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) - v. - for an Order, pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement	Index No. 651786/2011 **CHICAGO POLICE'S MEMORANDUM IN OPPOSITION TO THE PETITIONERS' APPLICATION TO PRECLUDE USE OF DISCOVERY AND PLEADINGS FROM OTHER ACTION** Assigned to: Hon. Kapnick, J.

The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago and other members of the Public Pension Fund Committee ("Chicago Police") respectfully submit this memorandum of law in opposition to the May 30, 2013 order to show cause by Bank of New York Mellon ("BNY Mellon" or the "Trustee") and various Intervener-Petitioners (collectively, the "Petitioners") to exclude documents from and evidence developed in other lawsuits (the "Collateral Lawsuits") from being used in the hearing to approve the Settlement (the "Settlement Hearing").

INTRODUCTION

Petitioners, by their order to show cause ("Petitioners' Motion"), seek to exclude from the Settlement Hearing the following information, among other things:

(1) The Docket sheet and certain publicly filed evidence submitted by the SEC in opposition to the summary judgment motions filed in *Securities and Exchange Commission v. Mozilo*, No. CV-09-3994-JFW (C.D. Cal.) (the "Mozilo Action");

(2) Deposition transcripts and documents publicly filed for summary judgment motions in *MBIA Insurance v. Countrywide Home Loans, Inc.*, No. 602825/2008 (N.Y. Sup. Ct.) (the "MBIA Action"); and

(3) Deposition transcripts and documents from depositions taken in litigation brought by Chicago Police in *Retirement Board of Policemen's Annuity & Benefit Fund of the City of Chicago v. Bank of New York Mellon*, No. 1:11-civ-05459 (WHP) (S.D.N.Y.) (the "Chicago Police Action").

Without identifying any particular testimony or documents, the Petitioners claim ***all*** this information is inadmissible under this Court's rules of evidence because (1) ***all*** of this information is "irrelevant" or violates other evidentiary rules barring the admission of hearsay or non-authentic documents[1]; and (2) its admission at the Settlement Hearing would be unfair. Neither position has merit.

ARGUMENT

I. The Issues to be Addressed in the Settlement Hearing

As the Petitioners state in their memorandum of law in support of the Petitioners' Motion ("Pet. Mem.") at 1, two of the relevant issues to be considered at the Settlement Hearing scheduled to begin June 3, 2013 are (1) the "reasonableness of the Trustee's conduct"; and (2) the "reasonableness of the Settlement." In addition, BNY Mellon by requesting this Court to enter certain factual findings in its proposed final order (the "Proposed Order"), that could be asserted as having preclusive effect in other litigation brought by Certificate-holders against BNY Mellon, has further broadened the scope of the relevant inquiry to be made by this Court. Thus, BNY Mellon has placed before the Court the following factual issues for resolution:

[1] None or almost none of the information which Chicago Police seeks to offer into evidence can be excluded as hearsay because it is not offered for its truth, but rather to show what information BNY Mellon would have learned had it conducted an adequate investigation of the facts. Much of this information is also admissible as against BNY Mellon as the admissions of its own officers, or because BNY Mellon attended the depositions and had a full opportunity to examine the witnesses. Many of the listed documents are business records. Depositions which have been certified by court reporters and documents produced by BNY Mellon or which are identified in depositions are "authentic."

- Whether the Settlement Agreement is the result of factual and legal investigation by the Trustee . . . (h);
- Whether the Trustee appropriately evaluated the terms, benefits and consequences of the Settlement and the strengths and weaknesses of the claims being settled . . . (i);
- Whether the Settlement negotiations were conducted at arms-length . . . (j); and
- Whether the Trustee acted in good faith, within its discretion, and within the bounds of reasonableness . . . (k).

As discussed in Chicago Police's Memorandum of Law in Opposition to the Proposed Settlement, dated May 3, 2013 (the "Settlement Opp."), Chicago Police contends that the Trustee has a disabling conflict of interest, and failed to satisfy each of the quoted proposed findings in the Proposed Order, by (1) proposing to settle and release trust claims to tens of billions of dollars of Bank of America ("BOA") repurchase liabilities, without first filing suit and conducting formal discovery; (2) failing to learn the underlying facts, and the "strengths" of the Trusts' repurchase claims, through either informal or formal discovery; and (3) exploiting the Trusts' "no action" clause to defeat Certificate-holders' ability to learn the facts and the "strengths" of the Trusts' claims. As Chicago Police demonstrates from its proposed proof, the Trustee, by this conduct, seeks to coerce a quiet resolution that would avoid disclosure of its own liability to Certificate-holders. This shows that BNY Mellon's conduct is decidedly ***not*** "reasonable" and the Settlement is ***not*** based upon an acceptable factual investigation which permitted the negotiations to be conducted at "arms-length" with a full disclosure of the ***strengths*** as well as the weaknesses of the Trusts' repurchase claims.

The documents and evidence from the three Collateral Lawsuits described above are offered against BNY Mellon (and not against the Intervener-Petitioners) to show the facts and litigation "strengths" of the Trusts' repurchase claims, including with respect to (1) the loan

quality and underwriting representation and warranty violations, (2) BOA's violations of its servicing obligations, including its failures to give notice and put-back defective loans to its affiliate; and (3) the collectability of a repurchase judgment. The Trustee could have learned much of this information informally, as well as through "formal" discovery had it acted diligently to learn the facts.

For instance, before negotiating the Settlement in the first half of 2011, had BNY Mellon done anything at all to investigate the relevant facts, BNY Mellon could have obtained critical evidence supporting a showing of pervasive Countrywide underwriting deficiencies, by reference to thousands of pages of SEC investigation and deposition transcripts, and critical BOA business records, that in August and September 2010 were publicly filed by the SEC and Defendants in the Mozilo Action.[2] Moreover, as the evidence to be submitted at the Settlement Hearing will show, because BNY Mellon did virtually nothing before or during the settlement negotiations to investigate the underlying facts of the Trusts' claims, choosing instead to accept on face value BOA's selective factual presentations, the only available factual evidence relating to the substantive "fairness" of the proposed settlement is that which can be derived from the Collateral Lawsuits. This is particularly true because even in the depositions taken in the course of these settlement proceedings, BOA's counsel blocked discovery into anything beyond what was actually produced and discussed in the Settlement negotiations themselves – which means that, even today, the Settlement record is devoid of the facts necessary to evaluate the "strengths" of the merits and collectability of the Trusts' claims against BOA.

II. Documents and Testimony from the Collateral Lawsuits Are Relevant to the Issues In the Settlement Hearing

A. Documents from the Mozilo Action are Relevant

[2] Excerpts of the docket sheet for the Mozilo Action, listed as Ex. R-197 on the exhibit list for the Settlement Hearing, are attached as Ex. A to the Affirmation of Beth A. Kaswan ("Kaswan Aff.") filed with this memorandum.

As the District Court in the Mozilo Action stated in its September 16, 2010 decision denying defendants' motion for summary judgment, the SEC's allegations and evidence in prosecuting Alfred Mozilo, Countrywide's Chief Executive Officer ("CEO"), David Sambol, Countrywide's President and Eric Sieracki, Countrywide's Chief Financial Officer ("CFO") for securities fraud, involved three main categories of misrepresentations. *S.E.C. v. Mozilo*, No. CV 09-3994-JFW, 2010 WL 3656068, at *3 (C.D. Cal. Sept. 16, 2010):

(1) statements regarding the quality of Countrywide's underwriting guidelines and loan production;

(2) statements regarding Countrywide's Pay-Option Arm loans; and

(3) statements describing Countrywide's loans as "prime" or "nonprime."

Misstatement category 1 above corresponds to two of the "representations and warranties," commonly included in the Countrywide pooling and servicing agreements ("PSA's") for the 530 Trusts,[3] and whose violation gives rise to the Trusts' repurchase claims:

- The origination, underwriting and collection practices used by Countrywide with respect to each Mortgage Loan have been in all respects legal, prudent and customary in the mortgage lending and servicing business (#23); and
- All of the Mortgage Loans were underwritten in all material respects in accordance with Countrywide's underwriting guidelines as set forth in the Prospectus Supplement (#37).

As the SEC Mozilo summary judgment decision reflects, John McMurray, Countrywide's Chief Risk Officer, explained in his deposition that:

[3] [redacted]

> ***Countrywide mixed and matched guidelines from various lenders in the industry, which resulted in Countrywide's guidelines being a composite of the most aggressive guidelines in the industry***: And so, . . . if you match one lender on – on one – on certain guidelines or for certain products and then you match a separate lender on a different product or a different set of guidelines, then in my view the composite of that – of the two-step match would be more – would be more aggressive than either one of those competitor reference points viewed in isolation. SF254.

Mozilo, 2010 WL 3656068, at *10. As the *Mozilo* docket shows, McMurray's SEC interview and deposition testimony, as well as the testimony and exhibits of the defendants and other key Countrywide officers, had all been publicly filed by August-September 2010. Had BNY Mellon bothered to perform even informal discovery, it would have had a wealth of evidence reflecting the "strength" of its claims of pervasive violations of representation #23 to use at its early 2011 settlement negotiations. Since BNY Mellon and its counsel did not review the *Mozilo* docket, transcripts and exhibits to which they had easy access, this evidence is "relevant" to show that BNY Mellon had not "appropriately evaluated . . . the strengths and weaknesses of the claims being settled" (Proposed Order (i)). Evidence publicly filed in the Mozilo Action is also "relevant" to the evaluation of the substantive fairness of the $8.5 billion settlement.

B. Evidence From the Chicago Police Action Is Relevant

As Judge Pauley described in his April 3, 2012 decision denying BNY Mellon's motion to dismiss Chicago Police's complaint:

> The gravamen of the Complaint is that a prudent trustee would have remedied these failures by requiring the master servicer to cure or repurchase the defective loans in the trusts, and would have compelled the master servicer to comply with its servicing duties. Yet BNYM allegedly took no action to protect investors.

Chicago Police, No. 1:11-civ-05459, 2012 WL 1108533, at *2 (S.D.N.Y. Apr. 3, 2012). Thus, the evidence that Chicago Police has been developing through depositions, document requests and subpoenas for this action, like the Mozilo Action, involves whether Countrywide, on a

systemic basis, originated "defective" mortgages. In addition, the Chicago Police Action involves BOA's servicing conduct – *i.e.*, its failure to present loans to its affiliate for repurchase – and BNY Mellon's failure to act to provide notice upon its "discovery" of mortgage loan representation and warranty violations, and to act as a prudent person would when it learned that BOA was failing to enforce the Trusts' repurchase rights, an event of default under §7.01 of the PSA's. These are, in large part, the same claims that the Intervener-Petitioners raised in their October 18, 2010 notice of default that led to the settlement negotiations. *See* Ex. C to the Kaswan Aff.

Chicago Police has proposed offering excerpts of the testimony of three witnesses who were BNY Mellon officers at the time they testified, [redacted], and two BOA officers who are currently involved in BOA's repurchasing group, [redacted], as well as documents marked in their depositions. This evidence, that is available in the Chicago Police Action but not through the discovery in this Settlement Action, shows:

(1) The Trustee was conflicted because it knew that it was exposed to liability under the PSA's, for failing to act in the face of widespread representation and warranty violations.

[redacted]:

[redacted]

[redacted]

[redacted]

4 [redacted]

C. Evidence From the MBIA Action is Relevant

The two recent decisions from Judge Bransten on a series of summary judgment motions show that factual issues presented in the MBIA Action are the same as the key factors that drive the settlement negotiations in this case – particularly (1) whether a substantial litigated judgment was collectible from BOA on the theory of de facto merger or successor liability; and (2) Countrywide's systemic breaches of representations and warranties about the quality and underwriting of its securitized mortgage loans.

Thus, *e.g.*, in Judge Bransten's April 29, 2013 decision reported at 2013 WL 1845525, she explains that MBIA's position was that there was a single plan "to integrate and transition Countrywide's businesses into BAC's business through a series of transactions by which BAC would acquire control over, and then transfer, all of Countrywide's productive assets, operations and employees to itself"; and that "BAC disputes that the July 2008 and November 2008 transactions were part of any 'Integration Plan.'" *Id.* at *2.

In her decision reported at 2013 WL 1845588, also dated April 29, 2013, Judge Bransten notes that MBIA alleges that Countrywide misled MBIA about "Countrywide's loan origination, underwriting and servicing practices." These are the same "loan origination, underwriting and servicing practices" that are alleged to have violated Representation and Warranty #23 of the PSA's described above.

This Court may take judicial notice of the MBIA docket which shows that more than 100 transcripts of testimony and thousands of pages of testimony underlie the presentation of these issues on summary judgment. There is little question that this evidence is "relevant" to show (1) what evidence was available for the Trustee to develop had it made a full investigation of the facts; and (2) to evaluate the substantive fairness of the Settlement amount.

III. There Is No Unfairness to Using Evidence from the Collateral Lawsuits

The Petitioners have cried foul at Chicago Police's proposed use of depositions taken in its action against BNY Mellon, but there is absolutely nothing untoward with its efforts to collect its certificate losses from more than one defendant. Much of the evidence in the two cases overlaps because both actions involve the same Countrywide Representations and Warranties and the same BOA servicing practices. The timing of the depositions in the Chicago Police Action was chosen by the witnesses and their counsel, particularly in the case of [redacted], by Wachtell, Lipton, Rosen & Katz ("Wachtell"). Moreover, what would be unfair is to permit the Petitioners and BOA to continue to game the record in this Settlement matter by continuing to block any consideration of the facts necessary to evaluate the substantive fairness of the Settlement.

As the evidence in this case shows, the Trustee did no investigation of the facts before agreeing to the $8.5 billion Settlement. Though thousands of pages of documents have been produced and more than 30 depositions taken in this Settlement Action, this discovery has been largely limited to a review of the factual materials showing the potential weaknesses of the Trusts' claims that BOA chose to provide to the Trustee, and the evidence of the negotiations that proceeded on this remarkably thin factual record.

Even where BOA witnesses with knowledge of the underlying facts testified in this Settlement proceeding, they were directed not to answer questions that went beyond the information exchanged or discussed in the settlement negotiations – so that this Court, if limited to a review of the facts elicited in this case, would still be hearing only one side of the factual story. Thus, *e.g.*, the deposition testimony in this Settlement Action of [redacted]:

[redacted]

[redacted] testimony as against the Trustee in this Settlement Action is hardly unfair, even if the lawyers from some of the Interveners would also have wished to be in attendance. Chicago Police is not offering this evidence against the Institutional Investors, and is asking for no findings against them.

Similarly, it is hardly unfair for Chicago Police to offer the admissions of BNY Mellon's own officers for depositions that were, again, defended by Mayer Brown. This is, after all, a Settlement that is purportedly being offered by BNY Mellon, and it appears that BNY Mellon is asking for unwarranted findings of fact in an effort to protect itself in collateral actions brought by its Certificate-holders, including by Chicago Police.

Thus, this Court should treat documents and evidence collected from the Collateral lawsuits the same way it would any other evidence before it. Particularly, to the extent that this Court is going to consider the substantive fairness of the Settlement, there is no place else to look

[8] [redacted]

but to the Collateral Lawsuits, because the Trustee did no factual investigation and Wachtell blocked the efforts in depositions in this Settlement Action to learn the underlying facts.

CONCLUSION

For the reasons stated herein, Petitioners' application to exclude documents and evidence from the Collateral lawsuits should be denied.

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