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), 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)

Petitioner,

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

Index No. 651786/2011

Assigned to: Kapnick, J.

MEMORANDUM OF ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN SUPPORT OF MOTION TO INTERVENE

On June 29, 2011, Bank of America ("BoA"), which bought Countrywide Financial Corporation in early 2008, announced a settlement with Bank of New York Mellon ("BNYM" or the "Trustee"), as trustee for 530 trusts (the "Trusts") created by Countrywide entities that comprise hundreds of billions of dollars in residential mortgage-backed securities, to settle all "potential claims" arising from the agreements governing the Trusts. On the same day, BNYM commenced this proceeding under CPLR Article 77, seeking a judicial finding that the proposed settlement is reasonable and within its powers as trustee. BNYM did not name any interested person as a respondent,

instead filing a unilateral proceeding for court approval of the broad and sweeping proposed settlement. BNYM seeks to make that finding binding on *all* beneficiaries of the Trusts, without ever giving beneficiaries or their representatives an opportunity to test its claim that the proposed settlement is reasonable and within its powers as trustee.

Nothing in Article 77 allows such a result. BNYM cannot obtain the broad relief it seeks in this proceeding unless the interests of the Trusts' beneficiaries are adequately spoken for and protected. The Attorney General of the State of New York Eric T. Schneiderman (the "Attorney General") has statutory and common law authority to safeguard the welfare of New York investors and the integrity of the securities marketplace generally. Pursuant to this authority, the Attorney General seeks to intervene in this proceeding to protect the marketplace and the interests of New York investors, the vast majority of whom otherwise are not present before the Court in this proceeding. Moreover, the Attorney General has an interest in this proceeding because the proposed settlement may interfere with his ability to pursue claims against BNYM, Countrywide, BoA, or affiliated entities. The Attorney General therefore seeks an order pursuant to CPLR 401, 1012, and 1013 granting him permission to intervene as an adverse party in this proceeding to protect the interests of the People of the State of New York.

ARGUMENT

Interested parties may intervene in a special proceeding, including an Article 77 proceeding, with leave of the court. CPLR 401. Pursuant to CPLR 1012(a), intervention by a party shall be permitted as of right if "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment."

CPLR 1012(a)(3). And intervention may be permitted under CPLR 1013 if "the person's claim or defense and the main action have a common question of law of fact . . . [and] the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party."

Intervention, if granted, vests the intervenor with all the rights of a party. *See David D. Siegel*, New York Practice § 183 (4th Ed. 2011). Thus, the right to intervene, as provided by CPLR 1012, is a right to participate *as a party* in a proceeding that may bind or adversely affect the intervenor. And nothing in the CPLR allows the court to deprive an intervenor of its right to party status by relegating the intervenor to a non-party, "objector" status, as BNYM has suggested.

I. THE ATTORNEY GENERAL'S INTERVENTION IS NECESSARY TO PROTECT THE INTERESTS OF ABSENT BENEFICIARIES

A. There Is A Risk That Unrepresented New York Investors May Be Bound By The Judgment

Given the broad relief sought by BNYM in this proceeding,[1] there is a risk that unrepresented beneficiaries, including New York investors, "may be bound by the judgment." CPLR 1012(a)(3). "Typically, persons seeking intervention need only carry a 'minimal' burden of showing that their interests are inadequately represented by the existing parties." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1168 (8th Cir. 1995). In this case, given that BNYM stands to benefit from the settlement agreement and that

[1] BNYM's Proposed Order and Judgment contains language stating that it would bind "all Trust Beneficiaries . . . , and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts . . . are bound by this Final Order and Judgment" (Settlement, Ex. B ¶ (e)), to a finding that "[t]he Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts" (*id.* ¶ (k)), and would "bar[] and enjoin[] [those parties] from instituting, commencing, or prosecuting . . . any suit, proceeding, or other action asserting against the Trustee any claims arising from or in connection with the Trustee's entry into the Settlement" (*id.* ¶ (p)).

the relief sought here appears designed to largely insulate BNYM from fiduciary duty claims arising from the settlement, there is no reason to presume that BNYM will adequately represent the beneficiaries, which are otherwise unrepresented in this proceeding. And BNYM itself has acknowledged that the absent beneficiaries may have divergent interests. Thus, BNYM noted that "different groups of [beneficiaries] may wish to pursue remedies for alleged breaches in different ways, creating the potential for conflicts among [beneficiaries] and placing the Trustee squarely in the middle of those conflicts." (BNYM Petition ¶ 14.)

Pursuant to CPLR 7703, absent parties with an interest in the trust will not be bound by the disposition of this case unless the absent parties' interests were adequately represented in the proceedings. *See* CPLR 7703 (applying the surrogate's court procedure act); *In re Judicial Settlement of First Intermediate Accounts of Proceedings of Cent. Hanover Bank & Trust Co.*, 18 Misc.3d 1138(A), 2008 N.Y. Slip Op. 50342, at *6 (Sup. Ct. N.Y. Co. 2008) (noting that the relevant provision of the surrogate's court procedure act invoked by CPLR 7703—Surr. Ct. Proc. Act § 315—requires "adequacy of representation"); Surr. Ct. Proc. Act §315(6) (limiting binding effect of proceedings).

The Attorney General seeks to intervene to protect the interests of the public and absent investors as to the proposed settlement, and to assert counterclaims against BNYM for the benefit of the absent investors and the public at large.

B. The Attorney General's Authority to Represent Absent New York Investors

The Attorney General has both common law *parens patriae* and statutory interests in protecting the economic health and well-being of all investors who reside or transact business within the State of New York. *See People ex rel. Spitzer v. Grasso*, 11 N.Y.3d

64, 69 n.4 (2008) ("[C]ourts have held that a state has a quasi-sovereign interest in protecting the integrity of the marketplace."); *State v. 7040 Colonial Road Assocs. Co.*, 176 Misc.2d 367, 374 (Sup. Ct. N.Y. Co. 1998) ("[T]he Attorney General is empowered not only to protect the investing public at large from misleading statements and omissions in connection with the sale of securities, but also to seek redress on behalf of individual investors who have been the victims of Martin Act violations."). The Attorney General also has an interest in upholding the integrity, efficacy, and strength of the financial markets in New York State, as well as an interest in upholding the rule of law generally. *See People v. Morris*, No. 0025/09, 2010 WL 2977151, at *13 (Sup. Ct. N.Y. Co. July 29, 2010) ("State Blue Sky securities acts such as the Martin Act represent considered legislative judgments of individual States to preserve the honesty and therefore investor confidence and the efficacy of the securities and capital markets."). The doctrine of *parens patriae* "allows the state to bring an action to prevent harm to its sovereign interests, such as the health, safety, comfort, and welfare of its citizens." *People ex rel. Cuomo v. Merkin*, 907 N.Y.S.2d 439, 2010 WL 936208, at *9 (Sup. Ct. N.Y. Co. 2010) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982); *People v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008); *State v. McLeod*, 819 N.Y.S.2d 213, at *8 (Sup. Ct. N.Y. Co. 2006)). Under this doctrine, the Attorney General is authorized to act in his capacity as *parens patriae* when, as in this case, the "alleged misconduct touched many investors, many of whom are New York State residents," including individuals as well as "funds and financial institutions representing individuals, charities, and foundations." *Merkin*, 2010 WL 936208, at *14.

II. THE ATTORNEY GENERAL SHOULD BE ALLOWED TO INTERVENE TO PROTECT HIS OWN INTERESTS

The widespread misconduct that gave rise to the proposed settlement, detailed in the Verified Pleading in Intervention, harmed New York investors and the marketplace generally.

A. The Attorney General Is Entitled to Intervene to Protect His Own Interests, Which Might Be Impaired by a Judgment In This Proceeding

The Attorney General has an interest in ensuring that any settlement of this magnitude fairly and comprehensively addresses harm to such investors, and does not cast doubt upon, or weaken, the integrity and strength of the financial markets. The Attorney General has the right to intervene to protect this unique interest, which is otherwise unrepresented in this proceeding. *See* CPLR 1012(a)(3).

In addition, the Attorney General is entitled to intervene because a judgment in this proceeding may interfere with his ability to assert claims against BNYM, BoA, or Countrywide. *Id.* The proposed pleading in intervention submitted with the Attorney General's motion includes counterclaims against BNYM for: (1) breach of fiduciary duty, brought in the Attorney General's capacity as *parens patriae*; (2) violations of Executive Law § 63(12), which prohibits persistent fraud or illegality in the conduct of business; or (3) violations of General Business Law § 352 *et seq*. (the Martin Act), for fraud in connection with a securities transaction, summarized below. The Attorney General also has potential claims against Countrywide and BoA under the same or similar causes of action.

Intervention pursuant to CPLR 1012(a)(3) is appropriate because BNYM, Countrywide, or BoA may take the position that the settlement and the facts found by this

court, if made binding on all beneficiaries, precludes the Attorney General from pursuing certain claims or remedies for such violations. *See, e.g., Spitzer v. Applied Card*, 11 N.Y. 3d 105, 125 (2008) (precluding restitution in some cases based on prior settlements having res judicata effect).[2] Moreover, a judgment in this case may impair the Attorney General's ability to prosecute his claims in light of the language in Petitioner's proposed judgment "permanently barring and enjoining" "[t]he Trustee, all Trust Beneficiaries, the Covered Trusts," and others, "from knowingly assisting in any way any third party in instituting, commencing, or prosecuting any suit against any or all of the Bank of America Parties and/or the Countrywide Parties asserting any of the Trust Released Claims." (Settlement Ex. B (Proposed Order and Judgment) ¶ (o).)

1. The Attorney General's Common Law Breach of Fiduciary Duty Claim

The Attorney General has an interest in ensuring that the Trustee did not breach its fiduciary duty by negotiating the instant settlement and in ensuring that the beneficiaries are not denied a remedy for any such breach. At this preliminary stage, the available facts surrounding the settlement suggest that the Trustee breached its fiduciary duties under New York State common law, in the course of administering the Trusts or in concluding the Settlement or both. *See Ambac Indem. Corp. v. Bankers Trust Co.*, 573 N.Y.S.2d 204, 208 (Sup. Ct. N.Y. Co. 1991) ("[T]he trustee is at all times obligated to avoid conflicts of interest with the beneficiaries") (citing *Elliott Assocs. v. J. Henry*

[2] Although the Attorney General's claims for violations of the Martin Act or Executive Law § 63(12) should fall within the definition of "claims not released" by the proposed settlement agreement (Settlement ¶ 10(c)), BYNM, Countrywide, or BoA drafted the release language and have not disclaimed any intention to assert that the proposed settlement would have preclusive effect as to claims, remedies, or issues of fact in connection with such causes of action by the Attorney General. Thus, there is no guarantee that the parties to the agreement will not argue after any final judgment is issued here that the Attorney General's claims are derivative of the released claims and therefore barred or that any facts found by the Court are binding on the Attorney General.

Schroder Bank & Trust Co., 838 F.2d 66, 73 (2d Cir. 1988) ("trustee must refrain from engaging in conflicts of interest")). And given that BoA negotiated the settlement with BNYM despite BNYM's obvious conflicts of interest, BoA may be liable for aiding and abetting BNYM's breach of fiduciary duty. *See Global Minerals & Metals Corp. v. Holme*, 35 A.D.3d 93, 102-03 (N.Y. App. Div. 1st Dept. 2006).

Moreover, the Attorney General's interest in protecting a potential breach of fiduciary claim is particularly strong given that the relief BNYM seeks in this proceeding—a finding that the Settlement is reasonable and binding on beneficiaries (Settlement Ex. B (Proposed Order and Judgment) ¶¶ (e), (k), (p))—might effectively deny beneficiaries a remedy for any breach of fiduciary duty by BNYM in the settlement process. And because the proposed settlement would indemnify BNYM against many claims for breach of fiduciary duty arising out of the settlement process (Settlement Ex. C (Indemnity Letter) at 2), there is a risk that BNYM will escape responsibility for any such breach, even if the claims are not precluded by this proceeding.

2. The Attorney General's Martin Act Claims

To date, the Attorney General's investigation has uncovered the following distinct claims arising under the Martin Act:

First, the Trustee violated the Martin Act by misleading investors about its conduct in the Pooling and Servicing Agreements governing the Trusts ("PSAs"), which provided that the Trustee would review and ensure mortgage file integrity, alert investors to events of default, and take action where necessary to remedy breaches. To the contrary, the Trustee failed to ensure mortgage file integrity, failed to alert investors to events of default, and took no actions to remedy the disastrous collapse in value of the Trusts it was supposedly safeguarding.

Second, Countrywide and BoA face Martin Act liability because there are repeated false representations in the Governing Agreements that the quality of the mortgages sold into the Trusts would be ensured, that servicing would be conducted to ensure value for the investors, and the integrity and completeness of mortgage files would be maintained.

Finally, the Trustee aided and abetted these violations of the Martin Act by failing, to take any action to correct Countrywide's misrepresentations, which the Trustee knew to be false or misleading and knew would be used to induce the sale of securities.

3. The Attorney General's Claims Under Executive Law § 63(12)

Similarly, the Attorney General's investigation has revealed the following violations of Executive Law §63(12):

The Trustee's conduct violates Executive Law § 63(12)'s prohibition on persistent fraud or illegality in the conduct of business: the Trustee failed to safeguard the mortgage files entrusted to its care under the Governing Agreements, failed to take any steps to notify affected parties despite its knowledge of violations of representations and warranties, and did so repeatedly across 530 Trusts.

Likewise, Countrywide and BoA face liability for persistent illegality in: (1) repeatedly breaching representations and warranties concerning loan quality; (2) repeatedly failing to provide complete mortgage files as it was required to do under the Governing Agreements; and (3) repeatedly acting pursuant to self-interest, rather than investors' interests, in servicing, in violation of the Governing Agreements.

B. In Any Case, Questions Presented By The Attorney General's Claims Would Be Similar to Questions Presented By This Proceeding

Even if the Attorney General were not entitled to intervene as of right, the Attorney General should be permitted to intervene because the claims that he might assert against BNYM, Countrywide, or BoA on behalf of the People of New York share "common question[s] of law or fact" with the instant proceeding. CPLR 1013.

This proceeding squarely presents the question of whether the Trustee breached its fiduciary duty in negotiating the settlement and whether the settlement is fair and reasonable. (*See, e.g.*, BNYM Petition ¶ 58 (urging approval of the settlement because it was negotiated "in good faith," is "reasonable," and is an exercise of the trustee's "independent, good faith judgment"); *id.* ¶ 62 (urging approval because "[a]t the very least, by entering into the Settlement, the Trustee is not acting in bad faith or outside the bounds of reasonableness"); Settlement Ex. B (Proposed Order and Judgment) ¶ (k) (proposing finding that the "Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts.").) The Attorney General's claim against BNYM for breach of fiduciary duty presents many of the same legal and factual questions.

In addition, the instant proceeding, as initiated by BNYM, which requires the evaluation of the fairness of the proposed settlement, will necessarily address the merits and likelihood of success of investors' claims against Countrywide and BoA. (*E.g.*, BNYM Petition ¶¶ 68-77 (discussing Countrywide's defenses).) And whether the Trustee facilitated any misconduct of Countrywide, or exacerbated the effect of such misconduct, is closely intertwined with a review of Countrywide's own conduct.

The common questions of fact between the instant proceeding and potential claims by the Attorney General further support intervention by the Attorney General. *See* CPLR 1013.

CONCLUSION

For all the foregoing reasons, the Attorney General respectfully requests that the Court grant his motion and amend the caption to add him as an Intervenor Counter-Plaintiff in this Article 77 proceeding and award such other and further relief as may be just.

Dated: August 4, 2011
New York, New York

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