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

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), et al.,	Index No. 651786/2011
	Part 39
Petitioners,	(Hon. Barbara R. Kapnick)
-against-	
CRANBERRY PARK LLC and CRANBERRY PARK II LLC,	
Respondents,	
for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a Proposed Settlement.	

REPLY IN FURTHER OPPOSITION TO PROPOSED SETTLEMENT

Cranberry Park LLC and Cranberry Park II LLC (together, "Cranberry Park") intervened in this proceeding on August 2, 2011, and filed an Objection to the Proposed Settlement on May 3, 2013. On that same date, the Institutional Investors filed a Statement in Support of the Settlement ("Institutional Investor Statement"). In response to the Institutional Investor Statement, Cranberry Park hereby respectfully submits this Reply in Further Opposition to the Proposed Settlement.

THE PROPOSED SETTLEMENT IS INADEQUATE

The Trustee, BAC, Countrywide, and the Institutional Investors have imposed on the Court an unenviable and unduly burdensome task: to sift through voluminous opinions of well-credentialed (and well-compensated) experts and hundreds of pages of legal argument in order to evaluate the reasonableness of a settlement of tens of billions in potential liabilities, involving 530 complex RMBS transactions incorporating many thousands of mortgage loans.[1]

In contrast to the immense effort it now asks of the Court, the Trustee *never looked at a single loan file*, never tested through negotiation whether a greater recovery was possible, and instead delegated its "pen" to a small minority of investors who do not and cannot represent the interests of investors in Countrywide RMBS as a whole. To rationalize this attempted avoidance of its duties to investors, the Trustee and its post-hoc experts have (i) uncritically accepted unverified assumptions of BAC/Countrywide regarding the scope of Countrywide's breaches of representations and warranties concerning loans in the Trusts; (ii) unjustifiably discounted the Trusts' claims for legal defenses that were speculative at the time of the Proposed Settlement and have been predictably rejected by courts since; (iii) disregarded BAC's resources and ability to fund Countrywide's liabilities on grounds of the theoretical possibility that BAC might cause a Countrywide bankruptcy ; and (iv) abandoned the Trusts' claims against BAC for its failures as master servicer – claims that would in any event survive the unlikely scenario of a Countrywide bankruptcy.[2]

[1] Capitalized terms have the same meanings as set forth in Cranberry Park's opening Objection.

[2] As detailed in Cranberry Park's opening Objection, BAC HLS's non-performance of its Master Servicer obligations generated much the same harm as caused by CHL's failure to meet loan repurchase obligations, in particular due to BAC HLS's failure to notify the Trustee of CHL breaches of loan representations and warranties and enforce CHL's repurchase obligations. *See* Objection at 23-24. Although there are certain limitations in the PSAs on direct claims by *Certificateholders* against the Master Servicers, *see* PSA at § 6.03, the Master Servicers are liable to the Trusts themselves for simple breaches of contract.

When "presented" with the Proposed Settlement by the Institutional Investors, the Trustee had at least two options, each of which likely would have avoided this protracted and costly proceeding: (1) engage in a reasonable effort on behalf of all investors to investigate the value of the Trusts' claims – including analyzing a meaningful sample of actual loan files (which the trustee is uniquely positioned to do) – and presenting the results of such analyses to all investors, which would form the basis for an informed negotiation of the best possible recovery; or (2) subject the Proposed Settlement to an informed and orderly vote by all investors.[3] Rather than pursue either of these more efficient and fair options, the Trustee initiated this Article 77 proceeding, a process designed for much simpler trust actions and entirely unsuited to balancing the interests and objections of investors holding billions of dollars of Countrywide RMBS spanning many trusts. Perhaps most important, the Trustee impermissibly asks this Court to approve substantive amendments to critical repurchase obligation and other provisions of the PSAs. Such PSA amendments simply cannot be approved by way of an Article 77 proceeding, but rather require the affirmative consent of a majority of investors pursuant to Section 10.01 of the PSAs.

As might be expected under these circumstances, the Institutional Investors make little effort to defend the *substantive* adequacy of the Proposed Settlement. Instead, they resort to irrelevant arguments designed, in effect, to excuse the slipshod process leading up to that settlement and the commencement of this proceeding. Four of the proponents' more evasive assertions stand out:

[3] The Trustee's failure to look at a single loan file or make files available to investors is inexplicable. The frequency and materiality of loan breaches are critical to analysis of the adequacy of the Proposed Settlement, and such information can be directly established only through review of loan files. A trustee representing the best interests of investors should be facilitating investor access to loan files and not, as here, actively preventing such access, and thereby driving many investors to throw up their hands and accept a meager and unjustified settlement.

1. "The PSAs plainly authorize the Trustee both to assert the Trusts' claims, see PSA §§ 2.01, 2.03(c), 2.04, and 3.03, and to settle the Trusts' claims."[4]

The proponents' sole argument in favor of the Trustee's right to agree to each and every provision of the Proposed Settlement is that this right is part-and-parcel of the Trustee's right to assert claims for breaches of representations and warranties. The proponents do not, and cannot, cite any provision of the PSAs that actually deals with settlement of a Trustee claim, and, most important, that authorizes the Trustee *by way of settlement* to alter and amend the PSAs. *See* PSA § 10.01 ("consent of the Holders of a Majority in Interest of each Class of Certificates" is required "for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement"). And yet altering and amending the PSAs is exactly what the Proposed Settlement would accomplish, without majority consent, by way of its explicit re-writing of document delivery and loan repurchase provisions of the PSAs.[5]

There is no judicial authority for such disregard of the amendment provisions of a PSA or any other form of trust agreement. *In re IBJ Schroder Bank & Trust Co.*, 706 N.Y.S.2d 114 (1st Dep't 2000) is the one case cited by the Institutional Investors that actually concerns settlement of trust claims.[6] In that case, the trial court ruled that a trustee did not have authority to settle

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[4] The Institutional Investors' Statement in Support of the Settlement ("Institutional Investors' Statement") at 42.

[5] In particular, the "document cure" terms of the Proposed Settlement amend the repurchase provisions of the PSAs and significantly narrow Countrywide's repurchase obligations. For example, whereas the PSAs require substitution or repurchase of all loans missing documentation, the Proposed Settlement would require repurchase only where a loan is missing documentation *and* lacks title insurance. *Compare* PSA § 2.02 *with* Proposed Settlement § 6(b). The settlement also requires Countrywide to reimburse the Trusts for uncured document exceptions for non-MERS mortgages only if there is a "Mortgage Exception" *and* a "Title Policy Exception" *and* a loss to the Trusts. Proposed Settlement § 6(c). In contrast, the PSAs require *either* a "Mortgage Exception" or a Title Exception," and they do not require a loss to the Trusts. There is, moreover, no PSA exception for the massive number of loans registered through MERS. PSA § 2.02. Further, the Proposed Settlement would grant Countrywide a new period to cure existing documentation failures, despite the fact that the cure period expressly provided for in (and limited by) Section 2.02 of the PSAs expired years ago.

[6] Institutional Investors' Statement at 44. Other cases cited by the Institutional Investors in support of the Trustee's right *to settle* claims solely concern the Trustee's undisputed right *to assert* claims for violation of the PSAs. *Id.* at 42-44. The Trustee relies on an unpublished decision by the trial court on remand in *In re IBJ Schroder*. *See* The

certain claims. The First Department reversed, holding that the trustee did have the power to settle, but only because the indenture provision authorizing the trustee to sue expressly "*vests the trustee with the power to 'take such action as shall be necessary' with respect to the subject matter of the underlying action.*" *Id.* The PSAs contain no such gloss on the Trustee's power to bring claims, and *IBJ Schroder Bank* in any event provides no support for allowing a trustee to settle claims by way of unauthorized amendment of a trust agreement. Moreover, an Article 77 proceeding cannot be used to end run around the amendment provisions of a trust. As is well established, a court in an Article 77 proceeding "cannot rewrite the language" of a trust instrument. *See, e.g.*, *In the Matter of the Construction of a Trust*, 39 N.Y.2d 663, 667 (1976).

Apart from these New York law restrictions on trust amendment by way of settlement, Section 316(a) of the federal Trust Indenture Act provides that an indenture must be deemed to contain provisions authorizing the holders of not less than a majority in principal amount to consent to waivers of any past defaults or their consequences. While the PSAs do authorize only 25% of holders to direct the Trustee to bring claims, Section 10.01 of the PSAs requires a majority to waive defaults by changing and eliminating loan-repurchase and document delivery requirements. Judge Pauley and Judge Forrest of the Southern District have both ruled as a matter of federal law that the Trust Indenture Act is applicable to RMBS pooling and serving agreements. *See Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of New York Mellon*, No. 11 Civ. 5459 (WHP), 2012 U.S. Dist. LEXIS 47133 (S.D.N.Y. Apr. 3, 2012); *Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of America N.A.*, No. 12 Civ. 2865 (KBF), 2012 U.S. Dist. LEXIS 173871 (S.D.N.Y. Dec. 7, 2012). These rulings are the subject of a consolidated appeal pending before the Second Circuit.

Bank of New York Mellon's Brief in Support of the Settlement ("BONY Brief") at 15. This ruling is not on point for the same reasons as with respect to the First Department's decision reversing the trial court's initial ruling.

2. "The Trustee's decision was within the bounds of the Trustee's reasonable discretion, the standard to be applied in this Article 77 Proceeding."[7]

In addition to asking the Court to approve PSA amendments and waivers of defaults without investor consent in the guise of settlement, the Trustee seeks to avoid the clear standards of conduct imposed on it by the PSAs. *See* PSA § 8.01. Prior to an Event of Default, the Trustee must act with due care and without negligence. *Id.* Upon one or more Events of Default, which plainly occurred as shown by the Institutional Investors' own letters to the Trustee, the Trustee is subject to *fiduciary* duties and must "exercise such of the rights and powers vested in it by [the PSA], and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs." *Id.* The Trustee has offered no authority to justify abandonment of these stringent duties in favor of the highly forgiving "abuse of discretion" standard that it claims should govern this proceeding.[8] The Court should not, and may not, relieve the Trustee of obligations to which it agreed, nor grant the Trustee greater protections than it bargained for in the PSAs.

Apart from attempting to avoid its duties under the PSAs, the Trustee seeks specific findings that go far beyond the "abuse of discretion" standard the Trustee advocates as the test of its actions in this proceeding. For example, the Trustee proposes that the Court make factual findings that, among other things, "[t]he Settlement Agreement is the result of factual and legal investigation by the Trustee," and "[t]he Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled." PFOJ ¶¶ h, i. In effect, the Trustee would have the Court affirmatively endorse the Trustee's conduct through gratuitous and unnecessary findings as to standards of prudence and due care that go far

[7] The Institutional Investors' Statement at 1.

[8] BONY Brief at 12.

beyond the minimal abuse-of-discretion hurdle. The Court should reject this sleight of hand along with the proponents' attempt at evading the terms of the PSAs through a rubberstamp abuse of discretion standard.

3. "The settlement has received broad and deep support from the tens of thousands of investors who hold the Trusts' securities."[9]

This is an unfounded assumption that neither the Trustee nor the Institutional Investors have made any effort to substantiate by affording all investors an efficient means of expressing their views. This easily could have been done long ago by asking investors to vote, up or down, on the Proposed Settlement. The Institutional Investors assert that "with the Institutional Investors there now stand tens of thousands of other certificateholders whose support for the settlement is nearly unanimous," and that "the Steering Committee's claim that the lack of an objection should not be taken as support for the settlement is absurd."[10] The simple fact is that the Court has not heard one way or another from the overwhelming majority of Countrywide RMBS investors. Of the thousands of investors in Countrywide RMBS, only about 40 supporters and 30 objectors have expressed their views.[11] The only thing that is absurd about this situation is the unprecedented notion that mere silence is legally or commercially equivalent to positively approving a settlement that fundamentally alters the rights of investors.[12]

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[9] Institutional Investors' Statement at 1.

[10] Institutional Investors' Statement at 4.

[11] These are the numbers of discrete legal entities that signed onto briefs in support or opposition to the Proposed Settlement (or separately submitted a supporting or opposing letter). The total numbers of supporters and objectors would be lower if affiliated entities (such as the Cranberry Park entities or the Maiden Lane entities) were grouped as a single "supporter" or "objector."

[12] The Institutional Investors cite but one decision addressing the silence of persons affected by a settlement. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2d Cir. 1987). That case involved a $60,000 class action settlement involving but 126 class members. The opinion does not even suggest that silent class members should be deemed to support the settlement. On the contrary, the court ruled only that it would not simply count heads among those expressing a view given its fiduciary responsibility to evaluate the fairness of the settlement on behalf of those who had expressed none. 823 F.2d at 22-24.

Setting aside the expense, distraction, and public exposure associated with intervening and participating in judicial proceedings such as this, bond indentures as a rule require affirmative consent – not consent implied by a choice not to intervene in a public proceeding – in matters of importance to holders. The PSAs are no exception. For example, Section 10.01 contains numerous requirements for affirmative investor consent:

- ”no amendment that significantly changes the permitted activities of the trust . . . may be made without *the consent of a Majority in Interest of each Class of Certificates affected* ”
- “Agreement may also be amended from time to time . . . with *the consent of the Holders of a Majority in Interest of each Class of Certificates affected thereby*”
- “no such amendment shall (i) reduce in any manner the amount of, or delay the timing of, payments . . . without *the consent of the Holder of such Certificate,* (ii) adversely affect in any material respect the interests of the Holders . . . in a manner other than as described in (i), without *the consent of the Holders of Certificates of such Class evidencing . . Percentage Interests aggregating 66-2/3%* or (iii) reduce the aforesaid percentages of Certificates the Holders . . . without *the consent of the Holders of all such Certificates then outstanding*.

By contrast, no provision of the PSAs – none – allows for any demand by any percentage of certificateholders to be deemed agreed to or joined by those who express no view. Rather than ever implying consent from silence, the PSAs recognize the rights of investors to choose to consent, to oppose, *or* simply to abstain and not be counted.

Cranberry Park seeks a fair and reasonable recovery. It recognizes, however, that it is but one voice, though by its Objection it has offered its particular knowledge of and experience in

the RMBS market. Cranberry Park would be prepared to be bound by the actual verdict of a significant majority of investors if the Proposed Settlement were put to a vote. Such a vote could be accomplished in a prompt and efficient manner. Should the Trustee and the Institutional Investors truly have the support of virtually every bondholder, then it should be no difficult task for them to carry the "not so silent majority" and win such a vote. The actions of the Trustee and the Institutional Investors, however, demonstrate to date that those proponents have no interest in the actual opinions of the majority of investors.[13]

4. "The $8.5 billion settlement is the largest ever obtained in private litigation."[14]

This empty substitute for argument is repeated over and over again in various formulations in the proponents' papers. The fact that the settlement is a large number is, in the abstract, meaningless. The question is "is it large enough?" The answer to that question depends on the magnitude of the actual liability (which the Trustee never estimated using any of the actual loan files in question). As Cranberry Park's objection makes clear, the $8.5 billion is well under 20% of Countrywide/BoA's actual liability. The mere size of the settlement is no substitute for an appropriate process and in itself is no indication that the Trustee exercised its fiduciary duties with the requisite care and prudence.

[13] As an alternative to an investor vote, Cranberry Park joins in the mediation proposal set forth in the Joint Memorandum of Law in Opposition to the Proposed Settlement at 7.

[14] Institutional Investors' Statement at 1.

CONCLUSION

For the reasons set forth above and in its opening Objection, Cranberry Park respectfully requests that this Court issue an Order denying approval of the Proposed Settlement in the amount of $8.5 billion.

Dated: New York, New York
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WOLLMUTH MAHER & DEUTSCH LLP

By: ____/s/ Thomas P. Ogden _____
Thomas P. Ogden
David H. Wollmuth
Steven S. Fitzgerald
Michael C. Ledley

500 Fifth Avenue
New York, New York 10110
Tel: (212) 382-3300

Attorneys for Cranberry Park LLC and Cranberry Park II LLC