

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 PLACE VII LLC, WALNUT
PLACE VIII LLC, WALNUT PLACE IX LLC,
WALNUT PLACE X LLC, WALNUT PLACE XI
LLC, POLICEMEN'S ANNUITY & BENEFIT FUND

Index No. 651786/2011

Assigned to: Kapnick, J.

OF CHICAGO, 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, V RE-REMIC, LLC, THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, WESTERN-SOUTHERN LIFE ASSURANCE COMPANY, COLUMBUS LIFE INSURANCE COMPANY, INTEGRITY LIFE INSURANCE COMPANY, NATIONAL INTEGRITY LIFE INSURANCE COMPANY, FORT WASHINGTON INVESTMENT ADVISORS, INC. on behalf of FORT WASHINGTON ACTIVE FIXED INCOME LLC, CRANBERRY PARK LLC, and CRANBERRY PARK II LLC

Proposed Intervenor-Respondents,

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

MEMORANDUM OF 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, AND FEDERAL HOME LOAN BANK OF SEATTLE IN SUPPORT OF ORDER TO SHOW CAUSE

The Bank of New York Mellon initiated this Article 77 proceeding on June 29, 2011, to request the Court's approval of its proposed settlement with Countrywide and Bank of America. That same day, BNYM presented to the Court *ex parte* an order to show cause that proposed very limited procedures for interested parties to object to the proposed settlement and no procedures at all to give them any information about it. The proposed order also set a date for the hearing at which objections would be heard. The Court signed BNYM's order to show cause (referred to here as the Preliminary Order). After the proposed settlement was announced to the public, several certificateholders petitioned the Court to intervene as respondents in this Article 77 proceeding. Those petitions are unopposed and remain pending before the Court.

The undersigned proposed intervenor-respondents believe that the procedures and schedule for objections that BNYM proposed to the Court and that are now embodied in the Preliminary Order are inadequate and prejudicial to investors that wish to investigate, and then possibly to object to, the proposed settlement. Proposed intervenor-respondents therefore respectfully ask the Court to modify the procedures in the Preliminary Order to enable them and other interested certificateholders to gather information about the proposed settlement, to have a reasonable time to evaluate that information before deciding whether to object to the settlement, and to exclude from the settlement those Trusts in which 20% or more of certificateholders inform the Court that they wish that Trust to be excluded.

In particular, proposed intervenor-respondents ask the Court to modify the Preliminary Order: (1) to extend the deadline for objections until the later of December 30, 2011, or 75 days after the parties and third parties have substantially completed their document productions under notices to produce and subpoenas that proposed intervenor-respondents will serve if the Court grants their petition to intervene; and (2) to provide an express right for certificateholders that own 20 percent or more of the voting rights in any Trust to exclude that Trust from the proposed settlement.

ARGUMENT

The schedule in the Preliminary Order is prejudicial to the proposed intervenor-respondents and to all other certificateholders that want necessary information about the proposed settlement before having to decide whether to object to it. Under the schedule that BNYM proposed *ex parte* and the Court embodied in the Preliminary Order, proposed intervenor-respondents have less than one month left to serve notices to produce and subpoenas, wait for documents to be produced, evaluate the information in those documents, possibly engage their own experts to assist them, decide whether to object to the settlement, and then give notice and a detailed statement of their objections.

The proposed settlement itself took over a year to negotiate.¹ It purports to release the rights of thousands of investors all over the world that invested hundreds of billions of dollars in the Trusts covered by the proposed settlement. The Settlement Agreement itself acknowledges that judicial review of the settlement will be considered, not hasty. There is no business reason – and certainly no legal reason – why the Court should countenance any procedure that denies investors the time and information that they need to make well considered decisions whether to object.

I. AFTER THEY ARE PERMITTED TO INTERVENE, PROPOSED INTERVENOR-RESPONDENTS WILL BE ENTITLED TO NORMAL DISCLOSURE UNDER ARTICLE 31.

Although leave of Court is required for disclosure in most special proceedings, parties to proceedings under Article 77 are entitled to the normal disclosure provided by Article 31. CPLR 408 provides: “Leave of court shall be required for disclosure [in a special proceeding]. . . . This section shall *not* be applicable . . . to proceedings relating to express trusts pursuant to article 77, . . . which shall be governed by article 31.” (Emphasis added.)² Because their petition to intervene is unopposed, proposed intervenor-respondents have prepared notices to produce to be served on BNYM and the 22 intervenor-petitioners and subpoenas to be served on Bank of America and certain of its subsidiaries and on certain of BNYM’s experts. (The notices to produce and subpoenas are attached as Exhibits A, B, and C to the accompanying order to show cause.) Proposed intervenor-respondents will serve these notices and subpoenas immediately if the Court grants their unopposed petition to intervene.

¹ Kathy D. Patrick, Esq., the attorney for the 22 investors, first wrote to BNYM on June 17, 2010, on behalf of the original members of that group. The proposed settlement was completed on June 28, 2011.

² Moreover, CPLR 7701 itself provides that, in an Article 77 proceeding, “any party shall have the right to examine the trustee[] . . . as to any matter relating to [its] administration of the trust.”

II. THE SCHEDULE IN THE PRELIMINARY ORDER DOES NOT ALLOW ENOUGH TIME FOR DISCLOSURE OR CONSIDERATION OF THE INFORMATION DISCLOSED.

The Preliminary Order states that any Potentially Interested Person must provide notice of intention to object to the proposed settlement and submit a detailed statement of the objection by August 30, 2011, and that these objections will be heard on November 17, 2011. That is the same day on which the Court plans to consider whether to approve the proposed settlement.

Interested certificateholders cannot possibly obtain the necessary disclosure and evaluate the proposed settlement in time to file objections in August and be ready for a hearing in November. BNYM, Bank of America, Countrywide, and the 22 self-appointed investors negotiated for over a year and had extensive access to the information with which to do so. Proposed intervenor-respondents are entitled to adequate time for the disclosure necessary to evaluate the fairness of the settlement, to consider the information disclosed (most likely with the assistance of their own experts), and then to present that information to the Court before the Court decides whether to approve the proposed settlement. *Andrusz v. Town of Lancaster*, 289 A.D.2d 950 (App. Div. 2001).

III. THE COURT SHOULD PROVIDE A PROCEDURE FOR INVESTORS TO EXCLUDE THEIR TRUSTS FROM THE SETTLEMENT IF THEY WISH TO DO SO.

Section 4(a) of the Settlement Agreement, which is attached as Exhibit B to BNYM's petition, expressly contemplates that Trusts may be excluded from the proposed settlement. Section 4(b) of the agreement even provides that Bank of America and Countrywide may scuttle the entire settlement if the unpaid principal balance of "Excluded Trusts" exceeds a certain "confidential percentage" of the total unpaid principal balance of all 530 Trusts.

But neither the Settlement Agreement nor the Preliminary Order provides any mechanism for certificateholders in a particular Trust to elect to exclude that Trust from the settlement. Indeed, certificateholders have no rights whatsoever under the Preliminary Order except to submit "written objections" to the proposed settlement.

Fairness dictates that certificateholders that represent a substantial percentage of the Voting Rights in a given Trust should have the right to exclude that Trust from the settlement and preserve the rights of the Trust to pursue its own remedies against Bank of America and Countrywide for breaches of representations and warranties. Moreover, it is crucial that certificateholders be made aware of the possibility of excluding their Trust – and of the specific method by which a Trust may be excluded – *before* the deadline for deciding whether to object to the settlement.

IV. EXPEDITED BRIEFING AND DECISION OF THIS APPLICATION IS NECESSARY

Proposed intervenor-respondents seek this relief by order to show cause because the CPLR requires that motions in a special proceeding be noticed for the day on which the final hearing is scheduled. Because virtually all of the relief that proposed intervenor-respondents are seeking relates to deadlines and procedures that are to occur before the final hearing, they have no choice but to proceed by order to show cause and to request an expedited briefing schedule.

CONCLUSION

For the foregoing reasons, the intervenor-respondents respectfully request that the Court order the modifications to the Preliminary Order that are proposed in the accompanying order to show cause.

Dated: New York, New York
August 4, 2011

KELLER ROHRBACK L.L.P.

By: /s/ David S. Preminger
David S. Preminger

770 Broadway
New York, New York 10003
(646) 495-6198
(646) 495-6197 (fax)

KELLER ROHRBACK L.L.P.

Lynn Lincoln Sarko
Derek W. Loeser
Amy Williams-Derry
Elizabeth A. Leland

1201 Third Avenue
Seattle, Washington 98101
(206) 623-1900
(206) 623-3384 (fax)

KELLER ROHRBACK P.L.C.

Gary A. Gotto

3101 North Central Avenue
Phoenix, Arizona 85012
(602) 248-0088
(602) 248-2822 (fax)

*Attorneys for Federal Home Loan Banks of
Boston, Chicago, and Indianapolis*

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: /s/ Heather Y. Fong
Heather Y. Fong

601 Lexington Avenue
New York, New York 10022
(212) 980-7400
(212) 980-7499 (fax)

Thomas B. Hatch
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8900
(612) 339-4181 (fax)

*Attorneys for Federal Home Loan Bank of
Pittsburgh*

GRAIS & ELLSWORTH LLP

By: 

David J. Grais (DG 7118)
Kathryn C. Ellsworth
Owen L. Cyrulnik
Leanne M. Wilson

40 East 52nd Street
New York, New York 10022
(212) 755-0100
(212) 755-0052 (fax)

*Attorneys for Federal Home Loan Banks of San
Francisco and Seattle*