

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), 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)

) Index No. 651786/2011
) IAS Part 39
) (Kapnick, J.)
)
) **MEMORANDUM OF LAW**
) **IN SUPPORT OF NOTICE**
) **OF INTENTION TO**
) **APPEAR AND OBJECT**
) **AND PETITION TO**
) **INTERVENE**

Petitioner,

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

Proposed Intervenor, Monarch Debt Recovery Master Fund Ltd, Monarch Opportunities Master Fund Ltd, Monarch Capital Master Partners LP, Monarch Structured Credit Master Fund

Ltd, Monarch Capital Master Partners II LP, P Monarch Recovery Ltd, Monarch Alternative Solutions Master Fund Ltd, Oakford MF Limited, Monarch Cayman Fund Limited, and Monarch Capital Master Partners II-A LP (collectively referred to herein as “Monarch”), by their attorneys Dickstein Shapiro LLP, submit this memorandum of law in support of their Petition to Intervene in the above-captioned proceeding pursuant to CPLR 401, 1012 and 1013.

INTRODUCTION

On June 29, 2011, The Bank of New York Mellon (“BoNY” or “Trustee”), in its capacity as trustee of 530 residential mortgage securitization trusts (the “Covered Trusts”), petitioned this Court pursuant to CPLR 7701 seeking judicial instructions and approval of a proposed \$8.5 billion settlement related to the Covered Trusts negotiated by and among BoNY, twenty-two institutional investors (the “Institutional Investors”), Bank of America Corporation (“BofA”) and Countrywide Home Loans, Inc. (“Countrywide”) (the “Proposed Settlement”).¹ If approved, the Proposed Settlement may release all claims that each Covered Trust may have against BofA and Countrywide and claims against BoNY relating to BoNY’s involvement in the Proposed Settlement. Monarch owns securities in 14 of the Covered Trusts, with an original principal value exceeding \$150 million, and therefore qualifies as a Potentially Interested Person pursuant to this Court’s August 5, 2011 Order (the “August 5 Order”). Accordingly, Monarch seeks to intervene as a respondent in this proceeding pursuant to CPLR 401, 1012 and 1013.

PROCEDURAL BACKGROUND

By its June 29, 2011 Petition, BoNY seeks to settle all potential claims relating to the Covered Trusts, including all claims that the loans Countrywide sold to the trusts did not comply with the representations and warranties set forth in the governing documents. According to

¹ A complete listing of the Covered Trusts is identified in Exhibit A to the Trustee’s Verified Petition.

BoNY's Petition, the Proposed Settlement was the product of extensive private negotiations between Countrywide, BofA, BoNY and the Institutional Investors. As part of those negotiations, BoNY received documents and information from BofA and Countrywide that were not provided to certificateholders at large, hired various experts (including a financial expert, legal expert and mortgage servicing expert), and received several expert reports. BoNY also had numerous meetings and discussions with Countrywide and BofA wherein the strength of the potential claims against Countrywide and/or BofA and any defenses thereto were discussed and analyzed along with the likely recovery if such claims were pursued in a litigation. BoNY Pet. ¶¶ 35, 38, 75, 94.

BoNY has neither disclosed the universe of documents it received and relied upon in connection with the Potential Settlement, nor provided details regarding its extensive negotiations to any of the non-Institutional Investors, including Monarch. In light of the complete lack of information available to Monarch and the significant potential flaws in the settlement process as well as the fairness of the Proposed Settlement, Monarch cannot reasonably assess the propriety of the Proposed Settlement without objecting to it and intervening in this proceeding so that Monarch may receive sufficient information to determine the fairness of the Proposed Settlement.

In its August 5 Order, this Court provided that “[a]ny Potentially Interested Person who wishes to object to the settlement may file with the Court” a written objection to the Proposed Settlement by August 30, 2011.² Subsequently, on August 19, 2011, this Court signed an omnibus order granting a significant number of motions by investors similarly situated to Monarch to intervene in this proceeding. In order to adequately protect its interests in the

² The August 5 Order modified an earlier Order, dated June 29, 2011, which also permitted the involvement of Potentially Interested Persons in this proceeding.

Covered Trusts, Monarch now moves to intervene pursuant to CPLR 401, 1012 and 1013 and objects to the Proposed Settlement on the basis that it does not have sufficient information to evaluate the reasonableness of the Proposed Settlement.

ARGUMENT

As a general matter, “[i]ntervention is liberally allowed by the 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. St. Smart Realty, LLC, 77 A.D.3d 197, 201 (1st Dep’t 2010). CPLR 1012 provides the standards for intervention as of right, while CPLR 1013 provides the standards for permissive intervention.³ New York courts, however, will liberally permit intervention regardless of whether it is as of right or permissive. Id. at 201. Indeed, the “[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied.” Id.; see also Perl v. Aspromonte Realty Corp., 143 A.D.2d 824, 825 (2d Dep’t 1988) (“[I]t has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance.”).

As further discussed below, Monarch’s bona fide ownership interest in 14 of the Covered Trusts and the facts surrounding the Proposed Settlement support the conclusion that Monarch should be permitted to intervene pursuant to both CPLR 1012 and 1013.

I. MONARCH SHOULD BE PERMITTED TO INTERVENE UNDER CPLR 1012(A)(2) BECAUSE BONY MAY NOT BE ADEQUATELY REPRESENTING MONARCH’S INTEREST IN THE COVERED TRUSTS

Under CPLR 1012(a)(2), intervention as of right is appropriate where “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound

³ Notably, all petitions to intervene, including intervention as of right, require the approval of the Court because this is a “special proceeding” under Article 77. N.Y. C.P.L.R. 401.

by the judgment.” N.Y. C.P.L.R. 1012(a)(2). In that regard, “[t]he potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention.” Yuppie Puppy Pet Prods., 77 A.D.3d at 202.

The Proposed Settlement purports to bind Monarch and the other certificateholders and release all claims that the Covered Trusts have against BofA and Countrywide. Further, the Proposed Settlement seeks to provide a release to BoNY for actions taken in its capacity as Trustee that relate to the Proposed Settlement. (Ingber Aff. Ex. I ([Proposed] Final Order and Judgment)). Accordingly, if this Court approves the Proposed Settlement, Monarch will be bound by that determination and may be unable to seek recourse against any of the signatories to the Proposed Settlement.

Additionally, by its Petition, BoNY acknowledges that its representation may be inadequate for certain certificateholders in the Covered Trusts. BoNY Pet. ¶¶ 14-16. Specifically, BoNY recognizes that “Certificateholders may wish to pursue remedies for the alleged breaches in different ways, creating the potential for conflicts among Certificateholders and placing the Trustee squarely in the middle of those conflicts.” BoNY Pet. ¶ 14. Moreover, particularly in light of the allegations suggesting that BoNY’s involvement in the settlement process as Trustee was riddled with conflicts, intervention is necessary so that Monarch may protect its own interests and obtain sufficient information to determine the fairness of the Proposed Settlement.

II. MONARCH SHOULD BE ALLOWED TO INTERVENE UNDER CPLR 1012(A)(3) BECAUSE IT HAS A SIGNIFICANT OWNERSHIP INTEREST IN 14 OF THE COVERED TRUSTS

Intervention as of right pursuant to CPLR 1012(a)(3) should be granted where “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.” N.Y. C.P.L.R. 1012(a)(3).

See Yuppie Puppy Pet Prods, 77 A.D.3d at 201 (finding that mortgagee had a right to intervene in seller's action to hold buyer in default of lease agreement because the trial court judgment, which permitted the seller to remain on the premises rent free, "substantially impair[ed] the interest of [the mortgage holder]"); Loewentheil v. O'Hara, 30 A.D.3d 360 (1st Dep't 2006) (granting intervenor application by 37.5% shareholder in the corporate defendant because the shareholder had a substantial economic interest in the outcome of an action to recover on disputed promissory notes).

Monarch, as the certificateholder in 14 of the Covered Trusts, owns a beneficial interest in the trust property. The approval of the Proposed Settlement and adoption of BoNY's proposed Final Order would bind all certificateholders and may release all claims that the Covered Trusts have against BofA, Countrywide and BoNY (to the extent that such claims related to BoNY's involvement in the Proposed Settlement). Moreover, this Court's August 5 Order envisions the involvement of Monarch and similarly situated certificate holders, as it expressly contemplates that "Potentially Interested Persons" may have an interest in the proceedings.⁴ Indeed, Monarch's significant ownership interest and its stake in this proceeding is similar to the other investors already permitted to intervene per this Court's August 19, 2011 Order.

Accordingly, as a certificateholder that will be bound by the Proposed Settlement and may be precluded from subsequently raising any claims it may have related to its ownership interest in the Covered Trusts, Monarch will suffer adverse effects if precluded from being involved in this proceeding.

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

III. MONARCH SHOULD BE PERMITTED TO INTERVENE UNDER CPLR 1013 BECAUSE COMMON ISSUES OF LAW AND FACT EXIST BETWEEN THE ARTICLE 77 PROCEEDING AND MONARCH'S PETITION TO INTERVENE

Permissive intervention is granted 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.” N.Y. C.P.L.R. 1013. Permissive intervention under CPLR 1013 is based on Rule 24(B) of the Federal Rules of Civil Procedure. Under CPLR 1013’s corollary federal rule, intervention is particularly appropriate if, in addition to presenting common questions of law and fact, the intervenor contributes additional factual variations and adds to the court’s understanding of the facts. See Commack Self-Serv. Kosher Meats, Inc. v. Rubin, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (finding intervention appropriate where 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”); Rodriguez v. Debuono, No. 97 Civ. 0700, 1998 WL 542323, at *3 (S.D.N.Y. Aug. 24, 1998) (“[I]ntervention is encouraged if the proposed intervenors’ claims will add to the Court’s understanding of the facts.”).

Here, intervention is necessary so that Monarch may protect its ownership interests by ensuring that the settlement is fair and reasonable. In that regard, Monarch’s interests coincide with many of the interests of the existing intervenors and overlap with the legal and factual questions this Court must consider in ruling on BoNY’s Article 77 Petition. Monarch’s interests therefore present common questions of law or fact and its participation in this proceeding will create a more fully developed factual record for the Court. Additionally, Monarch’s intervention will not unduly delay the determination of this action or prejudice the substantial rights of any party, as it has filed its petition in a timely manner, in accordance with this Court’s August 30,

2011 deadline for interested-party objections. Accordingly, permissive intervention under CPLR 1013 is appropriate.

CONCLUSION

Based on the foregoing, Monarch respectfully requests that the Court grant its petition and amend the caption to add Monarch Debt Recovery Master Fund Ltd, Monarch Opportunities Master Fund Ltd, Monarch Capital Master Partners LP, Monarch Structured Credit Master Fund Ltd, Monarch Capital Master Partners II LP, P Monarch Recovery Ltd, Monarch Alternative Solutions Master Fund Ltd, Oakford MF Limited, Monarch Cayman Fund Limited, and Monarch Capital Master Partners II-A LP as intervenor-respondents in this Article 77 proceeding.

Dated: New York, New York
August 30, 2011

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

By: s/Howard Graff

Howard Graff

Lindsay A. Bush

Courtney E. Topic

1633 Broadway

New York, New York 10019-6708

Telephone: (212) 277-6500

Facsimile: (212) 277-6501

Attorneys for Proposed Intervenors Monarch Debt Recovery Master Fund Ltd, Monarch Opportunities Master Fund Ltd, Monarch Capital Master Partners LP, Monarch Structured Credit Master Fund Ltd, Monarch Capital Master Partners II LP, P Monarch Recovery Ltd, Monarch Alternative Solutions Master Fund Ltd, Oakford MF Limited, Monarch Cayman Fund Limited, and Monarch Capital Master Partners II-A LP