

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),

Petitioners,

-against-

TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO
2006-2, LTD. and TRIAXX PRIME CDO 2007-1, LTD.
(Proposed Intervenor-Respondents),

Respondents.

Index No: 651786/2011

Assigned to Kapnick, J.

**MEMORANDUM OF LAW
IN SUPPORT OF
NOTICE OF INTENTION TO
APPEAR AND OBJECT AND
PETITION TO INTERVENE**

Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, the “Triaxx Respondents”) submit this Memorandum of Law in support of their Notice of Intention to Appear and Object and Petition to Intervene in the Article 77 proceeding instituted by the Bank of New York Mellon (the “Trustee”), as trustee for 530 residential mortgage-backed securities trusts (the “Covered Trusts”) containing mortgages sold and/or serviced by Countrywide Home Loans, Inc. and its affiliates (together, “Countrywide”), seeking judicial instructions and approval of a proposed settlement with Countrywide and its parent, Bank of America Corporation (together with its affiliates, “Bank of America”). The proposed settlement would bind all persons who may have claims against the Trustee, Countrywide and Bank of America with respect to the Covered Trusts, including the Triaxx Respondents.

The Triaxx Respondents should be permitted to intervene in this action, because:

(1) the proposed settlement affects the property and claims for damages of the Triaxx Respondents; (2) the existing parties may not adequately represent the interests of the Triaxx Respondents; and (3) the proposed settlement and the claims of the Triaxx Respondents share common issues of law and fact. The Triaxx Respondents respectfully request that the Court enter an order pursuant to CPLR 401, 1012, and 1013 to permit the Triaxx Respondents to intervene as respondents in this proceeding, and to exercise their rights, including “the right to examine the trustee[] . . . as to any matter relating to [its] administration of the trust,” as provided by CPLR 7701. The Triaxx Respondents seek to review not just the finalized terms of the expert reports and other documents that have been disclosed, but also the data and communications that

led to the proposed settlement, prior to deciding whether or not to agree to the permanent bar of their claims.¹

Statement of Facts

Countrywide sold millions of loans to trusts. Those trusts in turn sold notes to a wide variety of investors, including the Triaxx Respondents, which purchased approximately \$2.2 billion of original notional value in 26 of the Covered Trusts. To assure investors that the loans it was selling were of good quality, Countrywide made representations and warranties concerning the character of the loans and the creditworthiness of the borrowers. In each of the relevant agreements governing the Covered Trusts, Countrywide agreed to repurchase loans from the trusts that did not comply with those representations and warranties. Additionally, Countrywide continued to service many of the loans after they had been securitized. In its capacity as servicer, Countrywide assumed obligations under the various pooling and servicing agreements.

On June 29, 2011, the Trustee disclosed that it had entered into a proposed settlement agreement with Countrywide and Bank of America to settle all potential claims belonging to the Covered Trusts. The proposed settlement was negotiated by 22 institutional investors (the “Institutional Investors”), but it would bind all persons with potential claims against Countrywide or Bank of America, with no opt-out provision. The Trustee filed this Article 77 proceeding on the same day, seeking judicial approval of the terms of the proposed settlement agreement.

¹ The Triaxx Respondents do not seek to obtain discovery ahead of the schedule set forth in this Court’s August 5, 2011 Order. The Triaxx Respondents reserve all their rights, however, to seek appropriate discovery during and after the meet and confer process described in that Order.

It has been widely reported in the news media, congressional hearings and regulatory and civil lawsuits that many of the loans that Countrywide sold to the trusts did not, in fact, comply with the representations and warranties that it made about them. Additionally, the Institutional Investors and others have alleged various “violations of prudent servicing obligations.” *See* Trustee’s Petition, ¶¶ 27-34 (Docket No. 1, June 29, 2011); Memorandum of Law in Support of Trustee’s Verified Petition, at 3-4 (Docket No. 12, June 29, 2011).

Many observers, including proposed intervenor Attorney General of the State of New York, estimate that “the proposed cash payment is far less than the massive losses investors have faced and will continue to face.” *See* Verified Pleading in Intervention (Docket No. 101-2). Indeed, the \$8.5 billion settlement amount represents only about 2% of the \$424 billion original principal balance of the Covered Trusts. Negotiations allegedly took place over the course of approximately one year. During this time, those parties exchanged documents and information which has never been disclosed to the other investors that are affected by the proposed settlement, including the Triaxx Respondents.

Argument

The Triaxx Respondents should be permitted to intervene in this Article 77 proceeding. CPLR 1012(a) permits a party to intervene in an action as of right if “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 “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.” Additionally, CPLR 1013 permits a party to intervene with the permission of the Court if “the person’s claim or defense and the main action have a common question of law or fact.” Courts have consistently held that “[w]hether 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 since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings.” Wells Fargo Bank, Natl. Assn. v McLean, 70 A.D.3d 676, 677 (2d Dep’t 2010); Bernstein v. Feiner, 842 N.Y.S. 2d 556, 558 (2d Dep’t 2007) (“As a general matter, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.”); see also Teleprompter Manhattan CATV Corp. v. State Board of Equalization & Assessment, 34 A.D.2d 1033, 1033 (3d Dep’t 1970) (“Intervention should be liberally allowed.”).

The Triaxx Respondents qualify as intervenors under any of these three standards; therefore, the Court should grant their Petition to Intervene.

I.

THE ARTICLE 77 PROCEEDING WILL DIRECTLY AFFECT THE PROPERTY INTERESTS THAT THE TRIAXX RESPONDENTS POSSESS

CPLR 1012(a)(3) allows a party to intervene as of right 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.” As holders of certificates having an original unpaid balance of \$2.2 billion in 26 of the Covered Trusts, the Triaxx Respondents may possess claims against the Trustee, Countrywide and/or Bank of America based on false representations and warranties, deficient loan servicing, and other unlawful actions. Although the Triaxx Respondents would share in the award of the proposed settlement, they would be forced to relinquish these claims, which are potentially worth far more than the small percentage of the \$8.5 billion settlement that they would receive. Indeed, this Court’s June

29, 2011 Order to Show Cause recognizes that certificate-holders, such as the Triaxx Respondents, are “Potentially Interested Persons” that may have an interest in these proceedings.² The Triaxx Respondents fall squarely within the class of persons whose property rights will be affected by the judgment in this action, and who are, therefore, permitted to intervene in this proceeding as of right under CPLR 1012(a)(3).

II.

THE TRIAXX RESPONDENTS’ INTERESTS MAY NOT BE ADEQUATELY REPRESENTED IN THIS PROCEEDING

In addition, the Triaxx Respondents may intervene as of right under CPLR 1012(a)(2) which provides for intervention where “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.” The proposed intervenor need not show that the representation will be inadequate, merely that it may be so. See Matter of Romeo v. New York State Dept. of Educ., 2007 NY Slip Op 2840, at *2 (3d Dep’t 2007) (finding that appellant should have been permitted to intervene as of right where “[a]t the very least, the district’s interests ‘may’ not have been adequately represented.”).

The Trustee has expressly recognized “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.” See Trustee’s Petition, ¶¶ 13-14. The Triaxx Respondents’ holdings within the Covered Trusts are unique and differ from any of the 22 Institutional Investors that have already been granted intervenor status by the Court. See New

² “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.”

York State Public Employment Relations Board v. Board of Education, 46 A.D.2d 509, 513 (4th Dep't 1975) (“[W]here the interests of [plaintiff] and the [proposed intervenors’ members] are not identical, the [proposed intervenors’] full intervention is required to insure complete litigation of its interests in the judicial forum.”). Finally, there is no dispute that the proposed settlement order seeks to bind the Triaxx Respondents, satisfying the second prong under CPLR 1012(a)(2). The Triaxx Respondents are, therefore, entitled to participate in this proceeding pursuant to CPLR 1012(a)(2).

III.

ADDITIONALLY, THE TRIAXX RESPONDENTS QUALIFY FOR INTERVENTION UNDER CPLR 1013

In addition to meeting the standards for intervention as of right, the Triaxx Respondents should be permitted to intervene pursuant to the discretionary standard under CPLR 1013. The Court may permit intervention where “the person’s claim or defense and the main action have a common question of law or fact.” CPLR 1013. “In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” McLean, 70 A.D.3d at 677 (reversing denial of intervention petition where proposed intervenor “demonstrated a real and substantial interest in . . . the outcome of the action”).

Here, the questions of law and fact raised by the Triaxx Respondents’ Petition to Intervene are identical to those already present in the action. The Triaxx Respondents seek to evaluate whether the terms of the proposed settlement are fair, which is the purpose of this Article 77 Proceeding. The intervention of the Triaxx Respondents will not unduly delay the action because the Triaxx Respondents seek the same access to information that many other

intervenors are already seeking and to which all Potentially Interested Persons are entitled before being bound by the global settlement proposal. Moreover, the participation of the Triaxx Respondents will not prejudice the substantial rights of any party since the Triaxx Respondents do not seek to exclude any other Potentially Interested Persons from fully representing their own interests. The Court, therefore, should grant the Triaxx Respondents' Petition to Intervene under its discretionary authority. See United Servs. Auto. Ass'n v. Graham, 21 A.D.2d 657, 657 (1st Dep't 1964) (“[I]n view of the broad language of [CPLR 1013] and the mandate for liberal construction, the application of [the proposed intervenor] to intervene should have been granted.”) (citation omitted).

Conclusion

For the foregoing reasons, the Triaxx Respondents respectfully request that the Court grant their Petition to Intervene in this Article 77 proceeding.

Dated: August 24, 2011
New York, New York

MILLER & WRUBEL P.C.



Joel M. Miller
John G. Moon
Claire L. Huene
Corban S. Rhodes
570 Lexington Avenue
New York, New York 10022
(212) 336-3500

Attorneys for Triaxx Respondents