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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 RETIREMENT BOARD OF THE
4 POLICEMEN'S ANNUITY AND
5 BENEFIT FUND OF THE CITY OF
6 CHICAGO, et al

7 Plaintiff,

8 v.

11 CV 05459

9 BANK OF NEW YORK MELLON,
10 Defendant.

11 -----x
12 New York, N.Y.
13 November 3, 2011
14 12:25 p.m.

15 Before:

16 HON. WILLIAM H. PAULEY III,

17 District Judge

18 APPEARANCES

19 SCOTT & SCOTT, LLP
20 Attorneys for Plaintiff, Chicago Police Retirement Fund
21 and other pensions funds
22 BY: BETH ANN KASWAN MAX
23 RAPHAEL SCHWARTZ

24 MAYER BROWN, LLP
25 Attorneys for Defendant Bank of New York Mellon
BY: MATTHEW D. INGBER
CHRISTOPHER JAMES HOUP

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1 (Case called)

2 THE CLERK: All rise.

3 THE COURT: Good afternoon, please be seated. All
4 right. This is a premotion conference.

5 Mr. Ingber, do you want to be heard?

6 MR. INGBER: Please.

7 Your Honor, should I take the podium?

8 THE COURT: I think so, yes.

9 MR. INGBER: Your Honor, we're seeking permission to
10 file a motion to dismiss, because we believe there is several
11 problems with the complaint as filed by the Policemen's Fund
12 that would require dismissal of the entire case. And I would
13 like to focus on two issues today. The first, is standing.

14 Plaintiffs have or had holdings in 27 of the 534
15 trusts that are at issue in this case. There is 507 trusts in
16 which no named plaintiff has invested. And there has to be at
17 least one named plaintiff with holdings in these trusts or
18 there is no injury and there is no standing. And that's
19 consistent with your Honor's ruling in In Re: Smith Barney, 765
20 F.Supp 2d. where you ruled on a motion to dismiss that because
21 the named plaintiffs invested in only three out of a 103 funds
22 at issue, the claims with respect to those other funds had to
23 be dismissed. Same thing here.

24 It's consistent with your Honor's rulings in the
25 Pipefitters case that was a motion for appointment of lead

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1 plaintiff. And even though it was a motion to dismiss, the
2 principle was the same that you need standing to pursue your
3 claims. In particular, you need to have invested in that case
4 in the fund that was at issue.

5 It is consistent with your Honor's decision in Baydale
6 2009 Westlaw 260-3140. And so we think the law in the Second
7 Circuit is pretty clear, in particular --

8 THE COURT: At least in this courtroom, right?

9 MR. INGBER: And certainly in this courtroom it is
10 clear that unless they have holdings in the other trusts, they
11 have no standing to pursue claims with respect to those trusts.

12 Now, that standing issue -- and this leads to the
13 second issue. That standing issue creates a subject matter
14 jurisdiction problem, really, for the whole case. When we
15 focus on the trusts in which plaintiffs have holdings or had
16 holdings, many of them they don't have any current holdings,
17 there is 27 trusts. But only one of the trusts, your Honor, is
18 governed by the Trust Indenture Act. And we're fully prepared
19 to brief this. By its terms, the unambiguous terms of the
20 Trust Indenture Act, it doesn't apply to a security, quote,
21 "other than a note, bond, debenture or evidence of
22 indebtedness."

23 So only the trusts in this case that issue debt in the
24 form of notes are subject to the Trust Indenture Act. There is
25 only one of those trusts. The other trusts are governed by

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1 cooling and servicing agreements. And the trust issued
2 certificates to certificate holders. And those certificates
3 are equity, they are not debt. And that distinction is
4 critically important under the Trust Indenture Act. And we
5 know that those certificates are equity because the PSA --
6 well, there is a number of sources. But, for one, the PSA
7 tells us that it is equity. Exhibit E to the PSAs that are at
8 issue here. The certificate represents, quote, "beneficial
9 ownership interest in the trusts."

10 THE COURT: But the question of whether mortgage
11 backed securities are debt securities is a close question,
12 isn't it?

13 MR. INGBER: I don't think it is a close question.
14 It's not a close question because, like I said, the PSAs tell
15 us that the certificates are equity and not debt. I mentioned
16 exhibit E, Section 2.06 of the PSA, the certificates are
17 authorized denominations evidencing directly or indirectly the
18 entire ownership of the trust fund. The treatises that
19 discussion mortgage-backed securities say that with regard to
20 trusts, certificates evidencing ownership interest therein
21 should be viewed as equity security, since certificate holders
22 are only entitled to receive distributions in respect to their
23 trust certificates when, as, and if the trusts receive funds in
24 respect to its financial assets. And it goes on to say that
25 many asset-backed securities, unless they constitute pure debt,

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1 will not need to be qualified under the Trust Indenture Act.
2 SEC no action letters along these lines. And just -- this may
3 not be particularly relevant on the motion to dismiss, but as a
4 matter of practice, the closing deals for trusts that are
5 governed by PSAs have opinions of counsel saying that these
6 trusts need not be registered under the Trust Indenture Act.
7 So I don't think it is actually a close question as to whether
8 mortgage-backed securities -- or certificates issued pursuant
9 to trusts that are governed by PSAs, are debt. The cases that
10 are cited in Ms. Kaswan's letter, they make passing references
11 to mortgage-backed securities and say they are debt-like
12 instruments. But that doesn't mean, as we have said, your
13 Honor, that every mortgage-backed security is a debt-like
14 instrument. We know, based on the PSAs, based on these SEC no
15 action letters based on treatises, based on these opinions of
16 counsel that certificates issued by trusts that are governed by
17 PSAs are not debt. And the statute is unambiguous that it
18 applies only to debt securities.

19 So, that really -- that leaves one trust that is
20 governed by an indenture and that is governed by the Trust
21 Indenture Act. But there is a few problems with the claims as
22 they relate to that one trust. The first, is damages. There
23 is not an adequate allegation of damages because this is a
24 monoline-wrapped trust. There were no losses that could be
25 alleged in this trust. There was a monoline that was covering

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1 the difference between what the noteholder was entitled to, and
2 what the noteholder would otherwise receive by distributions
3 from the trustee based on collections. So there can't be an
4 allegation of damages, and we don't think there is an adequate
5 allegation of damages.

6 And if we had to go beyond that, your Honor, there is
7 really no allegation -- there is no allegation in the complaint
8 that there was a violation of the Trust Indenture Act because
9 all the Trust Indenture Act says is that a trustee is supposed
10 to give notice of default under the indenture. But defaults
11 under the indenture are only defaults by the issuer. The only
12 allegations of defaults in the complaint are those allegedly by
13 the master servicer. That is a different entity than the
14 issuer. So that's a 12(b)(6) issue. That gets rid of the
15 Trust Indenture Act claim. And when there is no Trust
16 Indenture Act claim, all we're left with is state law claims.
17 And the Court, at that point, would have no basis for
18 exercising supplemental jurisdiction when there is no federal
19 tail to wag the dog of the state law claims.

20 THE COURT: All right. Let me hear from your
21 adversary, all right?

22 MR. INGBER: Sure.

23 Thank you, your Honor.

24 THE COURT: Thank you.

25 MS. KASWAN: Your Honor, we agree that there is no

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1 colorable dispute with respect to whether or not these
2 particular NBS are covered by the Trust Indenture Act, because
3 they're undeniably are. It is notable that Mr. Ingber did not
4 cite a single case suggesting that a mortgage-backed security
5 is not a dead instrument. And, in fact, in Greenwich
6 Financial, when the Second Circuit was reviewing these
7 particular mortgage-backed securities, they say that the fact
8 that plaintiff seeks enforcement of the term of the PSAs, trust
9 agreements similar to bond indentures in many respects.

10 It is so well established that these are debt
11 instruments, that most of the time there are only passing
12 references to the fact that they're debt instruments.

13 Similarly, your Honor, in Littman vs. Waxstone Group,
14 another Second Circuit case 2011, 634 F.3d 706 at 709, footnote
15 3, it states: Residential mortgage-backed securities are a type
16 of asset-backed securities usually sold as bonds. And then
17 citing other cases in this jurisdiction.

18 In In Re: Ambeck Financial Group Securities 693
19 F.Supp.2nd 241, 248, Southern District of New York 2010, a
20 residential mortgage -- backed -- and I'm quoting: A
21 residential mortgage-backed security is a debt security that
22 receives cash inflows directly from underlying pools of
23 residential mortgages.

24 The payments that are made to the trust beneficiaries
25 in a mortgage-backed security is repayment of their principle

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1 and interest. They are merely an aggregate form of debt, and
2 sliced up into individual securities. It is not, as I say,
3 your Honor, even a close question. And if it was, I'm sure you
4 would have heard of at least one reported decision by Mr.
5 Ingber.

6 THE COURT: Were these securities sold as bonds in
7 this case?

8 MS. KASWAN: Well, they're sold as debt securities. I
9 mean they're sold as mortgage-backed securities. The mortgage
10 is the collateral for the debt. They are pools -- they are
11 essentially pools of mortgage loans that are then gathered up
12 and sold, sliced up into tranches. And then the securities are
13 in the nature of debentures. And that's -- and there is
14 nothing different between this case, in terms of this
15 particular group of mortgage-backed securities, versus any
16 other. And the terminology that the parties to the PSA may
17 use, is relevant to determining what the nature of the security
18 is.

19 THE COURT: Do the certificate holders here have any
20 ownership stake in anything as a result of their certificate
21 ownership?

22 MS. KASWAN: What they're entitled to, your Honor, is
23 part of the cash flow from the mortgage loans. What the
24 certificates reflect, right, is, is that there is cash as it's
25 collected from the borrower, which is then allocated by xxx

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1 tranch, based upon the structure of the security, so that the
2 certificate holders have an interest in the cash flow from the
3 underlying debt.

4 Then that debt is collateralized by the mortgages.
5 That's why the security is called a mortgage-backed security.
6 And, so, it is a classic -- I mean it -- it is a complicated
7 instrument, but it is a classic debt instrument.

8 THE COURT: In view of Mr. Ingber's letter,
9 submission, do you want to make any amendment to your
10 complaint?

11 MS. KASWAN: Well, your Honor, we might want to make
12 an amendment to our complaint based upon the think submissions
13 that were made in the settlement case this week. Because
14 frankly, your Honor, it's our view that the submission that was
15 made by Mr. Ingber's institutional investors went a very long
16 way in proving the case. And that's because the -- the
17 whole point of the Trust Indenture Act, all right, is to
18 supercede those types of trust indentures that exculpate the
19 trustee from its responsibilities to act, and exculpate the
20 trustee for its negligence. What came through in the two
21 filings that we saw this week, your Honor, is that the major
22 litigation risk that was identified in the two settlement
23 submissions was the fact that Mr. Ingber on behalf of the
24 trustee was unwilling to proceed to sue BOA, absent compliance
25 with the no-action clause that was in each of the PSAs in the

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1 pool and servicing agreements.

2 And his view, and the view of the institutional
3 investors, was that he had absolutely no duty to proceed with
4 those suits. And because he had no duty -- that Mr. Ingber had
5 no duty to file suit against BOA, and for most of the 530
6 trusts, there were not objectors with a 25 percent interest,
7 essentially, the investors, regardless of how extreme the
8 defaults might be in the performance either of Mr. Ingber's
9 client or BOA, the investors were without remedy because,
10 according to the arguments that were made here, is that Mr.
11 Ingber, as counsel for the trustee, had no obligation to sue.
12 And the investors could not sue, because their only recourse
13 was to rely on Mr. Ingber And --

14 THE COURT: What would be the precise contour of any
15 amendment to your complaint?

16 MS. KASWAN: Well, as we see it, your Honor, is
17 that the trustee in this case is responsible for the litigation
18 risk that reduced the loss recovery through the settlement.
19 And, also, what happened in the settlement agreement which,
20 frankly, we didn't realize this was in there until it was
21 pointed out by Mr. Ingber's institutional investments, is they
22 inserted a clause into the settlement agreement that provided
23 that BOA would indemnify the trusts for the defects in title
24 for the transfer of the mortgage loans into the trust. That's
25 the trustees' key predefault responsibility. The one thing

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1 that is in the PSA that is precisely described as the trustee's
2 responsibility, is to assure that the mortgage loans are
3 perfect on their face, and that the mortgage loan filed is
4 transferred into the trusts's. The institutional investors, in
5 their papers, stated based upon their review of the evidence,
6 that of the 770,000 mortgage loans, at a minimum, there were
7 defects in the title, or the mortgage loan files, of at least
8 30 percent. That, frankly, your Honor, is astounding. And so
9 those are defects that are precisely the responsibility of the
10 trustee. And what happened in this settlement agreement is
11 that, instead of BOA putting in more money for the settlement,
12 it relieved Mr. Ingber's client of the losses attributed to
13 their misconduct.

14 THE COURT: All right. But on the standing question,
15 do you want to amend to add certificate holders.

16 MS. KASWAN: Your Honor, certainly. And if I could, I
17 am familiar with your opinions on standing. It is our view,
18 and there are many cases in the Southern District of New York
19 that do draw distinction, for example, between whether you
20 needed to purchase in the offering, if you bring a Section 11
21 claim as a result of the language of the Section 11 --

22 THE COURT: Ms. Kaswan, my question is a simple one.
23 It calls for a yes or no. That's all. Because I'm going to
24 fix a motion schedule in this case. But I'm not going to go
25 through multiple motions addressed to the complaint.

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1 You know, Mr. Ingber cited to me an earlier decision
2 of mine in Smith Barney. And, as painful as that case was for
3 the lawyers, it's very painful for me. So I'm not going to
4 have multiple motions any more in these cases. In other words,
5 we're not going to have a very expensive education provided by
6 Mr. Ingber making his motion, and the Court ruling, and then
7 you coming back and saying, aha, I want to move to the amend.

8 MS. KASWAN: Your Honor, certainly we would amend to
9 include other plaintiffs who have approached us since we filed
10 the complaint, so that we do have more purchasers in more
11 trusts. And we would ask to add them.

12 THE COURT: When are you going to do that. When can
13 you do that because, then I'll tee up Mr. Ingber's motion.

14 MS. KASWAN: We can file an amended complaint within
15 the next 10 days.

16 THE COURT: The federal rules teaches us now that we
17 only count in sevens, so I'll give you two weeks, right? So
18 you'll file your amended complaint by November 17th.

19 Let me say that I think that this motion that Mr.
20 Ingber proposes -- there are some good arguments on both sides.
21 So I'm really going to have to wait to see what all of the
22 briefing is. And I would allow him to file his motion.

23 So Ms. Kaswan is going to give you an amended
24 complaint by November 17. When would you like to file your
25 motion?

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1 MR. INGBER: Can we file 30 days from the amendment
2 complaint?

3 THE COURT: That's fine.

4 MR. INGBER: Thank you.

5 And, your Honor, I would like to make one point,
6 unless you have questions about issues that Ms. Kaswan raised
7 either about standing, or mortgage-backed securities for the
8 settlement. And that is, we are not going to object to an
9 amendment to resolve standing issues, but I think we would
10 object to an amendment relating to the settlement agreement.

11 THE COURT: Yeah, having just listened to the colloquy
12 here, I'm permitting an amendment at this juncture on the
13 standing question.

14 MR. INGBER: Thank you, your Honor.

15 THE COURT: So why don't you file your motion on
16 December 16th.

17 MR. INGBER: That's fine, your Honor.

18 Would you like us -- I don't know if there will be
19 knew arguments based on the amendment, do we need to submit a
20 premotion letter?

21 THE COURT: You don't need to submit -- you can make
22 the arguments in the motion.

23 MR. INGBER: Thank you.

24 THE COURT: All right. How much time would you like
25 to oppose the motion?

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1 MS. KASWAN: Your Honor, three weeks would be fine.

2 THE COURT: I'm giving you four, because that is going
3 to work a hardship on somebody in your office. Probably not
4 you, but somebody.

5 All right. So January 13th for opposition.

6 Mr. Ingber, I'll give till the 20th to submit a reply.

7 MR. INGBER: Thank you, your Honor. That's fine.

8 THE COURT: And I'll put this matter down for an oral
9 argument February 10 at 11:00.

10 All right. Now, we are supposed to have an initial
11 conference in a couple of weeks, but I really don't see any
12 need for that. But because I think that there are close
13 questions, at least preliminarily on this motion, is there any
14 reason why I can't fix a discovery schedule that is consistent
15 with the discovery schedule that I fixed in Walnut Place?

16 MS. KASWAN: Your Honor, we would be happy to proceed
17 with that same schedule. When you say "consistent," you mean
18 the same dates?

19 THE COURT: I mean at a higher altitude. There's a
20 discovery cut-off in the case in April.

21 MS. KASWAN: That would be fine, your Honor.

22 THE COURT: Mr. Ingber, how do you feel about that?

23 MR. INGBER: Well, your Honor, we think it makes more
24 sense to stay discovery during the pendency of the motion to
25 dismiss --

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1 THE COURT: Moving defendants always do.

2 MR. INGBER: We think there would be value in that,
3 but we hear your Honor, and we think that April would be fine
4 subject to, obviously, our right to come back and ask for more
5 time. So, thank you.

6 THE COURT: Right. It's not written in stone.

7 MR. INGBER: Understood, your Honor.

8 THE COURT: Okay.

9 MR. INGBER: Thank you.

10 THE COURT: All right. So I'm just going to enter --
11 I'll enter a scheduling order on the motion, and a scheduling
12 order with respect to discovery. I won't micromanage any
13 expert discovery in the case, because I don't know what would
14 be in play. But just so that we're more or less on the same
15 wavelength, I will indicate in the order here that just the
16 curtain on discovery will come down at the end of June or so.
17 So you'll be free to deal with what you want. I'm not going to
18 close fact discovery, as I think about it, in April. But I'll
19 let you understand that all discovery has got to be complete by
20 the middle of July, by July 13. All right.

21 MS. KASWAN: That's fine, your Honor.

22 THE COURT: Okay.

23 MR. INGBER: Thank you, your Honor.

24 THE COURT: Have a good weekend.

25 (Adjourned)