

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 BadenWuerttemberg (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. 651786/2011

Assigned to: Kapnick, J.

Petitioners,

-against-

[VARIOUS PROPOSED INTERVENORS],

Respondents,

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

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**MEMORANDUM OF LAW IN SUPPORT  
OF PETITION TO INTERVENE**

Proposed intervenors, Knights of Columbus (the “Knights”), by and through their attorneys, Peter N. Tsapatsaris, LLC and Talcott Franklin P.C.,<sup>1</sup> submit this Memorandum of Law in Support of their Petition to Intervene in the above-captioned proceeding pursuant to CPLR 401, 1012, 1013, and 7701.

**INTRODUCTION**

The Knights are the world’s largest Catholic family fraternal service organization. The Bank of New York Mellon (“BNYM” or the “Trustee”) serves as trustee for a number of trusts in which the Knights have invested and that are at issue in this case.

On May 24, 2011, the Knights filed a non-adversarial lawsuit against BNYM demanding an accounting with respect to two of the trusts (the “Accounting Action”).<sup>2</sup> The Accounting Action contained detailed allegations regarding the servicing practices of Bank of America and its affiliates, sought to assess the resulting damages, and sought to protect borrowers and investors against future servicing abuses. Despite the fact that the Knights made BNYM keenly aware of the Knights’ interest in preventing servicing abuses by filing the Accounting Action and that BNYM purports to settle the claims underlying the Knights’ Accounting Action, BNYM failed to make the Knights aware of

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<sup>1</sup> *Pro hac vice* motion to be submitted.

<sup>2</sup> The case currently is pending before Justice Shirley Kornreich of the Commercial Division and is styled *Knights of Columbus v. The Bank of New York Mellon*, Index No. 651442/2011 (Sup. Ct. N.Y. County), but the parties have agreed to transfer the case to this Court.

the on-going settlement negotiations and claims evaluation and/or allow the Knights to participate in such negotiations and evaluation. Instead, BNYM prominently used the Knights' non-adversarial Accounting Action to support its claim that "the Trustee has been presented with conflicting demands." BNYM's Memorandum of Law in Support of Its Verified Petition Seeking Judicial Instructions and Approval of Proposed Settlement, June 29, 2011, at 13-14; *see also id.* at 1-2; BNYM's Verified Petition ¶ 14. After excluding the Knights from the settlement process, BNYM now demands that the Knights participate in the result.

In addition, the Knights served on BNYM discovery in the Accounting Action, which was narrowly tailored to help determine whether or not BNYM engaged in wrongdoing. BNYM refused to provide documents in response to that discovery. Meanwhile, additional information came to light – in the form of public reports, claims by the Attorney General of the State of New York, and provisions in the Proposed Settlement Agreement – which indicates that BNYM failed to fulfill critical duties in the administration of the trusts.

As a consequence, the Knights amended the Complaint in the Accounting Action to hold BNYM liable for its wrongful acts, and through this petition request the opportunity to object to any provision of the Settlement Agreement that would prejudice the Knights' claims and/or could be construed to relieve the Trustee of liability for the claims asserted by the Knights.<sup>3</sup>

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<sup>3</sup> The Knights may supplement their objections at a later date.

## ARGUMENT

Interested parties may intervene in an Article 77 proceeding with leave of court. CPLR 401. Pursuant to CPLR 1012(a) a party shall be permitted to intervene in an action as of right if “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” or 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.” Pursuant to CPLR 1013 a party may intervene with permission of the court if “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 substantial 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 (App. Div. 2010). Typically, “intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.” *Bernstein v. Feiner*, 842 N.Y.S. 2d 556, 558 (App. Div. 2007) (quoting *County of Westchester v. Department of Health of State of NY*, 645 N.Y.S. 2d 534 (App. Div. 1996)). Although any one of these conditions would be sufficient to permit the Knights to intervene, the Knights satisfy all three conditions for intervention.

### **I. THIS PROCEEDING INVOLVES A CLAIM FOR DAMAGES FOR INJURY TO PROPERTY, AND THE KNIGHTS MAY BE ADVERSELY AFFECTED BY THE JUDGMENT.**

The Knights own certificates in trusts that are subject to the Proposed Settlement Agreement. The Knights are also the plaintiff in another New York state court action

which originally requested that the Court order an immediate accounting of two trusts that are among the 530 trusts covered by the Proposed Settlement Agreement. BNYM has indicated that it seeks a stay of the Accounting Action, and indeed filed a motion to transfer or stay in the Accounting Action on July 20, 2011. In addition, BNYM contends that the Proposed Settlement Agreement will release all claims of the trusts owned by the Knights against Countrywide and Bank of America, which materially affects the value of the Knights' certificates in those trusts. Further supporting such a conclusion is the Order to Show Cause that BNYM obtained from this Court, which sets forth that "Potentially Interested Persons"<sup>4</sup> like the Knights may have an interest in these proceedings.

The Knights' property, ownership of certificates, as detailed above, may be adversely affected if this Court approves the Proposed Settlement Agreement. Thus, the Knights squarely fit CPLR 1012's definition of a party permitted to intervene as of right in this proceeding.

## **II. BNYM DOES NOT ADEQUATELY REPRESENT THE KNIGHTS' INTERESTS.**

CPLR 1012 also sets forth that a party may intervene as of right when "the representation of the person's interest by parties is or *may be* inadequate." (emphasis added); *see also Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).<sup>5</sup> "[P]ersons seeking intervention need only carry a 'minimal' burden of showing that their

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<sup>4</sup> Potentially Interested Persons is defined in the Verified Petition filed on June 29, 2011.

<sup>5</sup> CPLR 1012 is modeled after Rule 24 of the Federal Rules of Civil Procedure. Judicial opinions that interpret Rule 24 are therefore persuasive authority for this Court.

interests are inadequately represented by the existing parties.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1168 (8<sup>th</sup> Cir. 1995) (citations omitted).

While BNYM owes an equal duty to all certificateholders,<sup>6</sup> BNYM has already demonstrated that it will not represent the Knights’ interests adequately in this proceeding. First, BNYM claims to have settled the claims underlying the Knights’ Accounting Action without ever consulting the Knights or allowing the Knights to participate in the settlement negotiations or evaluation. Second, the Knights filed an Amended Complaint in the Accounting Action alleging various failures by BNYM as Trustee and are objecting to any settlement language or order of this Court that might be construed as releasing BNYM from claims brought by trust beneficiaries for such wrongdoing, or otherwise prejudicing actions against BNYM. These considerations make it unlikely that BNYM will fully represent the interests of the Knights in this proceeding.

### **III. THE ARTICLE 77 PROCEEDING AND THE KNIGHTS’ CLAIMS SHARE COMMON QUESTIONS OF LAW AND FACT.**

Even if the Knights were not permitted to intervene in this proceeding as of right, the Knights certainly satisfy the requirements for discretionary intervention under CPLR 1013. The Court has discretion to permit a party to intervene when “the person’s claim or defense and the main action have a common question of law or fact.” The Knights’ Accounting Action involves questions of law and fact common to the instant Article 77 proceeding. The two trusts involved in the Knights’ Accounting Action are

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<sup>6</sup> See *Groseclose v. The Merchants Nat’l Bank & Trust Co.*, 335 N.Y.S. 2d 652 (Sup. Ct. Onondaga County 1972) (holding trustee owed equal duty to all bondholders and could not ignore interests of minority bondholders); *Builders Capital & Servs, Inc., v. Rubino*, 43 Bankr. Ct. Dec. 276 (W.D.N.Y. 2004) (trustee owed a duty to all creditors to maximize the recovery of estate assets for the estate).

included in the 530 trusts, and the Proposed Settlement Agreement will affect the Knights' interests in other trusts, as well. Indeed, BNYM itself has asserted that common questions of law and fact exist between the Knights' Accounting Action and this Article 77 proceeding.

Moreover, it is particularly appropriate for the Knights to intervene as their proposed 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.) (intervention "is encouraged if the proposed intervenors' claims will add to the Court's understanding of the facts."). Finally, permitting the Knights to intervene in this proceeding will not "unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013. The Knights have filed their Petition to Intervene in advance of the deadline for Potentially Interested Parties to file objections with the Court.

### CONCLUSION

WHEREFORE, the Knights respectfully request that this Court grant their petition and add the Knights as intervenors-respondents in this Article 77 proceeding.

Dated: August 20, 2011

Respectfully Submitted,

/s Peter N. Tsapatsaris

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