

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

KABBAGE, INC. d/b/a KSERVICING, et al.,

Debtors.¹

Chapter 11

Case No. 22-10951 (CTG)

(Jointly Administered)

Hearing Date: March 22, 2023, at 1:00 pm ET

Re: Dkt. Nos. 622 & 683

**REPLY TO OBJECTION OF AMERICAN EXPRESS TO JOINT MOTION OF CROSS
RIVER BANK AND CUSTOMERS BANK FOR AN ORDER AUTHORIZING RULE
2004 EXAMINATION**

Cross River Bank (“**Cross River**”) and Customers Bank (collectively, the “**Movants**”) file this reply to the *Objection of American Express to Joint Motion of Cross River Bank and Customers Bank for an Order Authorizing Rule 2004 Examination* [Dkt. No. 683] (“**Objection**”).²

1. The Movants just want their files. It is undisputed that (1) American Express has these files and (2) the files have not been turned over to the Movants despite more than a year of efforts. American Express further does not dispute that access to the files is necessary, not just for the Movants, but also for the third-party borrowers whose continued loan servicing depends on it, to say nothing of potential regulatory obligations. Although American Express now suggests that it intends to deliver the files to Movants, as of the time of filing this reply it has refused to make

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, as applicable are: Kabbage, Inc. d/b/a KServicing (3937); Kabbage Canada Holdings, LLC (N/A); Kabbage Asset Securitization LLC (N/A); Kabbage Asset Funding 2017-A LLC (4803); Kabbage Asset Funding 2019-A LLC (8973); and Kabbage Diameter, LLC (N/A) (collectively, the “Debtors”).

² All terms not defined herein have the meaning given to them in the *Joint Motion of Cross River Bank and Customers Bank for an Order, Pursuant to Section 105(a) of the Bankruptcy Code, Bankruptcy Rule 2004, and Local Bankruptcy Rule 2004-1, Authorizing and Directing the Examination of American Express Kabbage Inc.* [Dkt. No. 622] (“**Motion**”).

any firm commitments concerning the scope or timing of that delivery. Given the timeline of the case and the consistent delays in providing these files—which belong to the Movants—Court oversight would be useful in resolving the issues and ensuring that the Movants receive their files consistent with the Debtors’ obligations to deliver. The Debtors were always just holding these files in trust for the Movants and the fact that they somehow transferred possession to American Express, without Movants’ consent, should not prevent the Movants from receiving them before the Debtors wind down.

2. Cross River has been demanding its files for years. At every turn, Cross River has been met with delay. In January 2023, Cross River directly asked American Express for the files, and was told to work through the Debtors to make any requests. Cross River then urged the Debtors to demand the files, but documents remain outstanding despite the Debtors’ January 13, 2023 request. In the interim, the Court confirmed the Debtors’ Plan, and all parties understand that time is of the essence, including in connection with the transfer of servicing. American Express’s failure to produce the documents promptly would harm not just Movants, but also third-party borrowers whose continued servicing is implicated by the transfer of such information.

3. American Express does not and cannot dispute that it needs to produce these files. Indeed, to American Express’ credit, within the last week, it has been cooperating with Cross River to begin production of the files, however on an initial review those remain incomplete, missing data, and without explanation regarding some of the data provided. Moreover American Express has also refused to make any commitments concerning the terms, scope, or timing of the transfer. Through counsel, Cross River sent the following email to American Express’ counsel last night in an effort to resolve the Motion:

Based on conversation yesterday, Cross River’s understanding is that Amex has agreed to produce the documents requested in the motion. If that is the case and if American Express

can produce those documents by March 31, then Cross River can withdraw from the motion.

If American Express will produce the documents requested in the motion, but cannot do so by March 31, we are amenable to adjourning the hearing for a reasonable period of time so that American Express can make the production.

However, if American Express will not confirm that it will produce the documents requested in the motion, we intend to move forward with the motion.

Please let us know.

American Express has not responded to that email.

Dated: March 17, 2023
Wilmington, Delaware

Respectfully submitted,

**BENESCH, FRIEDLANDER, COPLAN &
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CERTIFICATE OF SERVICE

I, Gregory W. Werkheiser, hereby certify that on March 17, 2023, the prefixed document was served via CM/ECF on all parties registered to receive notices in this case and on the parties listed below via email:

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Dated: March 17, 2023

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