

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

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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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Maiden Lane II, LLC (intervenor), Maiden Lane III, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisers, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), New York Life Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), 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, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Index No. 651786/11

Assigned to:  
Kapnick, Jr.

Petitioners.

-against-

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, and WESTERN NATIONAL LIFE INSURANCE COMPANY (collectively "AIG") (proposed intervenors),

Respondents.

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

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**THE INSTITUTIONAL INVESTORS' RESPONSE TO  
AIG'S MOTION TO INTERVENE**

AIG and its affiliates have appeared to object to the highly beneficial \$8.5 billion settlement the Trustee has achieved for all investors. Though AIG portrays itself as concerned only for the common good, events (not disclosed by AIG) suggest otherwise. Specifically, on the same day it appeared here to object, AIG filed its own, \$10 billion securities claim against Bank of America, which seeks recovery exclusively for itself. Thus, the Court should consider whether AIG is seeking to destroy a settlement that would generate funds flowing to *all* investors in order to channel those funds to itself alone, or whether it is using its opposition as a bargaining chip to extract a settlement of its own lawsuit.

The Institutional Investors do not object to AIG's intervention, but they urge the Court to scrutinize AIG's objection with healthy (and necessary) skepticism.

**There Are Abundant Reasons for Concern about Whether AIG Complied (Or Would Ever Comply) With the Governing Agreements**

**A. AIG's Motivation Is Suspect**

AIG's failure to disclose its simultaneously-filed individual claim against Bank of America is revealing. If, as we suspect, the motive for AIG's settlement objection is tied to its own lawsuit against Bank of America—and AIG is using its objection in this Article 77 proceeding to attempt to leverage those separate and simultaneously-filed securities claims—that would violate Section 10.08 of the Governing Agreements.<sup>1</sup> That Section prohibits AIG from invoking rights under the agreements for any purpose *other than* the “common benefit” of all Certificateholders.

AIG's account of its efforts to use the provisions of the Governing Agreements is also less than complete. While AIG's objection refers to its demands for loan files, *id.* at ¶19, AIG fails to disclose that it apparently sought those files to prepare its own securities claims, rather than to benefit the Covered Trusts. *Compare* AIG Securities Complaint at ¶ 8 (describing AIG's effort to prepare its *securities* claim, rather than a claim on behalf of the Covered Trusts, and pleading that “[d]espite multiple requests by AIG, AIG has been unable to gain access to the loan files for nearly all of the RMBS underwritten by Defendants”). This self-interested action is likewise prohibited by the Governing Agreements, because it does not serve “the common benefit of all Certificateholders.”

AIG also omits material facts in its three-paragraph effort to attack as “collusive” a garden-variety confidentiality agreement among the Institutional Investors, BNY Mellon and

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<sup>1</sup> Several other objectors likewise failed to tell the Court they were pursuing individual securities claims and thus failed to alert the Court to the possibility that they might be seeking discovery here to advantage their individual litigation claims. Thus, this type of self-interested leveraging will be a recurrent issue in this proceeding to be guarded against, so the benefit *all* certificateholders – the goal of the Settlement and of this Article 77 proceeding – will not be jeopardized.

Bank of America. See ¶ 29-30 of AIG Objection (citing an ostensibly difficult to locate “three-party confidentiality agreement designed to block outside beneficiaries’ review of the settlement related information.”). Nowhere in these paragraphs does AIG inform the Court that AIG signed virtually *identical* confidentiality agreements with both the Institutional Investors and Bank of America *before* it filed its objection. This, at minimum, undermines AIG’s claim that confidentiality agreements (which, as the Court noted, are customary in litigation) have precluded interested investors from gaining access to settlement information.<sup>2</sup>

**B. AIG Does Not Offer—and Has Never Offered—Any Plan That Would Lead to the Successful Pursuit of the Claims the Trustee Settled.**

AIG is also silent about whether a viable alternative exists for the Trusts if—as AIG urges—the settlement is not approved. AIG has held these securities for years: yet, it *never* took any action *at all* to invoke the Covered Trusts’ rights under the Governing Agreements, or to join with other certificateholders to do so. Instead, it waited until after a settlement was achieved to appear here in the form of its suspect objection.

In contrast to AIG’s inaction, eight of the Institutional Investors who support the settlement began working more than a year ago to assemble the voting percentages needed to surmount the many hurdles the Governing Agreements present to the pursuit of the Covered Trusts’ claims. Their efforts were widely publicized.<sup>3</sup> Many other investors joined the group, which more than doubled in size from 8 investors to 22. It was also no secret that Bank of America, BNY Mellon and the Institutional Investors were in discussions to try to remedy the

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<sup>2</sup> The Federal Home Loan Banks Intervenors were offered access to this information on the same basis, but declined.

<sup>3</sup> On October 19, 2010, the Wall Street Journal published a lengthy article entitled “Bondholders Pick a Fight with Banks.” The letter described the details of the Institutional Investors’ October 18 Notice of Non-Performance and identified their lead counsel.

issues identified in the Institutional Investors' Notice of Non-Performance.<sup>4</sup> These discussions, which went on for months, were the subject of disclosures in Bank of America's securities filings<sup>5</sup> and of press releases issued by the Institutional Investors, as well.<sup>6</sup> Despite these abundant disclosures that settlement discussions were occurring, neither AIG—nor any of the other Intervenors—contacted counsel for the Institutional Investors to ask to join the group or inquire about its efforts. AIG's inaction speaks volumes.

AIG also fails to inform the Court (or other investors) of the size of its current holdings of the Covered Trusts' securities. Careful reading of its objection, however, casts doubt on whether AIG could ever pursue claims on behalf of the Covered Trusts if the settlement were destroyed. AIG's allegations all but admit it does *not* hold 25% of the Voting Rights in *any* of the Covered Trusts. *Id.* at ¶10 (pleading only that AIG “owns certificates in 97 trusts” without disclosing AIG's actual holdings) and ¶ 20 (noting that BNY Mellon refused AIG's request for loan files, “citing a purported requirement that 25% of the trust beneficiaries must direct the Trustee's actions.”).<sup>7</sup> AIG also makes no allegation that it could (or would) have pursued the

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<sup>4</sup> On December 15, 2010, Bank of America and Gibbs & Bruns LLP issued a joint press release reported that they had agreed to extend time periods commenced by the Institutional Investors' October 18 Notice of Non-Performance to “permit the parties to continue a constructive dialogue around the concerns raised.” The same day, the Wall Street Journal published an article entitled “Bank of America in Mortgage Settlement Talks,” and reported that “Bank of America Corp., after vowing to fight requests that it repurchase certain loans, has begun potential settlement discussions with some of its largest mortgage investors, according to people familiar with the situation.” Other news outlets reported the same story on the same day.

<sup>5</sup> See e.g. Bank of America Form 10Q for the First Quarter of 2011 at pg. 49 (reporting Bank of America's receipt of the Institutional Investors' Notice of Non-Performance, describing “multiple extensions” of a forbearance agreement, and stating that “We are in discussions with the Law Firm, the investors and the trustee regarding the issues raised and more recently the parties have discussed possible concepts for resolution of any potential representations and warranties, servicing or other claims.”)

<sup>6</sup> See e.g. Press Releases by Gibbs & Bruns LLP on January 28, 2011 and March 31, 2011.

<sup>7</sup> The Court is well aware that the 25% threshold is not a “purported” requirement, as AIG tries to portray it. Many provisions of the Governing Agreements require that investors aggregate 25% of the Voting Rights *before* they are authorized to direct the Trustee to exercise the powers vested in it under the Governing Agreements. See Section 8.02 (iv) (Trustee “shall not be bound to make any investigation [into any matter] ... unless requested in writing to do so by Holders of Certificates evidencing not less than 25% of the Voting Rights ...”); 8.01(iii) (Trustee not liable

Covered Trusts' claims for the "common benefit of all Certificateholders" had the Trustee not settled them.

Finally, AIG never pleads that it offered—or would ever provide—the robust indemnity required to pursue these claims for the Trusts if the settlement were destroyed. *See* Section 10.08. AIG's omission on this point is highly probative. To salvage AIG, the New York Fed—one of the 22 Institutional Investors who *support* the settlement—"committed more than \$180 billion" to the rescue of AIG.<sup>8</sup> As part of that rescue, the New York Fed's Maiden Lane entities acquired from AIG billions of dollars of mortgage-backed securities issued by the Covered Trusts. AIG's response to this deliverance is its current effort to destroy a settlement that *benefits* AIG's Maiden Lane benefactors and thousands of other *innocent* investors as well.<sup>9</sup>

The Institutional Investors urge the Court to insist on strict compliance with the "common benefit" requirement of Section 10.08 and the other provisions of the Governing Agreements in evaluating any settlement objections. Otherwise, innocent certificateholders will face the risk that separately-motivated, self-interested parties will jeopardize the substantial (and otherwise unobtainable) benefits of this settlement to pursue their own ends. This Article 77 Proceeding is no place for certificateholders (or anyone else) to try to achieve their own, private

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with respect to action "taken by it in good faith in accordance with the direction of Holders of Certificates evidencing not less than 25% of the Voting Rights of Certificates relating to ... the exercise of any trust or power conferred on the Trustee under this Agreement."); 3.13 (specifying that "All Mortgage Files...shall be held by the Master Servicer for and on behalf of the Trustee and shall be and remain the sole and exclusive property of the Trustee, subject to the applicable provisions of his Agreement," and permitting the Trustee *but not* Certificateholders to request access to Mortgage Files); 7.01 (defining an Event of Default as occurring, among other times, "60 days after the date on which written notice of such failure [to perform] shall have been given ... to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates."); and, 10.08 (prohibiting Certificateholders from enforcing any right under the Governing Agreements unless "the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action... and shall have offered to the Trustee such reasonable indemnity as it may require...and the Trustee, for 60 days after its receive of such notice, request and offer of indemnity shall have neglected or refused to institute any such action...").

<sup>8</sup> *Id.* at 352

<sup>9</sup> AIG, as a certificateholder, will benefit from the settlement as well.

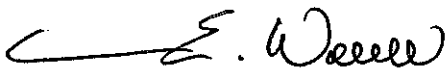
financial goals at the expense of the Covered Trusts and the common benefit of all certificateholders.

**Conclusion**

AIG's objection raises serious questions about whether it is acting recklessly and without regard for the interests of innocent investors. The Trustee's settlement benefits all investors, rather than just one or a few. It includes \$8.5 billion in cash payments to the Trusts for the benefit of *all* of their investors, landmark servicing improvements and a 100% indemnity for defective mortgage documentation. In this Article 77 Proceeding, the Trustee and the Court should be particularly vigilant to prevent this or any other litigant's, self-interested objection from jeopardizing the common good for all certificateholders.

Dated: New York, New York  
August 15, 2011

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