and various problematic issues. Indeed, a review of Credit Suisse's emails from the summer of 2006 through

¹ The court respectfully requests that when an attorney files all of its exhibits in a single pdf, as Mr. Slarskey did here, he should indicate in his affirmation the page number *of the pdf* where each exhibit begins. Citations to that pdf in the parties' brief should then reference the relevant pdf page number. Moreover, if possible, pdfs should be searchable.

much of 2007 reveals discord in Credit Suisse's underwriting department over the trading and sales departments' ability to overrule risk decisions.

In 2012, MBIA requested discovery on McKinsey's engagement with Credit Suisse. The court denied this request at that early stage believing the requested discovery to be immaterial and unnecessary because McKinsey was retained after the subject transaction closed. McKinsey's report, dated September 13, 2007, however, opined on countless topics regarding Credit Suisse's RMBS operational structure.² One such topic was the concern, articulated by Credit Suisse's underwriting department, regarding conflict of interest and the perils of allowing a sales desk to make risk decisions. MBIA, since, has obtained the McKinsey report by virtue of it being an exhibit to a deposition transcript from another action.

Based on a review of the McKinsey report, the court believes that MBIA is entitled to depose McKinsey employees who wrote the report. The report, as it pertains to the operational structure of Credit Suisse during the subject transaction is necessary, material and relevant.

² Credit Suisse's argument that McKinsey's report did not specifically focus on the type of collateral in the subject transaction (closed-end second lien loans) is not particularly persuasive. Though the report does emphasize subprime and Alt-A loans, McKinsey's organizational structure and fulfillment process critiques appear to be aimed at Credit Suisse's overall RMBS organizational structure (e.g., "Five Key Issues Leading to Ineffective Governance and Communication **Across RMBS Origination Organization**") (emphasis added) McKinsey clearly recognized (as McKinsey described it, a "misalignment of") incentives that exist when sales (whose compensation is based on volume, not long term performance) can override risk decisions made by the underwriting department (whose performance is judged based on risk assessment, not sales volume). *See generally United States v Countrywide Home Loans, Inc.*, No. 12-cv-1422, Dkt. 343 (SDNY July 30, 2014) (Rakoff, J) (discussing the impact of a similar incentive structure on Countrywide's fulfillment process). Moreover, McKinsey interviewed many of the important witnesses in this case, such as Robert Socco, Margaret Dellafera, Mike Daniels, Bruce Kaiserman, and Pete Sack. That these individuals were questioned by McKinsey about Credit Suisse's RMBS business, and that such individuals appear in charts addressing, for instance, "Organizational Issues Faced at RMBS Today," indicates that McKinsey's engagement touched on the practices at issue in this action.

Before such depositions take place (and indeed before the identification of who the proper deponents are), McKinsey shall produce, at MBIA's expense, all emails exchanged between McKinsey and Credit Suisse employees during the engagement related to that engagement. McKinsey need not produce its own internal emails. After review of the production, MBIA shall identify the one or two individuals it wishes to depose. Those individuals shall be the persons who primarily worked on the report relating to Credit Suisse's organizational structure during the relevant time period.

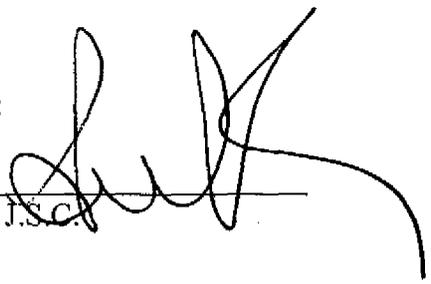
Finally, the McKinsey discovery shall not delay the completion of the other scheduled depositions nor will expert discovery wait until this discovery is complete. The parties and counsel for McKinsey shall contact the court at the time set forth below to resolve any disputes with respect to this ruling. Additionally, as agreed on a July 30 call with the court, the schedule for expert discovery shall also be discussed. Accordingly, it is

ORDERED that MBIA's motion to compel discovery from McKinsey is granted as follows: (1) by September 10, 2014, McKinsey shall produce all emails exchanged between its employees and Credit Suisse employees during the period of the discussed 2007 engagement that are related to that engagement; (2) MBIA shall pay McKinsey for the reasonable cost of that production; (3) MBIA shall complete its review of this production by October 15, 2014; (4) a future compliance conference will be held during the week of October 20, 2014 to determine which McKinsey employees will be deposed (if such individuals no longer work for McKinsey, their contact information shall be provided so that MBIA may serve them with subpoenas); (5) such depositions shall be completed by November 14, 2014; and (6) this discovery shall not delay expert discovery; and it is further

ORDERED that counsel for MBIA, Credit Suisse, and McKinsey shall call the court for a status conference on August 4, 2014 at 11:30 a.m.

Dated: July 31, 2014

ENTER:



J.S.C.