

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Hon. Saliann Scarpulla

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STAY ENTRY OF FINAL JUDGMENT**

PRELIMINARY STATEMENT

Respondent American International Group, Inc.¹ (“AIG”) respectfully submits this memorandum of law, along with the accompanying Affirmation of Michael Rollin, dated February 4, 2014 (“Rollin Aff.”), and the exhibits annexed thereto, in support of its motion to stay entry of final judgment in the instant Article 77 proceeding.² A stay is necessary so that the many issues that were left open in Justice Barbara Kapnick’s January 31, 2014 decision (the “Decision”) can be litigated in this action. As discussed below, absent a stay, all of the objecting parties will be prejudiced because they will have no effective or efficient way of seeking judicial redress as future proceedings take place, as contemplated by the Settlement Agreement that is the subject of this proceeding.

In the Decision, Justice Kapnick approved, in part, a proposed \$8.5 billion settlement (the “Settlement”) that was entered into among the Bank of New York Mellon (“BNYM” or “Trustee”), in its capacity as Trustee for 530 residential mortgage backed securitization

¹ This Motion is being made on behalf of all of the Respondent American International Group, Inc. entities, including American International Group, Inc., American General Assurance Company, American General Life and Accident Insurance Company, American General Life Insurance Company, American General Life Insurance Company of Delaware, American Home Assurance Company, American International Life Assurance Company of New York, Chartis Property Casualty Company, Chartis Select Insurance Company, Commerce and Industry Insurance Company, First SunAmerica Life Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Insurance Company, SunAmerica Annuity and Life Assurance Company, SunAmerica Life Insurance Company, The Insurance Company of The State of Pennsylvania, The United States Life Insurance Company in The City of New York, The Variable Annuity Life Insurance Company, and Western National Life Insurance Company.

² This Order to Show Cause is merely the first step in the process by which AIG will be challenging the Decision which only partially approved the settlement. In addition to the present motion, AIG intends to file a CPLR § 4404(b) motion challenging the Court’s legal and analytical errors as to the part of the settlement it approved. As will be detailed in the coming motion, the Trustee’s conduct throughout the process was conflicted and self-interested, and wholesale rejection of the settlement was warranted based on the law and the facts of this case.

("RMBS") trusts; Bank of America Corporation and BAC Home Loans Servicing, LP (collectively, "Bank of America"); and Countrywide Financial Corporation, and Countrywide Home Loans, Inc. (collectively "Countrywide"). A copy of the Decision is annexed to the Rollin Aff. as Exhibit A.³

The Settlement (a copy of which is annexed to the Rollin Aff. as Exhibit B) purports to resolve certain claims that the beneficiaries of the 530 RMBS trusts have against Bank of America and Countrywide, the entities that sold and/or serviced the underlying mortgage loans. AIG, one of the beneficiaries of the trusts, objected to the Settlement on the grounds, among others, that it was inadequate and collusive.

Although Justice Kapnick approved most of the Settlement, she explicitly rejected the Settlement to the extent that it purports to release the trust beneficiaries' claims that Bank of America and/or Countrywide are required to repurchase underlying mortgage loans that have been modified (the "Loan Modification Claims"). Decision, at 53. With respect to these claims, Justice Kapnick found that the "Trustee acted 'unreasonably or beyond the bounds of reasonable judgment,' . . . in exercising its power to settle the loan modification claims without investigating their potential worth or strength . . . Accordingly, it is hereby ORDERED and ADJUDGED that the Settlement Agreement is approved except to the extent that it releases the loan modification claims." *Id.* These Loan Modification Claims could be worth tens of billions of dollars.

In addition to rejecting a significant piece of the Settlement, the Decision fails to address many questions relating to the effectuation of the portion of the Settlement that was approved, including how much of the Settlement amount ultimately will be distributed to the trusts, which

³ The Decision contemplates the entry of final judgment as early as February 7, 2014. Decision, at 53.

trusts will be covered by the Settlement, and how the Settlement proceeds will be allocated among the covered trusts. Further proceedings will be required to resolve these and other open questions.

In the interests of fairness, efficiency, and judicial economy, these open questions all should be resolved in this action. Indeed, the Trustee and Bank of America contemplated precisely that result when they asked Justice Kapnick to retain continuing jurisdiction “for all matters relating to the Settlement and this Article 77 Proceeding, including the administration, interpretation, effectuation, or enforcement” of the Settlement. Proposed Final Order and Judgment (annexed to the Rollin Aff. as Exhibit C), ¶ (u). But the Decision does not address this Court’s continuing jurisdiction, and, as a result, the entry of a final judgment in this case could leave the trust beneficiaries with no choice but to commence new, duplicative actions in order to protect their rights. In order to avoid this inefficient result, the entry of final judgment should be stayed so that all issues relating to the enforcement or effectuation of the Settlement may be litigated in this action.

ARGUMENT

The Entry Of Final Judgment Should Be Stayed In Order To Ensure That Further Issues Relating To The Effectuation Of The Settlement Can Be Litigated In This Action

Critical features of the Settlement were not addressed in the Decision and, no doubt, will be the subject of future litigation. Under these circumstances, final judgment should not be entered. *See Slewett & Farber v. Board of Assessors*, 80 A.D.2d 186, 200-01, 438 N.Y.S.2d 544, 556 (2d Dep’t 1981) (final judgment “will issue only after all factual and legal issues have been decided”), *modified on other grounds*, 54 N.Y.2d 547, 446 N.Y.S.2d 241 (1982).

First, the Decision does not address which trusts will be covered by the Settlement. Paragraph 3(d)(iv) of the Settlement affords Bank of America complete discretion to exclude any trust in its entirety where just one bond is insured by a financial guaranty company, unless the insurer agrees not to pursue its rights against Bank of America. Further, under paragraph 4(b), Bank of America appears to have a right to exclude trusts on some other unspecified basis. AIG does not know how many trusts – or which ones – may be excluded from the Settlement under these provisions.

Second, the Decision does not address how much of the \$8.5 billion Settlement will actually be distributed to the trust beneficiaries. Under the terms of the Settlement, the portion of the \$8.5 billion Settlement that is allocable to any excluded trust will be retained by Bank of America, thereby reducing the amount of the Settlement proceeds actually being paid to trust beneficiaries. Settlement, ¶ 4(a). AIG does not know how much of the \$8.5 billion Settlement will be retained by Bank of America.

Third, the Decision does not address how the Settlement proceeds will be allocated to the covered trusts. The Settlement provides that BNYM's expert will calculate the cumulative lifetime losses suffered by each of the 530 RMBS trusts and then allocate the Settlement proceeds on a pro rata basis based on those losses. Settlement, ¶¶ 3(c)(i), 3(c)(ii), 3(c)(iv). But the method by which the trust losses will be calculated is incomplete. And because the Trustee's allocation expert was told to stop work on calculating the estimated lifetime losses and the pro rata share of losses suffered by the trusts, AIG does not know what percentage or amount of the Settlement proceeds will be allocated to the trusts, including those in which AIG has an interest.

BNYM should be required to address all of these open issues in this action. It should be required to make a full accounting of the method by which losses will be calculated, the amount

of money that will be distributed to each trust, the number of trusts that will be excluded from the Settlement, the amount of money that will be retained by Bank of America, the method and amount of distributions within each trust, and the relationship between the amount each trust will be paid and the amount of damage suffered by each trust as a consequence of the claims being released. AIG and other trust beneficiaries will seek and are entitled to limited discovery from BNYM and/or Bank of America on some or all of these issues, and they also may seek to challenge the allocation methodology and other matters relating to the effectuation of the Settlement.⁴

By entering final judgment, these matters – all of which could be efficiently litigated in the instant action – will instead be addressed through the subsequent filing of multiple, overlapping proceedings. That result runs counter to basic principles of fairness and judicial economy. The only way to avoid this situation and the attendant prejudice to the objecting parties is to stay entry of judgment.

CONCLUSION

For all of the foregoing reasons, Respondent AIG respectfully requests that the Court stay entry of final judgment until the Court has had an opportunity to conduct such further proceedings as may be necessary to determine: all variables associated with the method by which losses will be calculated, the amount of money that will be distributed to each trust, the number of trusts that will be excluded from the settlement, the amount of money that will be


⁴ The resolution of these issues could affect the decisions by AIG and other investors regarding whether to pursue their Loan Modification Claims, which, as explained above, Justice Kapnick specifically held were not released by the Settlement. Resolution of these open issues is critical because information about the value and potential recovery has a significant bearing for investors as they assess the allocation of the settlement payment. For this reason, the Court should not only postpone the entry of judgment, but also allow the parties to litigate the open issues relating to the allocation of the Settlement proceeds now, not after the exhaustion of all appeals.

retained by Bank of America, the method and amount of distributions within each trust, and the relationship between the amount each trust will be paid, and the amount of damage suffered by each trust as a consequence of the claims being released.

Dated: New York, New York
February 4, 2014

Respectfully submitted,

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