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), *et al.*, Petitioners, -against- WALNUT PLACE LLC, *et al.*, Intervenor-Respondents.	Index No. 651786/2011 Assigned to: Kapnick, J.

AMICUS CURIAE MEMORANDUM OF ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN OPPOSITION TO THE TRUSTEE'S MOTION REGARDING THE STANDARD OF REVIEW AND SCOPE OF DISCOVERY

INTEREST OF _AMICUS CURIAE_

The Attorney General submits this *amicus* brief in response to Bank of New York Mellon's ("BNYM") April 3, 2012 Motion Regarding The Standard of Review and Scope of Discovery. The Attorney General has a strong interest in ensuring that appropriate and fair procedures govern this article 77 proceeding, in which the Office has moved to intervene. More broadly, the Attorney General has a strong interest in ensuring the integrity, efficacy, and strength of the financial markets of New York State—an interest that is directly implicated by this dispute over the proper procedures for resolving trustees' requests for court approval of RMBS settlements like the one proposed here. The Office also has an interest in the correct application of principles governing the

administration of trusts organized under the law of New York, as is true for nearly all of the trusts involved in this proceeding.

PRELIMINARY STATEMENT

In this proceeding, BNYM asks the Court to make detailed and thorough findings about the reasonableness of an unprecedentedly large and complex securities settlement that would settle billions of dollars of claims on behalf of hundreds of RMBS trusts, affecting the interests of numerous investors. Notwithstanding the breadth and complexity of the claims it seeks to settle, BNYM essentially seeks to make this Court's approval a foregone conclusion by precluding an adequate exploration of crucial information about the settlement's negotiation, adequacy, and effect and by restricting the Court's authority to review the fairness of the proposed settlement.

This Court should decline BNYM's invitation to transform this article 77 proceeding into a rubber stamp of the proposed settlement. The size and complexity of the settlement, and the specific and unconditional factual findings that BNYM urges this Court to make, require adequate discovery into the basis for the settlement and the process by which it was negotiated and drafted. Moreover, contrary to BNYM's arguments, this Court can and should inquire into the settlement's fairness—*i.e.*, whether it adequately compensates investors for giving up many billions of dollars in potential claims for Bank of America's and Countrywide's alleged misconduct in the formation and marketing of RMBS. Only such an inquiry can resolve whether BNYM acted reasonably as a trustee in negotiating and entering into the proposed settlement.

By contrast, BNYM contends that its decision to enter into this settlement "is subject only to a narrow scope of review" under which this Court is essentially precluded from evaluating the settlement's fairness. (BNYM Memorandum in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery ["BNYM Mem."] 9.) BNYM asserts that this Court cannot "conduct an independent analysis of the terms of the Settlement" nor "independently evaluate the claims asserted or proposed to be settled." (*Id.* at 10.) Instead, according to BNYM, the *only* question that this Court is authorized to consider is whether BNYM acted dishonestly or in violation of the PSAs. (*Id.* at 3.) And on the basis of that narrow scope of review, BNYM seeks to shut off discovery at the outset of this proceeding without adequately disclosing evidence that is crucial, or may well prove crucial, to the Court's evaluation of the proposed settlement.

This Court should deny BNYM's motion, for two reasons. First, contrary to BNYM's arguments here, the scope of discovery is determined not by the standard of review, but rather by the traditional rule requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." C.P.L.R. 3101(a). In this action, BNYM urges the Court to make a broad range of specific findings for hundreds of trusts worth hundreds of billions of dollars. The unprecedented breadth of this case, and of the findings that BNYM has requested, requires correspondingly broad discovery into the process leading to the proposed settlement and the basis for its terms.

Second, BNYM's attempt to narrow this Court's authority to evaluate the settlement—before the completion of discovery, let alone any substantive hearing—is meritless. Under well-established law, a trustee's discretionary decisions always must be

reasonable—and here, the investors have alleged that the trustee's decision to settle billions of dollars of claims for a fraction of their value was unreasonable. Contrary to BNYM's position here, this Court is not constrained only to determine whether BNYM engaged in self-dealing or misconduct. But even if that were the standard, BNYM's alleged conflicts of interest would still require a more searching evaluation of the proposed settlement than BNYM advocates.

ARGUMENT

I. THE COURT SHOULD PERMIT ADEQUATE DISCOVERY TO RESOLVE THE COMPLEX FACTUAL ISSUES THAT BNYM HAS VOLUNTARILY PLACED BEFORE THIS COURT

BNYM asserts that "the scope of permissible discovery is determined by the standard of review," (BNYM Mem. at 11), and on that basis seeks to restrict discovery to the documents that it has already voluntarily produced (*id.* at 12). But that argument misstates the appropriate standard for disclosure in a civil proceeding. The standard of review—like the burden of proof—applies to this Court's post-hearing determination on the merits, not to the pre-hearing disclosure of potentially relevant evidence. And, just as the burden of proof has no bearing on the scope of discovery, so the standard of review should not affect the parties' obligation to produce "all matter material and necessary in the prosecution or defense of an action." C.P.L.R. 3101(a).

Article 77 proceedings are not exempt from the traditional rules of disclosure under the C.P.L.R. To the contrary, article 77 proceedings require *more* disclosure than many other forms of actions and proceedings. In addition to the normal rules for discovery under C.P.L.R. article 31, *see* C.P.L.R. 408, article 77 gives "[a]ny party to the proceeding . . . the right to examine the trustee[], under oath, . . . as to any matter relating

to [its] administration of the trust," C.P.L.R. 7701. As one commentator has noted, that provision "authorizes *full disclosure* from a trustee," Vincent C. Alexander, Practice Commentary to McKinney's Consolidated Laws of New York Annotated (2008) (emphasis added).

Two other factors further militate against BNYM's attempts to limit the scope of discovery in this case. First, the breadth and complexity of this article 77 proceeding are unprecedented. Article 77 was originally developed to address relatively uncomplicated trustee duties related to "accountings and administrations with incidental construction and enforcement relief" for a relatively small number of trusts. *Gregory v. Wilkes*, 205 N.Y.S.2d 405, 407 (N.Y. Sup. 1960); *see, e.g.*, *Andrews v. Trustco Bank, N.A.*, 289 A.D.2d 910 (3rd Dep't 2001); *In re Beeman*, 108 A.D.2d 1010 (3rd Dep't 1985); *Gregory v. Wilkes*, 26 Misc. 2d 641 (Sup. Ct. N.Y. Cnty. 1960).

This case is dramatically different. As the federal district court observed, "BNYM is trustee for 530 separate and unique trusts and seeks approval for its decision to settle the claims of each individual trust" in this single proceeding. *Bank of New York Mellon v. Walnut Place LLC*, No. 11 Civ. 5988, 2011 WL 4953907, at *5 (S.D.N.Y. Oct. 19, 2011). Moreover, the issues involved for any one trust—let alone all 530—are of unprecedented complexity, and far afield from the accountings and similarly straightforward administrative duties that are the typical subjects of article 77 proceedings. For each trust, BNYM seeks to compromise claims that, in BNYM's own words, may be "excruciatingly complex" to evaluate (BNYM Mem. at 13), as shown by BNYM's own commissioning of five expert reports to support the settlement. The negotiations between BNYM, the Institutional Investors, and Bank of

America/Countrywide over the proposed settlement lasted for more than half a year, *see* Petition ¶ 10 (noting that negotiations began in November 2010), and produced lengthy settlement agreements and related documents. And finally, the proposed settlement includes crucial non-monetary relief—including document cure procedures and servicing improvements—that will affect not just investors, but also hundreds of thousands of homeowners whose mortgage loans are held by the trusts. Appropriate disclosure under C.P.L.R. article 31 is the only way that the parties and this Court can fairly understand and consider the complex issues raised by this unprecedented proceeding.

Second, BNYM seeks far more than simple approval of the settlement in this proceeding. BNYM has asked this Court to make the following specific findings, solely on the basis of BNYM's own representations:

- "A full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon." (Proposed Order ¶ e.)

- "The Settlement Agreement is the result of factual and legal investigation by the Trustee…" (*Id.* ¶ h.)

- "The Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled. In that regard, the Trustee appropriately considered the claims made and positions presented by the Institutional Investors, Bank of America, and Countrywide relating to the Trust Released Claims in considering whether to enter into the Settlement Agreement." (*Id.* ¶ i.)

- "The arms' length negotiations that led to the Settlement Agreement and the Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the Settlement." (*Id*. ¶ j.)

- "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." (*Id.* ¶ k.)

Without adequate discovery of the facts underlying these findings, it would be impossible for this Court to justify the findings that BNYM demands. Thus, BNYM's own framing of this proceeding requires fuller discovery than BNYM requests into the basis for and process behind the proposed settlement.

II. THIS COURT SHOULD REJECT BNYM'S ATTEMPT TO CONSTRAIN THIS COURT'S REVIEW

As noted above, this Court need not resolve the standard of review to apply to this proceeding in advance of discovery and a hearing on the merits. But if this Court does reach the question of the appropriate standard of review, it should reject BNYM's attempts to narrow this Court's authority to evaluate the proposed settlement. As the Appellate Division has directly held, in a decision upon which BNYM itself relies, this Court must "consider *all relevant factors* in determining whether such approval [of a settlement] is warranted." *In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 322 (1st Dep't 2000) (emphasis added).

BNYM's argument for a narrow scope of review rests on the assertion that its discretionary decisions cannot be questioned absent affirmative misconduct. (BNYM Mem. at 6.) That argument is wrong. Even when a trust instrument gives the trustee discretionary powers, the trustee's decisions must still be *reasonable—i.e.*, "accepted as reasonable by persons of prudence"—and the trustee abuses its discretion when it acts (or fails to act) in a manner "beyond the bounds of a reasonable judgment." Restatement (Third) of Trusts § 87 cmt. c. For example, in *In re Stillman*, a case on which BNYM relies, a will gave the trustee "absolute and uncontrolled discretion" to invade the trust principal on behalf of the beneficiaries. 107 Misc. 2d 102, 104 (Sur. Ct. N.Y. Cnty.

1980). The court nonetheless found that the trustee had abused its discretion when it unreasonably refused certain beneficiaries' request to invade the principal, and it set aside the trustee's decision despite acknowledging that the trustee had acted "quite innocently" and "in good faith." *Id.* at 111. Thus, even without any finding of affirmative misconduct, this Court has the authority to inquire into the reasonableness of BNYM's actions.

Here, any inquiry into reasonableness requires some evaluation of the fairness of the proposed settlement. As the parties to this proceeding have argued, there are serious reasons to question whether the proposed settlement adequately compensates investors for settling their substantial claims against Bank of America and Countrywide. *See, e.g.*, Walnut Place Verified Petition To Intervene (filed July 5, 2011) ¶ 24; AIG Verified Petition To Intervene (filed Aug. 8, 2011) ¶ 39. BNYM *voluntarily* initiated this proceeding specifically to resolve this dispute and to obtain judicial findings approving the settlement's substantive fairness. Among other things, BNYM asks this Court to find that BNYM acted "within the bounds of reasonableness in determining that the Settlement Agreement was in the *best interests* of the Covered Trusts"; that BNYM's "deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims"; and that BNYM's settlement-related actions were proper "*in all respects*." (Proposed Judgment ¶¶ j, k, n (emphasis added).) All of these broad findings would require this Court to engage in at least *some* meaningful evaluation of whether the proposed settlement reasonably serves the best interests of investors or reasonably reflects the claims being compromised—and not only whether BNYM *thought* that any of these were true. BNYM's attempt to narrowly circumscribe this Court's review is an

improper effort to obtain a rubber stamp that it can later disguise as plenary judicial approval.

In any event, even under BNYM's unjustifiably narrow standard of review, its actions with respect to the proposed settlement may not be subject to the deference that it requests here because—as BNYM admits (BNYM Mem. at 7-8)—courts do not defer to a trustee that has allegedly acted dishonestly or "in a careless or negligent manner." *In re First Deposit & Trust Co.*, 280 N.Y. 155, 163 (1939). Here, the Attorney General and other parties have alleged that BNYM suffered from a conflict of interest in negotiating the proposed settlement. As explained more fully in the Attorney General's Amended Verified Pleading, BNYM stands to receive direct financial benefits under the settlement.[1] Specifically, a "side letter" appended to the proposed settlement expands the benefit of the PSAs' indemnification provisions by having BoA guarantee the indemnification obligations of Countrywide, which it acquired in August 2007. Moreover, the proposed settlement extends the indemnification to cover BNYM's negotiation and implementation of the terms of the settlement, and seeks to release all claims against the Trustee "arising from or in connection with the Trustee's entry into the Settlement."[2]

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[1] *See* Apr. 10, 2012 Amended Verified Pleading In Intervention, ¶¶ 13-14.

[2] *See* Settlement Agreement between Bank of New York Mellon, Bank of America Corporation and others dated June 28, 2011 Ex. B ¶ (p); *see also id.* ¶ (s) ("None of the Bank of America Parties, the Countrywide Parties, the Institutional Investors, or the Trustee shall have any liability (including under any indemnification obligation provided for in any Governing Agreement, including as clarified by the side-letter that is Exhibit C to the Settlement Agreement) to each other, the Trust Beneficiaries, the Covered Trusts, or any other Person arising out of the determination, administration, or distribution (including distribution within each Covered Trust) of the Allocable Shares pursuant to the Settlement or incurred by reason of any tax consequences of the Settlement.").

In addition, the parties have alleged that BNYM "fail[ed] to use its judgment," *Stillman*, 107 Misc. 2d at 110, and acted "in a careless or negligent manner," *First Deposit*, 280 N.Y. at 163, by entering into the settlement without a full investigation of its underlying claims. BNYM concedes, for example, that it "did not review loan files in reaching its decision to enter into the Settlement," even though it acknowledges that the proposed settlement relies on BNYM's assumptions about the contents of those loan files. (BNYM Mem. at 16.) BNYM defends its actions by arguing that "[t]he actual content of the loan files . . . has no bearing" on "whether it was reasonable for the Trustee to enter into the Settlement *without* reviewing them" (*id.*). But that is true only in this sense—*even if* the loan files in fact support the reasonableness of the proposed settlement, it was careless and negligent for BNYM to refuse to review them *at all*.

Thus, even under BNYM's improperly narrow view of this Court's authority, the allegations concerning its misconduct, if established, would require this Court to examine BNYM's settlement-related decisions and the fairness of the proposed settlement without deferring to BNYM's judgment.

CONCLUSION

For all the foregoing reasons, the Attorney General respectfully requests that the Court deny the Trustee's Motion Regarding The Standard of Review and Scope of Discovery.

Dated: April 19, 2012
New York, New York

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