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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
Petitioners,	Part 39
-against-	(Hon. Barbara R. Kapnick)
THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, WESTERN-SOUTHERN LIFE ASSURANCE COMPANY, COLUMBUS LIFE INSURANCE COMPANY, INTEGRITY LIFE INSURANCE COMPANY, NATIONAL INTEGRITY LIFE INSURANCE COMPANY, and FORT WASHINGTON INVESTMENT ADVISORS, INC. on behalf of FORT WASHINGTON ACTIVE FIXED INCOME LLC,	
Proposed Intervenors-Respondents,	
for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.	

AMENDED MEMORANDUM OF LAW IN SUPPORT OF
WESTERN & SOUTHERN'S PETITION TO INTERVENE

Proposed intervenors The Western and Southern Life Insurance Company, Western-Southern Life Assurance Company, Columbus Life Insurance Company, Integrity Life Insurance Company, National Integrity Life Insurance Company and Fort Washington Investment Advisors, Inc. (collectively, "Western & Southern"), by and through their attorneys, submit this memorandum of law in support of their motion to intervene in the above-captioned proceeding under CPLR 401, 1012, 1013 and 7701.

PRELIMINARY STATEMENT

As the housing boom of the mid-2000's rolled on, Countrywide Financial Corporation and its affiliates ("Countrywide") routinely granted new mortgage loans that should never have been approved issuing billions of dollars of mortgages based upon fake appraisals, inflated income figures, false owner occupancy attestations and rigged loan to value ratios. Countrywide packaged these loans into so-called "securitization trusts." Certificates or mortgage-backed securities ("MBS") issued by these trusts were sold to investors such as Western & Southern based on assurances that the loans underling the MBS were underwritten in accordance with prudent underwriting guidelines designed to ensure the borrowers' ability to pay and the sufficiency of the underlying properties as collateral. Countrywide further promised investors that any loans that did not comply with such guidelines would be repurchased by the originator, usually Countrywide itself.

The loans underlying Countrywide's MBS experienced abnormally high default rates soon after they were issued. The ratings agencies that had initially given most of the certificates triple-A ratings responded with a series of severe rating downgrades. Bank of New York Mellon ("BNY Mellon" or "Trustee"), the Trustee for all of securitization trusts included in the proposed settlement of this matter, appears to have made no effort to assess whether this dismissal performance was caused by Countrywide's failure to satisfy the representations and warranties it provided in connection with the offerings including its representation that the loans underlying the MBS were underwritten in accordance with Countrywide's disclosed underwriting guidelines. Beginning in June 2009, the Securities and Exchange Commission ("SEC") made public a large collection of documents and testimony establishing that Countrywide consciously departed from the underwriting guidelines it touted to investors in an effort to increase its market

share and earn fees offloading toxic mortgage loans to unsuspecting investors. This wrongdoing affected tens of billions of dollars of securities, had a ripple effect on the American economy and played a substantial role in plunging the world economy into a serious recession. However, despite the ample evidence of Countrywide's wrongdoing, BNY Mellon still did nothing.

Now, Countrywide's successor in interest, Bank of America Corporation ("BOA") is apparently colluding with BNY Mellon to sweep aside the enormous liability BOA faces for repurchase claims asking this Court to approve a sweetheart deal that would pay defrauded bondholders *two cents for every dollar* of the $424 billion in total loan exposure. This amount is wholly insufficient. According to BOA, approximately $103 billion of the total $424 billion loan pool consisted of loans that are in default or severely delinquent. The staggering degree of breach and default in these loans proves that they failed to comply with the representations in Countrywide's offering documents – false representations that these loans were issued in accordance with meaningful underwriting standards to reduce the risk of default. Moreover, based on forensic reviews that have been conducted to date it appears that two-thirds of the mortgages in question may not have complied with applicable representations and warranties.

For these reasons, Western & Southern moves to intervene in this action to allow it to obtain the discovery necessary to evaluate the proposed settlement. This Court should grant the relief requested to ensure that the interests of noteholders in the fairness of the proposed settlement are not improvidently abandoned by parties (including the Trustee) who are impaired by disabling conflicts of interest.

PROCEDURAL BACKGROUND

On June 29, 2011, BNY Mellon petitioned this Court pursuant to CPLR 7701 for judicial instructions and approval of the proposed settlement, which relates to 530 mortgage-

securitization trusts (the "Covered Trusts"). The Covered Trusts are identified as Exhibit A to the Trustee's verified petition. Among other things, the proposed settlement purports to release certain claims related to MBS issued through the Covered Trusts in exchange for a payment of $8.5 billion. Western & Southern holds MBS issued through 25 of the Covered Trusts. Affirmation of Vincent T. Chang dated July 29, 2011 ¶ 3. Western & Southern now seeks to intervene in the above-captioned matter to take discovery regarding the fairness of the proposed settlement.

By its petition, BNY Mellon seeks to settle claims that Countrywide made misrepresentations in the representations and warranties in the governing agreements for the Covered Trusts concerning the underwriting standards and practices employed by Countrywide in generating the loans that were eventually sold to the Covered Trusts and packaged into MBS. These "representation and warranty" claims relate to hundreds of billions of dollars worth of Countrywide MBS that suffered massive losses because, contrary to its representations, Countrywide was not adhering to its underwriting standards.

The proposed settlement was negotiated in private between twenty-two corporate and hedge fund investors (the "Corporate Investors"), Countrywide, BNY Mellon and BOA. The Corporate Investors claim to hold certificates issued in 115 of the 530 offerings that are the subject to the proposed settlement. They do not purport to hold any certificates issued in connection with 415 offerings that are part of the proposed settlement. Yet these investors seek to force this settlement upon investors who have had no say in the structuring of, or the terms of the proposed settlement.

In addition to the wholly inadequate recovery provided to injured investors, Western & Southern has identified several significant issues that raise serious questions about the fairness of

the proposed settlement. Although the Trustee owes a fiduciary duty to the noteholders, the deficiencies set out below suggest that the Trustee has failed to comply with its fiduciary duties:

(1) The proposed settlement does not appear to give investors the opportunity to opt out of the proposed settlement.

(2) Many of the twenty-two corporate investors that negotiated the proposed settlement appear to have significant ongoing business dealings with BOA, raising conflict-of-interest concerns. For example, BlackRock Financial Management, Inc. is one of the 22 investors. During the time in which the Settlement Agreement was being negotiated, BOA owned up to 34 percent of BlackRock. Many other of the 22 investors also have substantial business dealings with BOA or its subsidiaries other than their ownership of certificates in Countrywide-sponsored trusts.

(3) The proposed settlement provides the trustee with an enhanced indemnification backed by BOA. Previously, the Trustee had only an indemnification backed by Countrywide, a much less creditworthy entity. This difference is significant because the Trustee may face many potential claims based upon its failure to provide accurate exception reports and its failure to monitor the performance of the MBS and take corrective action. In any event, the existence of potential claims and the generous nature of the release conferred upon the Trustee in the proposed settlement provide a strong incentive for the Trustee to back the proposed settlement to the detriment of absent bondholders.

(4) The Trustee has another serious and disabling conflict of interest: more than 60 percent of BNY Mellon's trustee business comes from BOA. This dependence provides a powerful incentive for the Trustee to defer to BOA to the disadvantage of investors.

(5) The proposed settlement purports to preserve certain claims held by the investors in a carveout appearing on page 34 of the proposed settlement. This provision however, forecloses Western & Southern from enforcing any contractual rights against Countrywide or BOA. It is also unclear as to whether the release is intended to eliminate all claims that are not based on misrepresentations or nondisclosures. Thus, for example, it is not clear whether negligence or gross negligence claims based upon conduct (as opposed to representations) would be released. Such claims might include negligence or gross negligence claims that BOA/Countrywide failed to implement proper underwriting, servicing, and/or foreclosure standards.

(6) Under the terms of the proposed settlement, the settlement fund is allocated among investors in accordance with the "payment waterfall" set forth in the Pooling and Servicing Agreements, which may provide some investors with a windfall and may not appropriately compensate others for their actual loss.

(7) The proposed settlement carves out "Individual Securities Claims" from the release, but fails to address the securities claims asserted in the class action securities lawsuits that are currently pending in the United States District Court for the Central District of California.

(8) The proposed settlement appears to give BNY Mellon broad indemnification rights for the role that it played as Trustee for the Countrywide MBS, but does not appear to specifically carve out claims against BNY Mellon from the release.

In light of these numerous red flags of potential collusion and prejudice to Western & Southern and other noteholders, Western & Southern contends that the fairness of the proposed settlement cannot reasonably be assessed without additional document and deposition discovery. On June 29, 2011, this Court issued an Order setting a hearing date of November 17, 2011 at 2:15 p.m. for "anyone having an interest in the mortgage-securitization trusts listed on Exhibit A to the Verified Petition" to show cause why the judgment requested by BNY Mellon should not be granted. The Court further ordered that written objections are due by August 30, 2011.

Western & Southern now moves to intervene under CPLR 401, 1012 and 1013 to take discovery regarding the fairness of the Proposed Settlement. Such discovery is necessary because BNY Mellon and BOA have refused to provide "information necessary to determine adequacy of the settlement." For example, investors have been unable to review loan files to assess how many of the mortgages in the pools satisfied the characteristics and representations promised to investors who bought into them.

BASES FOR INTERVENTION

"Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (1st Dept. 2010).[1] As set out

[1] Because this is a "special proceeding" under Article 77, all petitions to intervene, including as of right, require the approval of the Court. CPLR 401.

below, Western & Southern's interests would be adversely affected by, and overlap with, those of the 22 investors who have agreed to the Proposed Settlement. Under either CPLR 1012 or 1013, Western & Southern is entitled to intervention.

I. INTERVENTION IS WARRANTED UNDER CPLR 1012 BECAUSE. WESTERN & SOUTHERN WILL BE AFFECTED BY THE JUDGMENT

Intervention as of right is permitted under CPLR 1012(a) when "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment."

Western & Southern, as a holder of MBS issued by the Covered Trusts, has a bona fide interest in this action and has interests and claims that will be affected by the proposed settlement. Accordingly, intervention under CPLR 1012 is appropriate. If the proposed settlement is approved, Western & Southern may lose the ability to assert certain claims against Countrywide and BOA. Consequently, it has a direct interest in determining whether the proposed settlement is fair. In fact, in releasing claims held by the Covered Trusts, the proposed settlement will thereby materially affect the value of Western & Southern's certificates in those trusts. In recognition of this potential impact, the Order to Show Cause that the trustee obtained from this Court contemplates that "Potentially Interested Persons" like Western & Southern may have an interest in these proceedings.[2]

Thus, Western & Southern certainly falls within the class of parties that may be affected by the proposed settlement, within the meaning of CPLR 1012. At a minimum, Western & Southern's intervention is desirable because it will lead to a more fully developed factual record

[2] "Potentially Interested Person" is defined in paragraph 4(a) of the Affirmation of Matthew D. Ingber, dated June 28, 2011, to include "holders of certificates or notes evidencing various categories of ownership interests in the Trusts."

that will better enable the Court to evaluate the proposed settlement, which is a matter of significant public interest.

II. THE TRUSTEE MAY NOT ADEQUATELY REPRESENT THE INTERESTS OF WESTERN & SOUTHERN

CPLR 1012 also permits intervention as of right where "the representation of the person's interest by the parties is or *may be* inadequate." (Emphasis added.) To intervene as an adverse party, Western & Southern need not show that the Trustee's representation will necessarily be inadequate; it is sufficient for Western & Southern to show merely that the Trustee *may* not adequately represent Western & Southern's interests. *See Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Courts have also held that "[t]ypically, persons seeking intervention need only carry a minimal" burden of showing that their interests are inadequately represented by the existing parties." *U.S. v. Union Electric Company*, 64 F.3d 1152, 1168 (8th Cir. 1995).

Although the Trustee ostensibly is required to protect the interests of all certificateholders, including Western & Southern, in the trusts that it administers, BNY Mellon itself acknowledges that certificateholders may have conflicting views about the adequacy of the proposed settlement. Thus, the Trustee has stated that it "recognizes the potential that some Certificateholders may disagree with the Trustee's judgment that the Settlement is reasonable" and that "different groups of Certificateholders may wish to pursue remedies for alleged breaches in different ways, creating the potential for conflicts among Certificateholders and placing the Trustee squarely in the middle of those conflicts." (BNY Mellon Petition ¶¶ 13-14.) For the reasons set out above, Western & Southern believes that there is a possibility that the Trustee will not adequately represent Western & Southern's interests, given its potential conflicts of interest as described above. Similarly, Western & Southern cannot know from information

now available whether the 22 institutional investors, all of which have intervened in this proceeding, can or will protect the interests of Western & Southern. Because those investors are bound by the Institutional Investor Agreement to support the proposed settlement, they will not question the proposed settlement to the extent necessary to protect Western & Southern's interests.

III. WESTERN & SOUTHERN SATISFIES THE REQUIREMENTS FOR INTERVENTION UNDER CPLR 1013

Intervention by permission is allowed under CPLR 1013 where "the person's claim or defense and the main action have a common question of law or fact . . . [and] the intervention [will] not unduly delay the determination of the action or prejudice the rights of any party." Under either standard, "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (1st Dep't 2010). Under Federal Rule of Civil Procedure 24(b), on which CPLR 1013 is patterned, "intervention is appropriate where the intervenor seeks virtually the same relief as the named plaintiff and . . . is encouraged if the proposed intervenors claims will add to the Court's understanding of the facts." *Rodriguez v. Debuono*, No. 97 Civ. 0700, 1998 WL 542323, at **2-3 (S.D.N.Y. Aug. 24, 1998); *see also Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (intervenors "will bring a different perspective to the case and will contribute relevant factual variations that may assist the court in addressing the constitutional issue raised").

Even if Western & Southern were not permitted as of right to intervene in this proceeding, they still satisfy the requirements for discretionary intervention under CPLR 1013. Western & Southern owns many of the same MBS that are at issue in the proposed settlement

and thus Western & Southern's claims or defenses involve "common questions of law" with those implicated by the Proposed Settlement. The case law makes clear that the presence of only some common issues is sufficient to warrant intervention. *See Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407-08 (S.D.N.Y. 2006) (recognizing that "[e]ven where factual distinctions exist, courts have permitted intervention where the same legal issue is presented."). In this case, it is particularly appropriate for the Court to exercise its discretion to permit intervention, because "in the absence of the intervenors, there is, as a practical matter, no real adversary proceeding before the court." *In re The Petroleum Research Fund*, 3 A.D.2d 1, 4 (1st Dep't 1956).

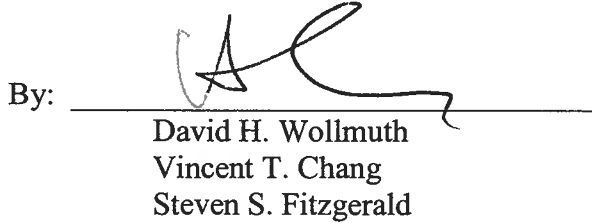
Under such circumstances permissive intervention – and discovery – should be granted *See ACORN (The New York Association of Community Organizations for Reform Now) v. County of Nassau*, 270 F.R.D. 123, 125-26 (E.D.N.Y. 2010) (granting permission to intervene and take supplementary discovery).

RELIEF REQUESTED

Western & Southern respectfully requests that this Court issue an order permitting Western & Southern to intervene in the above-captioned proceeding.

Dated: New York, New York
July 29, 2011

WOLLMUTH MAHER & DEUTSCH LLP



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