

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



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.

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

Petitioner-Appellant-Cross-Respondent,

and

(Additional Caption On the Reverse and Following Pages)

MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION AND THE NEW YORK BANKERS ASSOCIATION

ALSTON & BIRD

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The American Bankers Association and

The New York Bankers Association

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BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY, TRUST COMPANY OF THE WEST and affiliated companies controlled by The TCW Group, Inc., NEUBERGER BERMAN EUROPE LIMITED, PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, GOLDMAN SACHS ASSET MANAGEMENT, L.P., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, INVESCO ADVISORS, INC., THRIVENT FINANCIAL FOR LUTHERANS, LANDESBANK BADEN-WUERTTEMBERG, LBBW ASSET MANAGEMENT (IRELAND) PLC, DUBLIN, ING BANK FSB, ING CAPITAL LLC, ING INVESTMENT MANAGEMENT LLC, NATIONWIDE MUTUAL INSURANCE COMPANY and its affiliated companies, AEGON USA INVESTMENT MANAGEMENT LLC, authorized signatory for Transamerica Life Insurance Company, AEGON FINANCIAL ASSURANCE IRELAND LIMITED, TRANSAMERICA LIFE INTERNATIONAL (BERMUDA) LTD., MONUMENTAL LIFE INSURANCE COMPANY, TRANSAMERICA ADVISORS LIFE INSURANCE COMPANY, AEGON GLOBAL INSTITUTIONAL MARKETS, PLC, LIICA RE II, INC., PINE FALLS RE, INC., TRANSAMERICA FINANCIAL LIFE INSURANCE COMPANY, STONEBRIDGE LIFE INSURANCE COMPANY, WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, FEDERAL HOME LOAN BANK OF ATLANTA, BAYERISCHE LANDESBANK, PRUDENTIAL INVESTMENT MANAGEMENT, INC., and WESTERN ASSET MANAGEMENT COMPANY,

Intervenors-Petitioners-Appellants-Cross-Respondents,

against

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, 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, WESTERN NATIONAL LIFE INSURANCE, UNITED STATES DEBT RECOVERY VIII, LP, UNITED STATES DEBT RECOVERY X, LP and AMERICAN FIDELITY ASSURANCE COMPANY,

Respondents-Respondents-Cross-Appellants,

and

STERLING FEDERAL BANK, F.S.B., BANKERS INSURANCE COMPANY, BANKERS LIFE INSURANCE COMPANY, FIRST COMMUNITY INSURANCE COMPANY, BANKERS SPECIALTY INSURANCE COMPANY, FEDERAL HOME LOAN OF PITTSBURGH, AMICI ASSOCIATES, LP, AMICI FUND INTERNATIONAL LTD., AMICI QUALIFIED ASSOCIATES, CEDAR HILL CAPITAL PARTNERS LLC, CEDAR HILL MORTGAGE FUND GP LLC, CEDAR HILL MORTGAGE OPPORTUNITY MASTER FUND LLP, DECLARATION MANAGEMENT & RESEARCH LLC, DOUBLELINE CAPITAL LP, FIRST BANK, FIRST FINANCIAL OF MARYLAND FEDERAL CREDIT UNION, FIRST NATIONAL BANK & TRUST CO. OF ROCHELLE, ILLINOIS, FIRST NATIONAL BANKING COMPANY, FIRST PENN-PACIFIC LIFE INSURANCE COMPANY, KERNDT BROTHERS SAVINGS BANK, LEA COUNTY STATE BANK, LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK, LINCOLN NATIONAL REINSURANCE COMPANY (BARBADOS) LIMITED, LL FUNDS LLC, MANICHAEAN CAPITAL, LLC, NEXBANK, SSB, PEOPLES INDEPENDENT BANK, RADIAN ASSET ASSURANCE INC., THE COLLECTORS' FUND LP, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, THOMASTON SAVINGS BANK, VALLEY NATIONAL BANK, MORTGAGE BOND PORTFOLIO LLC, FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY, LIBERTY VIEW, PLATINUM UNDERWRITERS BERMUDA, LTD., PLATINUM UNDERWRITERS REINSURANCE, INC., RELIANCE STANDARD LIFE INSURANCE COMPANY, SAFETY NATIONAL CASUALTY CORPORATION, SUN LIFE INSURANCE COMPANY OF CANADA, CA CORE FIXED INCOME FUND, LLC, CA CORE FIXED INCOME FUND, LTD., CA HIGH YIELD FUND, LLC, CA HIGH YIELD FUND, LTD., STRATEGIC EQUITY FUND, LLC, STRATEGIC EQUITY FUND, LTD., SAND SPRING CAPITAL III MASTER FUND, LLC, CIFG ASSURANCE NORTH AMERICA, INC., BANKERS TRUST COMPANY, PINE RIVER FIXED INCOME MASTER FUND LTD., PINE RIVER MASTER FUND LTD, SILVER SANDS FUND LLC, TWO HARBORS ASSET I LLC, GOOD HILL PARTNERS LP, and BALLANTYNE RE PLACE,

Respondents-Respondents,

and

THE KNIGHTS OF COLUMBUS,

Intervenor-Respondent-Respondent.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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THE BANK OF NEW YORK MELLON (as Trustee
under various Pooling and Servicing Agreements and
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judicial instructions and approval of a proposed
settlement.

Index No. 651786-2011

**NOTICE OF
MOTION FOR
LEAVE TO FILE
AMICUS BRIEF**

PLEASE TAKE NOTICE that upon the annexed affirmation of Michael E. Johnson, dated September 18, 2014, the American Bankers Association (“ABA”) and the New York Bankers Association (“NYBA”), by their attorneys Alston & Bird LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on October 1, 2014 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting ABA and NYBA to serve and file a brief as *amici curiae*.

Dated: September 18, 2014
New York, New York

ALSTON & BIRD LLP

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Association and the New York Bankers
Association*

SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 651786-2011

**AFFIRMATION OF
MICHAEL E.
JOHNSON IN
SUPPORT OF
MOTION FOR
LEAVE TO FILE
AMICUS BRIEF**

Michael E. Johnson, an attorney duly admitted to practice before the courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am a member in good standing of the Bar of the State of New York and a partner with the law firm of Alston & Bird LLP, attorneys for the proposed amici, the American Bankers Association (“ABA”) and New York Bankers Association (“NYBA,” together the “Amici”). I make this affirmation in support of Amici’s *Motion for Leave to File an Amicus Brief on Behalf of the American Bankers Association and the New York Bankers Association*. Amici seek leave to file an amicus brief in support of the position of The Bank of New York Mellon (“BNYM” or “Trustee”) in this matter.

2. The ABA is the principal national trade association of the financial

services industry in the United States. Founded in 1875, the ABA is the voice for the nation's \$13 trillion banking industry and its two million employees. ABA members are located in each of the fifty states and the District of Columbia, and include financial institutions of all sizes and types.

3. The ABA, members of which hold a substantial majority of domestic assets of the banking industry and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry. The members of the ABA's Corporate Trust Committee, which focuses on the role of banks in providing corporate trust services, provide more than 95 percent of corporate trust services in the United States.

4. The New York Bankers Association ("NYBA"), founded in 1894, is an association of more than 140 community, regional and money center commercial banks and federal savings associations located in New York State. Its members have aggregate assets in excess of \$9 trillion and employ more than 200,000 people in New York State. NYBA members include national banks chartered pursuant to the National Bank Act, federal savings associations chartered pursuant to the Home Owners' Loan Act, and commercial and thrift depository institutions chartered pursuant to the New York Banking Law. The NYBA has a vibrant Trust & Investment Division.

5. Amici and their members have extensive experience and expertise

with respect to the residential mortgage-backed securities (“RMBS”) industry and, specifically, with respect to providing services as trustees in connection with RMBS trusts.

6. Amici make this motion because Objectors¹ have taken the position in this Appeal that BNYM should have retained separate counsel to represent investors. This issue is of vital importance to RMBS trustees and the RMBS marketplace generally. A finding that the Trustee here should have retained separate counsel to represent the interests of investors would have far-reaching consequences for financial institutions that serve as trustees for RMBS trusts and for investors in the RMBS market. The role of the trustee in an RMBS transaction is described in the transaction documents, and those at issue here are typical of the agreements that govern the trillions of dollars of securities that have been issued by RMBS trusts. Accordingly, if this Court were to adopt the Objectors’ suggestion that BNYM should have retained separate counsel to represent investors, it would almost certainly have an impact on RMBS trustees throughout the marketplace.

7. Amici submit their proposed brief to supplement the briefing of the parties, and to provide the Court with a broader industry perspective that may be

¹ The Objectors are Respondents-Appellee-Cross-Appellants, the Retirement Board of the Policemen’s Annuity & Benefit Fund of the City of Chicago, the City of Grand Rapids General Retirement System and the City of Grand Rapids Police and Fire Retirement System.

useful in addressing the separate counsel issue. Amici's proposed brief explains that the documents that govern RMBS transactions are carefully structured and purposefully vest in RMBS trustees the power and authority to prosecute claims of RMBS trusts for the benefit of their investors. It also points out that the governing agreements do not impose any requirement that a trustee appoint separate counsel for investors. Amici's proposed brief shows that imposing a requirement that RMBS trustees must appoint separate counsel for investors would run contrary to the well-established RMBS paradigm, the express terms of applicable contracts, and the expectations of RMBS trustees and investors. Accordingly, Amici's proposed brief urges the Court to reject Objectors' suggestion that a separate counsel requirement should be imposed.

WHEREFORE, on behalf of Amici, I respectfully request that the court grant Amici's motion to participate in this appeal as *Amici Curiae*.

Dated: September 18, 2014
New York, New York

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