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 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),

Petitioners,

-against-

WALNUT PLACE LLC, WALNUT PLACE II LLC, WALNUT PLACE III LLC, WALNUT PLACE IV LLC, WALNUT PLACE V LLC, WALNUT PLACE VI LLC, WALNUT

Index No. 651786/2011

Assigned to: Kapnick, J.

MEMORANDUM IN SUPPORT OF ORDER TO SHOW CAUSE

PLACE VII LLC, WALNUT PLACE VIII LLC, WALNUT PLACE IX LLC, WALNUT PLACE X LLC, WALNUT PLACE XI LLC, POLICEMEN'S ANNUITY & BENEFIT FUND OF CHICAGO AND THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, TM1 INVESTORS, LLC, FEDERAL HOME LOAN BANK OF BOSTON, FEDERAL HOME LOAN BANK OF CHICAGO, FEDERAL HOME LOAN BANK OF INDIANAPOLIS, FEDERAL HOME LOAN BANK OF PITTSBURGH, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FEDERAL HOME LOAN BANK OF SEATTLE, and V RE-REMIC, LLC,

Proposed Intervenor-Respondents,

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

Intervenors, Policemen's Annuity & Benefit Fund of Chicago, Westmoreland County Employee Retirement System, City of Grand Rapids General Retirement System and City of Grand Rapids Police and Fire Retirement System (collectively, the "Public Pension Fund Committee"), by their attorneys Scott+Scott LLP, submit this memorandum of law in support of their order to show cause in the above-captioned proceeding.

INTRODUCTION

The self-appointed group of twenty-two corporate investors (the "Corporate Investors") that privately negotiated the pending $8.5 billion Countrywide RMBS settlement have withdrawn their opposition to the Public Pension Fund Committee's petition to intervene and the parties have now submitted a proposed order granting the petitions to intervene. One of the main reasons that the Public Pension Committee sought to intervene in this proceeding is because, under the schedule set by Bank of New York Mellon ("BNY Mellon") and the Corporate Investors, interested parties must file any objections to the proposed settlement by August 30,

2011, which, significantly, must include a detailed statement of their objections, the grounds therefor, and *all of the supporting documents they desire the Court to consider*. Accordingly, by the Order to Show Cause, the Public Pension Fund Committee respectfully requests that the Court enter the proposed Case Management Order that is attached as Exhibit A,[1] to establish a protocol for the taking and use of expedited and coordinated discovery. As described in the affidavit of Dr. Scott Hakala ("Hakala Aff.") (Exhibit B), document discovery is needed to evaluate the reliability of the expert opinions and the reasonableness of the settlement, and thus to permit the Public Pension Fund Committee, other intervenors and other certificate holders to make an informed decision on whether to object to the settlement by the August 30, 2011 deadline, and, if they choose to object, to do so in a meaningful way, consistent with the Court's previous Orders. The Public Pension Fund Committee also believes that discovery bearing upon the interests and potential conflicts of the negotiating parties, the adequacy of the development of the facts, as well as the basis of the expert reports is warranted for the reasons discussed in its petition to intervene, and for the additional reasons set forth below.

The Corporate Investors and BNY Mellon continue to maintain that discovery on the proposed settlement is premature and should proceed only after all objections are filed by August 30, 2011, but the discovery is needed for the filing of objections. Recently, Defendants have filed five skeletal expert reports relating to the proposed settlement which cannot be assessed without the documents upon which they are based. *See* Ex. B (Hakala Aff ¶2). Moreover, the expert reports on their face raise concerns suggesting that Countrywide RMBS investors need the opportunity to take discovery before making a decision on a settlement that releases complex claims for billions of dollars. In particular:

[1] Unless otherwise noted, all exhibits referenced in this memorandum are attached to the Order to Show Cause.

- The RRMS Advisors' report on the "fairness" of the $8.5 billion settlement payment appears to use faulty numbers when calculating the number of defaulted loans that violated the representation and warranties in the PSA (the "Breach Rate"), and, thus, badly underestimates potential damages;

- None of the reports analyzes whether Bank of America assumed the repurchase liabilities of Countrywide Home Loans when Bank of America purchased all of Countrywide Home Loan's assets on November 7, 2008;

- None of the expert reports addresses whether BNY Mellon and/or the Corporate Investors are conflicted and are not capable of adequately representing the interests of other Countrywide RMBS investors;

- None of the expert reports discusses the plan of allocation – which distributes the settlement funds without regard to the investors' actual loss, or the broad scope of the release – which covers claims of individual past and current certificate holders as well as claims belonging to the Trusts.

Thus, rather than showing that discovery is not needed, the expert reports raise more questions than answers and show why the Public Pension Fund Committee should be allowed to take expedited discovery to permit them to make an informed decision before the objection deadline.

ANALYSIS

A. The Public Pension Fund Committee needs discovery on whether Bank of America assumed Countrywide Home Loans' repurchase liabilities when purchasing all of Countrywide Home Loans' assets on November 7, 2008.

According to BNY Mellon's expert, Capstone Valuation Services, LLC, Countrywide has $4.8 billion in assets available to pay a judgment on the repurchase claims. The original principal balances of the 530 Trusts exceed $420 billion, so that the collectability of a potential judgment is one of the key issues for purposes of the proposed settlement. Thus, the adequacy of the $8.5 billion settlement turns in substantial part on whether Bank of America can be held liable for the false representations and warranties that Countrywide Home Loans made in the

Pooling & Servicing Agreements ("PSA") and the contractual repurchase obligations set forth in the PSA.

Critically, Countrywide Home Loans, and not Countrywide Financial Corporation, made the representations and warranties in the PSA, and it is Countrywide Home Loans that is obligated under the PSA to repurchase those mortgage loans that failed to comply with the representations and warranties in the PSA. Yet, remarkably, the Corporate Investors, BNY Mellon, and their "experts" never considered whether Bank of America directly assumed Countrywide Home Loans' liabilities when it purchased all of Countrywide Home Loans' assets on November 7, 2008.[2]

The starting point for purposes of analyzing whether or not Bank of America is directly liable for the liabilities of Countrywide Home Loans is the "Asset Purchase Agreement by and between Bank of America Corporation and Countrywide Home Loans, Inc., dated Nov. 7, 2008" and the "Assignment and Assumption Agreement, dated Nov. 7, 2008." Other documents of interest are "Amendment No. 1 to the Asset and Purchase Agreement dated January 5, 2009" and the "Supplemental Agreement No. 1 to the Asset and Purchase Agreement dated March 6, 2009." BNY Mellon's "experts" listed these documents among those they reviewed when preparing their report, but they did not discuss or analyze them despite their obvious importance. Importantly, the documents have not been made available for Countrywide RMBS investors to review and, as far as the Committee can tell, the documents are not available in the public

[2] Indeed, Professor Robert Daines makes it clear in his report that BNY Mellon asked him only to opine on "two legal theories (veil piercing and successor liability) under which the Trustee could potentially seek to recover money from Bank of America Corporation."

domain.[3] These are documents that are critical for Countrywide RMBS investors to review in making an informed decision as to whether to object to the settlement.

Investors also need an opportunity to explore whether Bank of America subsidiary NB Holdings Corporation directly assumed any of the Countrywide Home Loans liabilities when it purchased certain of Countrywide Home Loans' assets on July 2, 2008. BNY Mellon's experts reference a "Purchase and Sale Agreement between CHL & NB Holdings Corporation dated July 2, 2008" and a "Master Mortgage Loan Purchase and Subservicing Agreement between CHL and NB Holdings Corporation dated July 1, 2008," but the experts fail to discuss the Agreement or whether Bank of America subsidiary, NB Holdings, assumed the Countrywide Home Loans liabilities when it purchased these assets. Countrywide RMBS investors also need discovery to determine the intent of the parties when entering into these agreements – to the extent that the agreements themselves are at all ambiguous and extrinsic evidence is needed to determine the parties' intent in transferring the liabilities to Bank of America and NB Holdings. There is no indication in any of the expert reports that any discovery has so far been taken on what the Public Pension Fund Committee submits is the key issue in this entire case.

In addition, there is no indication that the Corporate Investors or BNY Mellon have reviewed (or were even provided) any of the evidence that has already been produced and obtained in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.,* Case No. 2008-602825 (N.Y. Sup. Ct.) (Bransten, J.). In *MBIA,* Judge Bransten recognized that the parties

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[3] One would have expected the Corporate Investors, BNY Mellon and their "expert" to have analyzed the Asset Purchase Agreement between Bank of America and Countrywide Home Loans, given the critical importance that the assumption of liability question plays in the settlement of the repurchase claims in this case. Investors need to know: does the Asset Purchase Agreement unambiguously transfer the repurchase liabilities from Countrywide Home Loans to Bank of America or, alternatively, unambiguously carve out the repurchase liabilities from those that Bank of America has agreed to assume? Is the language in the Asset Purchase Agreement ambiguous on the transfer of the repurchase liabilities and, if so, did the Corporate Investors take any discovery to try to assess the intent of the parties when entering into that Agreement? BNY Mellon's report fails to ask any of these questions and, thus, the Committee should be allowed to take discovery to answer these questions for the investors.

needed to take discovery to determine whether Bank of America was liable for the Countrywide Home Loans repurchase obligations, explaining:

> My thinking is that [Bank of America's] successor liability is very much tied to quite a few of the people that are going to be deposed as we go forward in the next period of time in terms of depositions. And partially because some of the people who used to work for Countrywide now work for BAC, so that they have a sense of dual knowledge. They have knowledge about what happened at Countrywide and that's what they're going to be deposed on. But also what happened after they went over to BAC in terms of what happened in terms of successor – type of liability you might say.

Transcript, April 27, 2011 Hrg., at 23:20-24:5.

Importantly, it appears that some of this discovery has already been taken, and should be readily accessible for production for purposes of making a decision by August 30, 2011 on whether to object to the settlement. As MBIA explained in a June 6, 2011 filing with the Court, "In recent months, MBIA has conducted numerous depositions of former Countrywide employees who also worked for BAC in the period after the acquisition of Countrywide. These depositions have yielded significant evidence supporting MBIA's allegations that Countrywide and BAC merged or 'de facto' merged in 2008." MBIA's June 6, 2011 Brief ("MBIA Br."), at 8.

For instance, on May 12, 2011, MBIA deposed Andrew Gissinger, who as "president and COO of Countrywide Home Loans" until what he describes as "the close of the merger … in July 2008." *Id.* Gissinger explained that after July 2008, he was employed by "Bank of America Home Loans" – not Countrywide Home Loans, and that his primary responsibility "post merger" was to "integrate the two companies' sales forces and transitioning or assisting in the transition of and integration of the sales force … into Bank of America." *Id.* As Gissinger explained it, "[y]ou had two companies who originated mortgages going into one company." "It was, you

know, a combination of the two units to be the most efficient and effective organization you could be, based upon the assets and capabilities of both entities." *Id.*

MBIA also disclosed that, on April 30, 2011, it deposed Celia Coulter, who worked in mortgage operations for Countrywide and then for BAC. She testified that after July 1, 2008 – the closing date of Bank of America's acquisition of Countrywide "we were working for BAC." *Id.* Numerous other Countrywide Home Loan and Bank of America employees gave similar testimony. *Id.* This testimony is consistent with the statements made by Bank of America spokesperson Scott Silvestri, who stated in 2008 that "[Bank of America] bought [Countrywide] and all of its assets and liabilities . . . We are aware of the claims and potential claims against the company and have factored these into the purchase." *Id.* at 5. Statements in Bank of America's Second Quarter 2010 Form 10-Q also show that Bank of America may have assumed Countrywide Home Loans' obligation to purchase non-conforming mortgage loans. There, Bank of America stated that "[l]oans have been repurchased and a liability for representations and warranties has been established for monoline repurchase requests, based upon valid identified loan defects." *Id.* at 7. This information is described in the Memorandum of Law that MBIA publicly filed on June 6, 2011, while excerpts of the underlying depositions and documents were filed under seal. Thus, again, this information is readily available and should be produced before August 30, 2011 to permit an informed decision on whether to object to the settlement.

There is, however, no indication that the Corporate Defendants or BNY Mellon looked at any of this evidence when assessing the likelihood that Countrywide RMBS investors could prevail on a successor liability claim against Bank of America. Since this is the key question for purposes of arriving at a settlement number, if the experts did not review these evidentiary

materials, it raises serious concerns as to whether the parties to the settlement performed the necessary due diligence in reaching an agreement.

B. The RRMS Advisors Report on the $8.5 Billion Settlement Is Too Superficial to Permit an Informed Decision on the Settlement.

The Public Pension Fund Committee also shares many of the same concerns regarding the RRMS Advisors' report on the fairness of the $8.5 billion settlement amount that were previously set forth in a response that was filed by the TM1 intervenors. Specifically, Mr. Brian Lin of RRMS Advisors prepared a report in which he concluded that "a settlement figure somewhere between $8 and $11 billion is reasonable." In reaching this conclusion, Mr. Lin:

- Assumed that an unusually low percentage of the mortgage loans would go into default, without providing any documentation or basis for this assumption;
- Assumed that, of those loans that go into default, between 36-40% of those loans are non-conforming in that they breached the representations and warranties in the PSA, another assumption without any credible or verifiable basis, such as being based on a statistical sampling of the actual mortgage loans in the covered trusts that are subject to the settlement;
- Assumed that the trusts would recover between 45% and 60% of the principal balance on non-conforming loans through foreclosure, an undocumented assumption that again is not apparently based on statistical sampling of the recoveries that the loan servicer has been able to obtain through foreclosure to date, or other credible or verifiable data.

Additional discovery is needed to identify the facts underlying Mr. Lin's assumptions and determine whether his conclusions are reasonable and reliable. *See* Ex. B (Hakala Aff. at ¶2).

C. This Court Should Order BNY Mellon to Establish a Document Repository for the Documents and Deposition Transcripts Obtained By the Pension Committee.

The Corporate Investors and BNY Mellon argue that discovery should not be allowed at this time because it would be unduly burdensome and other Countrywide RMBS investors could potentially petition to intervene to request duplicative or inconsistent discovery. These concerns are easily and efficiently addressed through the establishment of a Document Repository for the

documents and deposition transcripts that the Public Pension Fund Committee obtains prior to the objection deadline. The Court then could grant other Countrywide RMBS investors access to the Document Repository so that they can evaluate the fairness of the proposed settlement for themselves, based on the same information, without slowing down the proceedings.

In another recent case involving a large number of interested parties, and a ready stable of relevant documents, the Eastern District of Louisiana ordered the defendants in actions involving the Deepwater Horizon to place documents that they had produced to government agencies into a similar document repository, so that the many private plaintiffs could access those documents and their claims could proceed as quickly and efficiently as possible. The Eastern District of Louisiana's order creating that document repository is attached as Exhibit 1 to the Case Management Order. Further, attached as Exhibit 2 to the Case Management Order is a list of documents that BNY Mellon, BOA and the Corporate Investors should have ready access to – because they have produced them to their experts or in similar cases, have exchanged them with one another, or would necessarily have relied on them as seminal information to manage the portfolios – which should form the initial production into the Document Repository here. The documents listed in Exhibit 2 are both readily accessible and necessary for an informed review of the expert opinions that BNY Mellon relied on in reaching the proposed settlement, which were recently made public, and also the allocation plan proposed in the settlement.

The key point here is that the persons being asked to release multi-million dollar or multi-billion dollar claims and to submit written objections to the settlement that would release their claims by August 30, 2011, should be permitted to do so an informed basis. The other parties are no longer in a position to independently evaluate the fairness of the settlement because they all

have a vested interest – and, in the case of the Corporate Investors, are contractually bound by the Institutional Investor Agreement – in supporting the settlement in its current form.

D. The Expert Reports Fail to Address Any of the Other Issues that the Public Pension Fund Committee Previously Raised Regarding the Settlement.

The expert reports also fail to deal with or address any of the other concerns with the settlement that the Public Pension Fund Committee previously raised with the proposed settlement – concerns that included potential problems with the proposed plan of allocation, concerns with the broad scope of the release, the fact that investors were not given an opportunity to opt-out of the settlement, and potential conflict of interest concerns pertaining to both BNY Mellon and the Corporate Investors that led the negotiations. The fact that the experts have not (and, perhaps, cannot) address these concerns only serves to further underscore why discovery is needed in this case.

RELIEF REQUESTED

WHEREFORE, the Public Pension Fund Committee respectfully requests that this Court grant the Order to Show Cause, and enter the Case Management Order attached thereto, which requires BNY Mellon, BAC and the Corporate Investors to establish an electronic Document Repository and produce an initial set of documents therein.

DATED: New York, New York
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Beth Kaswan /MS

David R. Scott
Beth A. Kaswan
Max R. Schwartz
Scott+Scott LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110
Tel: 212-223-6444
Fax: 212-223-6334

Counsel to Public Pension Fund Committee