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-

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 (proposed intervenor-respondents),

Respondents,

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 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 THEIR PETITION TO INTERVENE

The Bank of New York Mellon filed this Article 77 proceeding to seek judicial approval of a proposed settlement of the claims of 530 trusts for which BNYM serves as trustee. Between them, the Federal Home Loan Banks of Boston, Chicago, Indianapolis, Pittsburgh, San Francisco, and Seattle own securities issued by 73 of those Countrywide trusts. The Banks paid over $8.8 billion, more than the amount of the proposed settlement, for those securities. If approved, the proposed settlement would extinguish all claims – including loan-repurchase claims – that those 73 trusts have against Countrywide and Bank of America Corporation.[1] Given the large amount of their investments in the 73 trusts, and the material effect that the proposed settlement may have on the value of those investments, the Banks must evaluate the proposed settlement very carefully before deciding whether they should file objections to it. Unfortunately, there is very little information on which the Banks can base their decisions. Moreover, if further information reveals that the proposed settlement would be adverse to the interests of the Banks, they wish to be parties to this proceeding to protect their interests. The Banks therefore seek an order pursuant to CPLR 401, 1012, and 1013 to intervene as respondents in this proceeding in order to gather the information that they need, such as by exercising "the right to examine the trustee[] . . . as to any matter relating to [its] administration of the trust," as provided by CPLR 7701, and further to protect their interests as necessary.

PROCEDURAL BACKGROUND

Countrywide Home Loans, Inc. and its affiliates sold millions of its loans to securitization trusts that Countrywide sponsored. To raise the money to pay Countrywide for the loans, those trusts in turn sold certificates, which are backed by those mortgage loans, to investors all over the world. To assure the trusts and investors that the loans it was selling them were of good quality,

[1] Each of the Banks has sued the issuers and sellers of securities that they purchased in Countrywide trusts. The proposed settlement would not release those claims.

Countrywide made numerous representations and warranties about those loans. And to stand behind those representations and warranties, Countrywide agreed to repurchase from the trusts loans that did not comply with the representations and warranties.

BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent, Bank of America Corporation, to settle all "potential claims belonging to the [530] trusts" for which BNYM serves as trustee. Although the proposed settlement was negotiated by 22 institutional investors, its effect is not limited to the interests of those investors. Rather, the proposed settlement would extinguish any obligation of Countrywide or Bank of America to repurchase from any of the 530 trusts loans that did not comply with the representations and warranties that Countrywide made to the Trustee about them. On the same day, BNYM filed this Article 77 proceeding to request judicial approval of the proposed settlement. BNYM requested assignment of its proceeding to Justice Kapnick on the ground that its petition is related to a lawsuit brought by other investors, the Walnut Place entities, on behalf of two other Countrywide trusts.

It has been widely reported that many of the loans that Countrywide sold to the trusts did not comply with the representations and warranties that it made about them. Indeed, many observers now estimate that Countrywide and Bank of America are liable to repurchase loans in amounts that are many times the amount of the proposed settlement involved in this proceeding. Apparently, the parties that negotiated the proposed settlement had access to extensive information about the size of Countrywide's and Bank of America's repurchase liabilities. Indeed, the Settlement Agreement recites that "in the settlement negotiations, the Trustee received and evaluated information presented by Bank of America, Countrywide, and the Institutional Investors related to potential liabilities and defenses, and alleged damages." Unfortunately, those parties have disclosed none of that information to investors like the Banks, which must make careful and fully-informed decisions whether to object to the proposed

settlement. To gain access to the information they need to evaluate the proposed settlement, and generally to protect their interests in this proceeding, the Banks now move to intervene.

ARGUMENT

"As a general matter, 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 (App. Div. 2007). CPLR 1012 (a) permits a party to intervene in an action as of right if [1] "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 [2] "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 1013 permits a party to intervene with the permission of the Court if [3] "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."[2]

Although any one of these conditions would be sufficient to permit the Banks to intervene, all three are satisfied in this proceeding.

I. THIS PROCEEDING INVOLVES CLAIMS FOR DAMAGES FOR INJURY TO PROPERTY, AND THE BANKS WILL BE AFFECTED BY THE JUDGMENT.

The Banks own securities in 73 of the 530 trusts that are subject to the proposed settlement. If approved, the settlement would release all claims of those trusts against Countrywide and Bank of America and thereby materially affect the value of the Banks' certificates in those trusts. Moreover, the Order to Show Cause that the trustee obtained from this Court contemplates that "Potentially Interested Persons" like the Banks may have an interest in these proceedings.[3]

[2] Because this is a "special proceeding" under Article 77, all petitions to intervene, including as of right, require the approval of the Court. CPLR 401.

[3] "Potentially Interested Person" is defined in paragraph 4(a) of the Affirmation of Matthew D. Ingber, dated June 28, 2011, to include "holders of certificates or notes evidencing various categories of ownership interests in the Trusts."

Thus, the Banks fit the textbook definition of parties that are permitted to intervene as of right in this proceeding under CPLR 1012.

II. BNYM MAY NOT ADEQUATELY REPRESENT THE INTERESTS OF THE BANKS.

CPLR 1012 also permits intervention as of right where "the representation of the person's interest by the parties is or *may be* inadequate." (Emphasis added.) To intervene as adverse parties, the Banks need not show that BNYM's representation will necessarily be inadequate; it is sufficient for the Banks to show merely that BNYM *may* not adequately represent their interests. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).[4] Courts have also held that "[t]ypically, persons seeking intervention need only carry a 'minimal' burden of showing that their interests are inadequately represented by the existing parties." *U.S. v. Union Electric Company*, 64 F.3d 1152, 1168 (8th Cir. 1995).

Although BNYM ostensibly is required to protect the interests of all certificateholders, including the Banks, in the trusts that it administers, BNYM itself has acknowledged that certificateholders may have conflicting views about the adequacy of the proposed settlement. Thus, BNYM has stated that it "recognizes the potential that some Certificateholders may disagree with the Trustee's judgment that the Settlement is reasonable" and that "different groups of Certificateholders may wish to pursue remedies for alleged breaches in different ways, creating the potential for conflicts among Certificateholders and placing the Trustee squarely in the middle of those conflicts." (BNYM Petition ¶¶ 13-14.) The Banks are concerned that BNYM may not have adequately protected their interests in the negotiation of the settlement, given the details of their particular investments, and may not do so in this proceeding. Similarly, the Banks cannot know from information now available whether the 22 institutional investors, all of which have intervened in this proceeding, can or will protect the interests of the Banks. Because those investors are bound by the Institutional Investor Agreement to support the proposed settlement,

[4] CPLR 1012 is modeled after Rule 24 of the Federal Rules of Civil Procedure. Judicial opinions that interpret Rule 24 are thus persuasive authority for this Court.

they are not likely to identify ways in which the proposed settlement would adversely affect the interests of the Banks. These are precisely the circumstances that CPLR 1012 was designed to address by permitting parties like the Banks to intervene as of right to protect their own interests.

III. THE BANKS SATISFY THE REQUIREMENTS FOR INTERVENTION UNDER CPLR 1013.

Even if the Banks were not permitted as of right to intervene in this proceeding, they still 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." In this case, it is particularly appropriate for the Court to exercise its discretion to permit intervention, because "in the absence of the intervenors, there is, as a practical matter, no real adversary proceeding before the court." *In re The Petroleum Research Fund*, 157 N.Y.S.2d 693 (App. Div. 1956). Under Federal Rule of Civil Procedure 24(b), on which CPLR 1013 is patterned, "intervention is appropriate where the intervenor seeks virtually the same relief as the named plaintiff and . . . is encouraged if the proposed intervenors' 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. Aug. 24, 1998); *see also Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (intervenors "will bring a different perspective to the case and will contribute relevant factual variations that may assist the court in addressing the constitutional issue raised"). The Banks satisfy all of these conditions for intervention.

Finally, permitting the Banks 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 Banks filed their petition to intervene in a timely manner, well in advance of the deadline for Potentially Interested Parties to file objections in this Court. The involvement of the Banks will help the Court to reach a balanced judgment of the proposed settlement because they are not contractually bound to support it. And any other interested party that wishes to participate in this proceeding is free to do so, as the 22 investors that participated in the negotiation of the

settlement with BNYM, Countrywide, and Bank of America have done by intervening in this proceeding to support the proposed settlement. In these circumstances, substantial rights of the Banks would be prejudiced if they were not allowed to intervene.

CONCLUSION

For all of these reasons, the Banks respectfully request that the Court grant their petition and amend the caption to add them as intervenors-respondents in this Article 77 proceeding.

Dated: New York, New York
July 13, 2011

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