

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 JOSEPH R. BIDEN, III, ATTORNEY GENERAL OF  
 THE STATE OF DELAWARE (THE "DELAWARE DEPARTMENT OF  
 JUSTICE"), IN SUPPORT OF ITS PETITION TO INTERVENE**

The Bank of New York Mellon ("BNYM", or the "Trustee") filed this Article 77 proceeding on June 29, 2011, to obtain judicial approval of a proposed settlement of the claims of 530 trusts (the "Covered Trusts"), including a small number of Delaware statutory trusts, for which BNYM serves as trustee or indenture trustee. BNYM seeks a judicial finding that the proposed settlement is reasonable and within BNYM's powers as

trustee. The proposed settlement, if approved, would eliminate the claims of the trusts, including the Delaware statutory trusts, against Countrywide entities ("Countrywide") and Bank of America ("BoA"). BNYM seeks to make that finding binding upon all beneficiaries of the Trusts, without giving beneficiaries or their representatives the opportunity to challenge BNYM's claim that the proposed settlement is reasonable and within its powers as trustee. The relevant facts relating to the background of the proposed settlement are more fully set forth in the Delaware Department of Justice's Petition to Intervene (the "Petition"), filed herewith. *See* Petition ¶¶ 6-11.

The Delaware Department of Justice objects to the approval of the proposed settlement at this time. The Delaware Department of Justice seeks permission to intervene in this proceeding: (i) to ensure that the interests of Delaware investors who are beneficiaries of the Covered Trusts are represented and protected; (ii) to preserve the Delaware Department of Justice's ability to pursue state law claims, including claims for securities fraud and deceptive trade practices, against BNYM, BoA or Countrywide, arising out of the conduct covered by the potential settlement; and (iii) to ensure that the trusts covered by the proposed settlement (either directly or indirectly) that were created pursuant to the provisions of the Delaware Statutory Trust Act and are governed by Delaware law appropriately are addressed. This is the Delaware Department of Justice's Memorandum of Law in support of his Petition to Intervene pursuant to New York CPLR 401, 1012 and 1013.

## ARGUMENT

Interested parties may intervene in an Article 77 proceeding with leave of the court. CPLR 401. Pursuant to CPLR 1012(a), intervention by a party shall be permitted as a matter 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." Intervention is permissible pursuant to CPLR 1013 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."

### **I. THE DELAWARE INTERVENTION OF THE DELAWARE DEPARTMENT OF JUSTICE IS NECESSARY TO PROTECT THE INTERESTS OF ABSENT BENEFICIARIES INCLUDING DELAWARE INVESTORS**

#### **A. There is a Risk that Unrepresented Delaware Investors May be Bound by the Judgment**

The relief sought by BNYM in this proceeding contains broad language<sup>1</sup> suggesting that unrepresented beneficiaries, including Delaware investors, statutory trusts and beneficiaries "may be bound by the judgment." CPLR 1012(a)(3). The proposed settlement also contains a sweeping release of claims provision, under which all trust beneficiaries' claims are fully and finally resolved by the terms of the agreement. The Delaware Department of Justice seeks to intervene to protect the interests of Delaware citizens, including the aforementioned Delaware investors.

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<sup>1</sup> BNYM's Proposed Order and Judgment states 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", to a finding that "[t]he Trustee acted in good faith . . . " 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." (*See Settlement, Ex. B to New York Memorandum of Law In Support of Motion to Intervene*).

## **B. The Delaware Department of Justice Has Both Statutory and Common Law Authority to Represent Absent Delaware Investors**

The Delaware Department of Justice has a significant interest in preserving potential claims against the parties to the proposed settlement that arise out of the conduct covered by the proposed settlement. The Delaware Department of Justice seeks to intervene pursuant to its statutory and common-law authority to protect Delaware investors. The Delaware Department of Justice has statutory authority, pursuant to the Delaware Securities Act, to “remedy any harm caused by securities law violations.” 6 *Del. C.* § 7301 (b). The Delaware Department of Justice, like other state attorneys general acting pursuant to their *parens patriae* authority, also has common-law authority to protect the interests of its citizens and investors in the market. *See People ex. Rel Spitzer v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008). The Delaware Department of Justice legally is charged with protecting the interests of all Delaware investors, including those Delaware investors who are beneficiaries of the Covered Trusts. The Delaware Department of Justice also has statutory authority to pursue remedies for deceptive trade practices that are harmful to Delaware residents or consumers. 6 *Del. C.* § 2533(d). Finally, the Delaware Department of Justice's intervention is essential given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a conflict of interest. *See* Petition ¶ 14. It is therefore particularly important that the interests of absent beneficiaries, including Delaware investors, are represented.

## **II. THE DELAWARE DEPARTMENT OF JUSTICE SHOULD BE ALLOWED TO INTERVENE TO PRESERVE DELAWARE LAW CLAIMS.**

While the Delaware Department of Justice has limited information regarding the merits of the settlement, the details of the potential misconduct leading to the proposed settlement are widely reported. The Delaware Department of Justice therefore has a legitimate basis upon which to assume, pending verification through confirmatory discovery, that Delaware's interests may adversely be affected by the proposed settlement.

### **A. The Delaware Department of Justice's Potential Claims May Be Impaired by a Judgment in This Proceeding**

The Delaware Department of Justice has a unique interest in protecting the Delaware interests that potentially are affected by the proposed settlement. Intervention pursuant to CPLR 1012 or 1013 is appropriate because BNYM, Countrywide, or BoA may take the position that the settlement and the facts found by this court, if made binding upon all beneficiaries, precludes the Delaware Department of Justice from pursuing certain claims or remedies for such violations.<sup>2</sup> While the Delaware Department of Justice's potential claims, including its securities fraud and deceptive trade practices claims, should fall within the definition of "claims not released" in the proposed settlement agreement (§ 10(c)), there is no guarantee that BNYM, Countrywide or BoA would not assert that the Delaware Department of Justice's claims are barred by the terms of the proposed settlement, once approved.

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<sup>2</sup> There is some precedent from the Third Circuit Court of Appeals suggesting that an investor may, through a contract with a third party, bargain away the State's ability to pursue restitution on his or her behalf. *See Olde Discount Corp. v. Tupman*, 1 F.3d 202 (3d Cir. 1993).

**a.i. The Delaware Department of Justice's Potential Securities Fraud Claim**

As stated previously, the Delaware Department of Justice's investigation is still in preliminary stages. The Delaware Department of Justice believes, however, that the acts and practices of BNYM alleged herein may have violated the Delaware Securities Act, 6 *Del. C.* § 7303(2), in that BNYM may have made untrue statements of material fact and/or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading. BNYM's conduct as described above may have violated the Delaware Securities Act insofar as the Trust PSA requires the Trust annually to certify the following "servicing criteria":

- "Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents."
- "Mortgage loan and related documents are safeguarded as required by the transaction agreements;" and
- "Any addition, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements."<sup>3</sup>

The Delaware investors in the Trusts may have been misled by BNYM into believing that BNYM would review the loan files for the mortgages securing their investment, and that any deficiencies would be cured.

**a.ii. The Delaware Department of Justice's Potential Deceptive Trade Practices Claim**

The acts and practices of BNYM alleged herein also may have violated Delaware's Deceptive Trade Practices Act, 6 *Del. C.* §§ 2532(a)(7) and 2532(a)(12), in that BNYM's conduct created "a likelihood of confusion or misunderstanding" in the

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<sup>3</sup> See generally, Trust PSA, Exhibit W to New York Motion to Intervene.

investors in the Trusts. The Delaware Deceptive Trade Practices Act, which is based on the Uniform Deceptive Trade Practices Act, is intended to be broadly construed to encompass a wide range of potentially deceptive practices.<sup>4</sup> While the Delaware Department of Justice's investigation is preliminary, the fact that the Delaware investors in the trusts may have been misled by BNYM concerning the scope of review of the loan files for the mortgages securing their investment may give rise to a Deceptive Trade Practices claim under Delaware law.

**B. Questions Presented by the Delaware Department of Justice's Claims Would be Similar to Questions Presented by This Proceeding**

Even if the Delaware Department of Justice is not entitled to intervene as a matter of right, the Delaware Department of Justice should be permitted to intervene because the claims that it might assert against BNYM, Countrywide, or BoA on behalf of the relevant Delaware interests share "common questions of law or fact" with this proceeding. CPLR 1013.

This proceeding will address the question of whether the Trustee breached its fiduciary duty in negotiating the settlement and whether the settlement is fair and reasonable. *See* 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.") In addressing these issues, the proceeding necessarily will address the merits and likelihood of success of investors' claims against Countrywide and BoA. Such claims contain common questions of law or fact with the Delaware

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<sup>4</sup> *Delaware Solid Waste Authority v. Eastern Shore Environmental, Inc.*, 2002 WL 537691, at \*6 (Del. Ch. Mar. 28, 2002) (The intent of Section 2532(a)(12) is to enable courts to prevent "new kinds of deceptive trade practices").

Department of Justice's potential securities fraud and deceptive trade practices claims. The Delaware Department of Justice's participation would therefore assist the court in ascertaining all of the relevant facts of the proposed settlement.

**III. THE DELAWARE DEPARTMENT OF JUSTICE SHOULD BE ALLOWED TO INTERVENE TO ENSURE THAT THE COVERED TRUSTS THAT WERE CREATED UNDER DELAWARE LAW ARE APPROPRIATELY ADDRESSED**

The Delaware Department of Justice has a substantial interest in ensuring that Delaware vehicles, including Delaware statutory trusts, are not being used to facilitate violations of the law. Delaware also has a substantial interest in ensuring that the claims relating to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure under the Act. The Delaware Department of Justice believes that an Article 77 Proceeding is not the appropriate venue for resolving those issues relating to Delaware Statutory Trusts, particularly where, as here, the trust agreements that create and govern trusts formed under the Delaware Statutory Trust Act are governed by Delaware law.<sup>5</sup> See Petition ¶¶ 18-20.

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<sup>5</sup> See 12 Del. C. § 3809 ("Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts").



## CONCLUSION

For the foregoing reasons, the Delaware Department of Justice respectfully requests that the Court grant its motion and amend the caption to add it as an Intervenor in this Article 77 proceeding, and award such other and further relief as the Court deems appropriate.

Dated: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: 

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