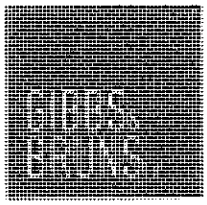
Exhibit B



Kathy D. Patrick
kpatrick@gibbsbruns.com
713.751.5253

August 25, 2011

Via Email and Federal Express
Mr. Owen Cyrulnik
Grais & Ellsworth LLP
40 East 52nd Street
New York, New York 10022

Re: Attempt to Remove Article 77 Proceeding

Dear Mr. Cyrulnik:

We appreciate your willingness to listen to the concerns that we and Trustee's counsel expressed concerning your clients' contemplated removal of the Article 77 proceeding on the basis of the Class Action Fairness Act. We will not repeat those concerns in this letter. We remain concerned, however, about the harm that will be suffered by the Covered Trusts and their certificateholders as a result of the delay occasioned by removal.

I also write to reiterate a request we and Trustee's counsel made at the end of our call: If your clients persist in their intention to remove the Article 77 proceeding, we urge them to refrain from doing so until after the August 30 objection deadline established by Justice Kapnick. We do not believe there is any particular urgency to your stated intention to remove the matter and you did not articulate one. Removal prior to the objection deadline would unnecessarily disrupt this proceeding and would be prejudicial to absent certificateholders—all of whom have been informed that their deadline to object is August 30 and that such objections should be filed in the New York Supreme Court.

Thank you for your consideration of these issues.

Very truly yours,

Kathy D. Patrick

KDP/tjm

cc: Matt Ingber (via email and federal express)
(mingber@mayerbrown.com)

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 39

- X

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 (Intevenor) 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 -

PROCEEDINGS

WALNUT PLACE LLC, WALNUT PLACE II LLC, WALNUT PLACE III LLC, WALNUT PLACE IV LLC, WALNUT PLACE V LLC, WALNUT PLACE VI LLC, WALNUT PLACE VII LLC, WALNUT PLACE VIII LLC, WALNUT PLACE IX LLC, WALNUT PLACE X LLC, WALNUT PLACE XI LLC, POLICEMEN'S ANNUITY & BENEFIT FUND OF CHICAGO AND THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, TM1 INVESTORS, LLC, 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, FEDERAL HOME LOAN BANK OF SEATTLE, and V RE-REMIC, LLC,

PROPOSED INTERVENOR-RESPONDENTS,

For an Order pursuant to CPLR 7701 seeking judicial instructions and approval of a proposed settlement.

- X

INDEX NO: 651786/11

60 Centre Street
New York, New York
August 5, 2011

BEFORE: BARBARA R. KAPNICK, Justice

APPEARANCES:

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ROBERT J. MADDEN, ESQ.

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NINA J. KOSS, C.S.R., C.M.
Official Court Reporter

forced to decide that they will not be heard on the settlement, without having some fundamental ability to --

THE COURT: I think everybody agrees that there has to be some more information out there.

What she is saying is, we agree. We have read everything you say. We agree we have to make some modifications of the original Order. Why don't we just say August 30th is the date by which people have to say I want to reserve, I want to preserve my right to oppose and file. Then, everybody is on notice and everybody can get together in the next week or two after that, meet and confer, make some discovery requests, which you have already started to do in your Order to Show Cause, and one that came in this morning, and they can coordinate the discovery and it can get going and we can have a conference.

I understand there is a November 17th date. I also understand that if I think that's too soon, I can move past it, but we don't really want this to take forever and ever.

It's important to remember that this petition was brought as an Article 77 petition, which I personally have hardly ever seen before, so I had to go into the C.P.L.R., which doesn't have too much about Article 77, and read it. That's what they did. That's the proceeding they brought.

It's not, it's not a Class Action. There aren't

provisions in there to opt out that you are talking about. That's not what this is. If you started it, maybe that's what you would have done, but they started it and that's what they did. I have to work, at least now, within the confines of the proceeding that is before me.

So, I think that there is some sense to do that and when everybody is on notice, then you can get discovery and if by November 17th that doesn't look like that's a reasonable date -- we don't get too much power over here -- but one thing I can say, let's do it the next month.

What's the big deal.

MS. KASWAN: What we had proposed, which I think is a compromise actually between Miss Patrick's position and also the position of certain other Intervenors, and that is, to have certain very limited amounts of discovery that could be produced quickly and inexpensively, that people who might be interested in knowing whether they want to participate could look at, and then first make the preliminary decision.

That, if your Honor will recall, when we moved for an Order to Show Cause we attempted to list very limited categories of information. It was 10 or 11 which basically just asked the Intervenors, the Trustee and Miss Patrick's group who, I might note, does not represent the Trustee. She is -- this is effectively a derivative case being run by Miss Patrick -- not a Trustee's action.

Exhibit D

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), Petitioner, for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.	:	Index No. **[PROPOSED] FINAL ORDER AND JUDGMENT**

Petitioner, The Bank of New York Mellon, solely in its capacity as trustee or indenture trustee under 530 mortgage-securitization trusts identified in Exhibit A to the Verified Petition (the "Petitioner" or the "Trustee"), evidenced by 530 separate Pooling and Servicing Agreements ("PSAs") or Indentures and related Sales and Servicing Agreements ("SSAs," and together with the PSAs and Indentures, the "Governing Agreements"), having applied to this Court for an order pursuant to CPLR § 7701 for judicial instructions and approval of a settlement entered into by and among the Trustee, Bank of America Corporation, BAC Home Loans Servicing, LP, Countrywide Financial Corporation, and Countrywide Home Loans, Inc. (the "Settlement"), such Settlement being embodied in the settlement agreement, dated June 28, 2011 (the "Settlement Agreement") attached to the Verified Petition herein and attached hereto as Exhibit A; and

UPON reading and filing the Verified Petition and the exhibits thereto; the Affirmation of Matthew D. Ingber, counsel to the Trustee, in support of the Verified Petition, dated June 28, 2011 (the "Ingber Affirmation"); The Bank of New York

Mellon's Memorandum of Law In Support of Its Verified Petition Seeking Judicial Instructions and Approval of a Proposed Settlement, dated June 28, 2011; all answers, objections, or other responses filed in response to the Verified Petition; all papers filed in response to those answers, objections, or responses; and upon all prior proceedings and pleadings heretofore had; and

UPON this Court having rendered its decision (the "Decision") on _____, 2011, which Decision is attached hereto as Exhibit B; and

UPON the Decision with notice of entry (attached hereto as Exhibit C) having been served upon all parties on _____, 2011;

NOW, it is hereby ORDERED, ADJUDGED, and DECREED that:

a) For purposes of this Final Order and Judgment, the Court adopts all defined terms set forth in the Settlement Agreement. Capitalized terms used herein, unless otherwise defined, shall have the meanings set forth in the Settlement Agreement.

b) The Court has jurisdiction over the subject matter of this Article 77 Proceeding. The Court has jurisdiction over the Petitioner, the Covered Trusts, and all certificateholders and noteholders of the Covered Trusts (the "Trust Beneficiaries") with respect to the matters determined herein. (As used herein, "Trust Beneficiaries" shall have the same meaning as "Investors" under the Settlement Agreement.)

c) The form and the method of dissemination of notice (the "Notice"), as described in and as previously approved by the Court's Order dated _____, 2011 (the "Preliminary Order"), provided the best notice

practicable under the circumstances and was reasonably calculated to put interested parties on notice of this action. The Preliminary Order provided, *inter alia*, for the Notice to be provided by a combination of individual notice, notice by publication in specified publications, notice through the Depository Trust Company, advertising on the internet, and notice through a website created and maintained by the Trustee for the Article 77 Proceeding. The Petitioner has submitted evidence establishing its compliance with reasonable diligence with the Preliminary Order. The Court finds that the Notice was provided in accordance with the provisions of the Preliminary Order.

d) The Notice provided due and adequate notice of these proceedings and the matters set forth herein, including the Settlement and the Court's consideration of the actions of the Trustee in entering into the Settlement Agreement, to all persons entitled to such notice, including the Potentially Interested Persons identified in paragraph 6 of the Ingber Affirmation, including the Trust Beneficiaries, and the Notice fully satisfied the requirements of New York law, federal and state due process requirements and the requirements of other applicable law.

e) 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. Accordingly, the Covered Trusts, all Trust Beneficiaries, and their successors-in-interest and assigns, and any Persons claiming by, through,

or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements are bound by this Final Order and Judgment.

f) The Trustee has the authority, pursuant to the Governing Agreements and applicable law: (i) to assert, abandon, or compromise the Trust Released Claims, and (ii) to enter into the Settlement Agreement on behalf of all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements.

g) Pursuant to the Governing Agreements and applicable law, the decision whether to enter into the Settlement Agreement on behalf of all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements is a matter within the Trustee's discretion.

h) The Settlement Agreement is the result of factual and legal investigation by the Trustee, and is supported by the Institutional Investors.

i) 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.

j) The arm's-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.

k) 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.

l) Pursuant to CPLR § 7701, the Court hereby approves the actions of the Trustee in entering into the Settlement Agreement in all respects.

m) The Parties are directed to consummate the Settlement in accordance with its terms and conditions, and the Settlement is hereby approved by the Court in all respects.

n) The Settlement Agreement is hereby approved in all respects, and is fully enforceable in all respects. The release in the Settlement Agreement provides as follows:

> **9. <u>Release</u>.**
>
> (a) Effective as of the Approval Date, except as set forth in Paragraph 10 [of the Settlement Agreement], the Trustee on behalf of itself and all Investors, the Covered Trusts, and/or any Persons claiming by, through, or on behalf of any of the Trustee, the Investors, or the Covered Trusts or under the Governing Agreements (collectively, the Trustee, Investors, Covered Trusts, and such Persons being defined together as the "Precluded Persons"), irrevocably and unconditionally grants a full, final, and complete release, waiver, and discharge of all alleged or actual claims, counterclaims, defenses, rights of setoff, rights of rescission, liens, disputes, liabilities, Losses, debts, costs, expenses, obligations, demands, claims for accountings or audits, alleged Events of Default, damages, rights, and causes of action of any kind or nature whatsoever, whether asserted or unasserted, known or unknown,

suspected or unsuspected, fixed or contingent, in contract, tort, or otherwise, secured or unsecured, accrued or unaccrued, whether direct, derivative, or brought in any other capacity that the Precluded Persons may now or may hereafter have against any or all of the Bank of America Parties and/or Countrywide Parties arising out of or relating to (i) the origination, sale, or delivery of Mortgage Loans to the Covered Trusts, including the representations and warranties in connection with the origination, sale, or delivery of Mortgage Loans to the Covered Trusts or any alleged obligation of any Bank of America Party and/or Countrywide Party to repurchase or otherwise compensate the Covered Trusts for any Mortgage Loan on the basis of any representations or warranties or otherwise or failure to cure any alleged breaches of representations and warranties, including all claims arising in any way from or under Section 2.03 ("Representations, Warranties and Covenants of the Sellers and Master Servicer")[1] of the Governing Agreements, (ii) the documentation of the Mortgage Loans held by the Covered Trusts (including the documents and instruments covered in Sections 2.01 ("Conveyance of Mortgage Loans") and 2.02 ("Acceptance by the Trustee of the Mortgage Loans") of the Governing Agreements and the Mortgage Files) including with respect to alleged defective, incomplete or non-existent documentation, as well as issues arising out of or relating to recordation, title, assignment, or any other matter relating to legal enforceability of a Mortgage or Mortgage Note, and (iii) the servicing of the Mortgage Loans held by the Covered Trusts (including any claim relating to the timing of collection efforts or foreclosure efforts, loss mitigation, transfers to subservicers, Advances, Servicing Advances, or that servicing includes an obligation to take any action or provide any notice towards, or with respect to, the possible repurchase of Mortgage Loans by the Master Servicer, Seller, or any other Person), in all cases prior to or after the Approval Date (collectively, all such claims being defined as the "Trust Released Claims").

(b) The Trust Released Claims shall also be deemed to have been released as of the Approval Date to the full and same extent by the Master Servicer of the Covered Trusts (including the current Master Servicer, BAC HLS, and any subsequent servicer who may in the future be substituted for the current Master Servicer with respect to one or more of the Covered Trusts or any loans therein) and the Master Servicer shall be deemed to be a Precluded Person.

(c) The release and waiver in Subparagraphs 9(a) and 9(b) [of the Settlement Agreement] is intended to include, and upon its effectiveness shall include, any claims or contentions that Bank of America or any non-Countrywide affiliate, division, or subsidiary of Bank of America, and any of the predecessors or assigns thereof, is liable on any theory of successor

[1] Which provision is numbered 2.04 in the Sale and Servicing Agreements relating to CWHEQ 2006-A and CWHEQ 2007-G.

liability, vicarious liability, veil piercing, de facto merger, fraudulent conveyance, or other similar claim or theory for the obligations, exposure, or liability of Countrywide or any of its affiliates, divisions, or subsidiaries, and any of the predecessors or assigns thereof concerning any of the Covered Trusts, with respect to the Trust Released Claims.

10. Claims Not Released.

(a) Administration of the Mortgage Loans. The release and waiver in Paragraph 9 [of the Settlement Agreement] does not include claims based solely on the action, inaction, or practices of the Master Servicer in its aggregation and remittance of Mortgage Loan payments, accounting for principal and interest, and preparation of tax-related information in connection with the Mortgage Loans and the ministerial operation and administration of the Covered Trusts and of the Mortgage Loans held by the Covered Trusts for which the Master Servicer receives servicing fees unless, as of the Signing Date, the Trustee has or should have knowledge of the actions, inactions or practices of the Master Servicer in connection with such matters.

(b) Servicing of the Mortgage Loans. Except as provided in Subparagraph 10(a) [of the Settlement Agreement], the release and waiver in Paragraph 9 [of the Settlement Agreement] includes: (i) all claims based in whole or in part on any actions, inactions, or practices of the Master Servicer prior to the Approval Date as to the servicing of the Mortgage Loans held by the Covered Trusts; and (ii) as to all actions, inactions, or practices by the Master Servicer after the Approval Date, only (A) actions, inactions, and practices that relate to the aspects of servicing addressed in whole or in part by the provisions of Paragraph 5 [of the Settlement Agreement] (material compliance with which shall satisfy the Master Servicer's obligation to service the Mortgage Loans prudently in accordance with all relevant sections of the Governing Agreements) and (B) actions, inactions, or practices that relate to the aspects of servicing not addressed by the provisions of Paragraph 5 [of the Settlement Agreement] that are consistent with (or improvements over) the Master Servicer's course of conduct prior to the Signing Date. It is further understood and agreed that Investors may pursue such remedies as are available under Section 10.08 ("Limitation on Rights of Certificateholders") of the Governing Agreements with respect to an Event of Default as to any servicing claims not released by this Settlement.

(c) Certain Individual Investor Claims. The release and waiver in Paragraph 9 [of the Settlement Agreement] does not include any direct claims held by Investors or their clients that do not seek to enforce any rights under the terms of the Governing Agreements but rather are based on disclosures made (or failed to be made) in connection with their decision to purchase, sell, or hold securities issued by any Covered Trust, including claims under the securities or anti-fraud laws of the United States or of any state; provided,

however, that the question of the extent to which any payment made or benefit conferred pursuant to this Settlement Agreement may constitute an offset or credit against, or a reduction in the gross amount of, any such claim shall be determined in the action in which such claim is raised, and the Parties reserve all rights with respect to the position they may take on that question in those actions and acknowledge that all other Persons similarly reserve such rights.

(d) Financial-Guaranty Provider Rights and Obligations. To the extent that any third-party guarantor or financial-guaranty provider with respect to any Covered Trust has rights or obligations independent of the rights or obligations of the Investors, the Trustee, or the Covered Trusts, the release and waiver in Paragraph 9 [of the Settlement Agreement] is not intended to and shall not release such rights, or impair or diminish in any respect such obligations or any insurance or indemnity obligations owed by or to such Person.

(e) Indemnification Rights. The Parties do not release any rights to indemnification under the Governing Agreements including the Trustee's right to indemnification by the Master Servicer of the Covered Trusts.

(f) Settlement Agreement Rights. The Parties do not release any rights or claims against each other to enforce the terms of this Settlement Agreement.

(g) Excluded Covered Trusts. The release and waiver in Paragraph 9 [of the Settlement Agreement] does not include claims with respect to any Excluded Covered Trust.

o) The Trustee, all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements, and each of their heirs, executors, administrators, successors-in-interest, and assigns, are hereby: (i) permanently barred and enjoined from instituting, commencing, or prosecuting, either directly, derivatively, or in any other capacity, any suit, proceeding, or other action asserting any of the Trust Released Claims, against any or all of the Bank of America Parties and/or the Countrywide Parties; (ii) conclusively determined to have fully, finally, and

forever compromised, settled, released, relinquished, discharged, and dismissed with prejudice and on the merits the Trust Released Claims; and (iii) permanently barred and enjoined from knowingly assisting in any way any third party in instituting, commencing, or prosecuting any suit against any or all of the Bank of America Parties and/or the Countrywide Parties asserting any of the Trust Released Claims. These provisions shall also be deemed to apply to the full and same extent to the Master Servicer of the Covered Trusts (including the current Master Servicer, BAC HLS, and any subsequent servicer who may in the future be substituted for the current Master Servicer with respect to one or more of the Covered Trusts or any loans therein).

p) All Trust Beneficiaries and each of their heirs, executors, administrators, successors-in-interest, and assigns, and the Bank of America Parties and the Countrywide Parties and each of their respective heirs, executors, administrators, successors-in-interest, and assigns, are hereby permanently barred and enjoined from instituting, commencing, or prosecuting, either directly, derivatively, or in any other capacity, 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, including but not limited to the Trustee's participation in negotiations regarding the Settlement, the Trustee's analysis of the Settlement, the filing by the Trustee of any petition in connection with the Settlement, the provision of notices concerning the Settlement to Potentially Interested Persons, and any further actions by the Trustee in support of the Settlement, including the response by the Trustee to

any objections to the Settlement and any implementation of the Settlement by the Trustee; provided, however, that nothing herein precludes any Party from asserting any claims arising out of a breach of the Settlement Agreement.

q) With the exception of prosecuting any appeals directly from this Final Order and Judgment, all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements, and each of their heirs, executors, administrators, successors-in-interest, and assigns, are hereby permanently barred and enjoined from instituting, commencing, asserting, or prosecuting, either directly, derivatively, or in any other capacity, any claim or objection challenging this Final Order and Judgment, the actions of the Trustee in entering into the Settlement Agreement or this Article 77 Proceeding.

r) The Trustee will not, by virtue of actions taken in seeking, or pursuant to, any orders in this proceeding or this Final Order and Judgment, impair the rights it has under the applicable Governing Agreements to be compensated for the fees and expenses it incurs in discharging its duties as Trustee.

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.

t) All objections to the Settlement have been considered and are overruled and denied in all respects.

u) Without affecting the finality of this Final Order and Judgment in any respect, the Court hereby retains exclusive jurisdiction over the Petitioner, the Covered Trusts, and all Trust Beneficiaries (whether past, present, or future) for all matters relating to the Settlement and this Article 77 Proceeding, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Final Order and Judgment.

v) There is no just reason for delay in the entry of this Final Order and Judgment and immediate entry by the Clerk of the Court is expressly directed.

Judgment entered on this _____ day of ___, 2011.

ENTER

_____
JSC

_____
CLERK OF THE COURT

Exhibit E

09-3660-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GREENWICH FINANCIAL SERVICES DISTRESSED MORTGAGE FUND 3 LLC, and QED LLC, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., and COUNTRYWIDE HOME LOANS SERVICING LP,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

Of Counsel:

David J. Grais
J. Bruce Boisture
Owen L. Cyrulnik

GRAIS & ELLSWORTH LLP
Attorneys for Plaintiffs-Appellees
70 East 55th Street
New York, New York 10022
212-755-0100

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GREENWICH FINANCIAL SERVICES DISTRESSED MORTGAGE FUND 3, LLC, and QED LLC, on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellees, -against- COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., and COUNTRYWIDE HOME LOANS SERVICING LP, Defendants-Appellants.	**No. 09-3660-cv** **(SDNY Case No. 08-cv-11343)**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, plaintiffs-appellees Greenwich Financial Services Distressed Mortgage Fund 3, LLC, and QED LLC (both private, non-governmental parties) state that neither entity has corporate parents, affiliates and/or subsidiaries that are publicly held.

Dated: New York, New York

January 15, 2010

Respectfully submitted,

GRAIS & ELLSWORTH LLP

David J. Grais (DG 7118)
J. Bruce Boisture*
Owen L. Cyrulnik

70 East 55th Street
New York, New York 10022
(212) 755-0100
(212) 755-0052 (fax)

Attorneys for Plaintiffs-Appellees Greenwich Financial Services Distressed Mortgage Fund 3, LLC, and QED LLC

* Admitted only in Connecticut.

STATEMENT OF THE CASE

The Countrywide defendants removed this action on the theories that there is diversity jurisdiction under the Class Action Fairness Act and federal-question jurisdiction because one section of the Truth-in-Lending Act may relate to plaintiffs' claims. The district court rejected both theories and remanded the action to state court.

Pursuant to 28 U.S.C. § 1453, which permits this Court to consider an appeal of an order that remands a class action as defined by CAFA, Countrywide now asks this Court to reverse the order of the district court.

STATEMENT OF FACTS

Countrywide, one of the largest mortgage lenders in the United States, made and then securitized hundreds of thousands of subprime mortgage loans.[1] To raise new money to lend, Countrywide sold its mortgage loans to securitization trusts. After they purchased such loans, the trusts would receive the payments of principal and interest from the borrowers. To raise the money to pay for the loans, the trusts sold certificates, or bonds, to investors. Each certificate entitles its owner to payment of an agreed part, calculated by a complex formula known as the "waterfall," of the payments that a trust receives from borrowers.

[1] The facts summarized in this section are taken from paragraphs 23 to 32 of the Complaint, which is reproduced on pages 8 through 21 of the Joint Appendix.

In most securitizations (including all involved in this case), a contract known as a Pooling and Servicing Agreement, or PSA, governs the rights and duties of the participants in the securitization. These participants include the seller of the mortgage loans and the investors in the certificates. Other participants include the master servicer (which, under the PSA, is to service and administer the loans) and the trustee (on which the PSA imposes various duties to protect the rights of the certificateholders). Thus, the role of the PSA in a securitization is much like the role of an indenture in the issuance of a traditional debt security.

Beginning in the summer of 2008, the Attorneys General of California, Illinois, and at least five other States sued Countrywide for violating laws against predatory lending. Their complaints alleged that Countrywide engaged in many deceptive sales practices, charged unlawful fees and interest rates, and made mortgage loans that Countrywide had no reasonable basis to think that the borrowers could afford, all in violation of the laws of the United States and those seven States. The Attorneys General of approximately 10 other States were investigating Countrywide for similar violations. To settle the accusations of the Attorneys General, Countrywide agreed on October 6, 2008, to a settlement under which it is required to modify numerous mortgage loans that it services and that meet certain financial criteria.

Modifying a mortgage loan almost always means reducing or delaying payments due on that loan. Indeed, Countrywide has estimated that the modifications it has agreed to make may cost as much as $8.4 billion. If Countrywide still owned the loans that it has agreed to modify, then it would itself bear this cost. But in fact Countrywide sold almost all – 88%[2] – of those loans to securitization trusts. Even though it was Countrywide's own conduct that the Attorneys General complained of in the proceedings that Countrywide settled, Countrywide has no plans to make the trusts whole for the reduction of payments into those trusts that will be caused by Countrywide's modification of loans that those trusts own. And, of course, a reduced or delayed flow of funds into those trusts reduces the value of the certificates that those trusts sold to investors.

Plaintiffs filed this class action on behalf of owners of certificates in two series of securitizations of mortgage loans that Countrywide made and still services. The PSAs that govern these securitizations permit Countrywide as master servicer in certain circumstances to modify mortgage loans owned by the trusts. But, if Countrywide does modify a loan, then it must purchase that loan from the trust at a defined purchase price. As the PSAs state: "The Master Servicer may

[2] According to the chief financial officer of Bank of America, Countrywide's parent, "[o]f the eligible loans, about 12 percent are now held by Bank of America." Press Release, Bank of America, Bank of America Announces Nationwide Homeownership Retention Program for Countrywide Customers (Oct. 6, 2008) (quoting Joe Price, Bank of America Chief Financial Officer) *at* http://newsroom.bankofamerica.com/index.php?s=43&item=8272.

agree to a modification of any Mortgage Loan if . . . [the Master Servicer] purchases the Modified Mortgage Loan from the Trust Fund . . . ." (JA 19; *see also* JA 20). The only relief that plaintiffs ask is a declaration that Countrywide must fulfill this contractual obligation.[3]

*

Countrywide's argument that it is modifying mortgage loans under "Treasury Guidelines and a nationwide program addressing subprime mortgages at risk for foreclosure," (Countrywide Br. 11), is irrelevant to its appeal, and also untrue. Countrywide is modifying loans to settle allegations of predatory lending. Its settlement with the Attorneys General long predates any national program to modify subprime mortgages. Plaintiffs have no objection to modifying mortgage loans, only to Countrywide's use of their money to do so in settlement of allegations against Countrywide itself.

SUMMARY OF THE ARGUMENT

This Court should affirm the order of the district court. The district court correctly applied the decision of this Court in *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), and concluded that this action comes squarely within an

[3] The Complaint pleads two causes of action. The first seeks a declaration that Countrywide is obligated to repurchase the modified loans from the trusts, (JA 20), and the second seeks a declaration that the purchase price at which the loans must be repurchased is not less than 100% of the principal balance of, and any accrued interest on, those loans immediately before modification. (*Id*.)

exception to diversity jurisdiction under CAFA. Countrywide's argument that the district court erred is based on a misinterpretation of CAFA and on misleadingly selective quotations from both this Court's decision in *Pew* and the legislative history of CAFA.

The district court also correctly held that nothing in the Truth-in-Lending Act is an essential element of plaintiffs' purely state-law claims. In any event, this Court has jurisdiction to hear an appeal only if there is federal jurisdiction under CAFA. Thus, this appeal will necessarily be decided on the question of CAFA alone. The Court therefore should not review the ruling of the district court that there is no federal-question jurisdiction. Moreover, even if this Court were to conduct such a review, the district court held correctly that there is no substantial federal question that is an essential element of plaintiffs' claim.

ARGUMENT

I. The District Court Held Correctly that this Action Comes Within an Exception to Diversity Jurisdiction Under CAFA.

The district court held that this action comes within an exception to diversity jurisdiction under CAFA. (*See* SPA 8.)[4] CAFA extends diversity jurisdiction to cases in which at least one member of a class of plaintiffs and at least one defendant are citizens of different States and in which the amount in controversy

[4] References to the SPA are to the Special Appendix that Countrywide submitted with its initial brief.

exceeds $5,000,000. 28 U.S.C. § 1332(d)(2). But CAFA includes an exception to diversity jurisdiction that applies squarely to this case:

> [Jurisdiction under CAFA] shall not apply to any class action that solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under Section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1332(d)(9)(C).

It is undisputed that plaintiffs' certificates are "securities"; that the certificates were created pursuant to the PSAs and that the PSAs define the rights of the certificateholders and the duties and obligations of Countrywide; and that the sole objective of this action is to enforce Countrywide's obligation under the PSAs to repurchase loans that it modifies. The district court thus held correctly that plaintiffs' claim comes under the exception to jurisdiction in 28 U.S.C. § 1332(d)(9)(C) because it "relates to the rights, duties . . . and obligations relating to or created by or pursuant to any security."

This Court already has analyzed § 1332(d)(9)(C) in *Pew*, and the district court faithfully applied this Court's analysis. (*See* SPA 5.) ("Fortunately, the Court of Appeals has already done the lion's share of the work interpreting this exception."). In *Pew*, this Court held that § 1332(d)(9)(C) applies to any suit based on rights, duties, or obligations arising out of "instruments that create and define securities" (like trust indentures and PSAs), but not to suits based on rights, duties,

or obligations that arise out of other sources of law, like statutory actions under consumer protection laws or common-law actions for fraud. *Pew*, 527 F.3d at 32-33. Thus, from the plain meaning of § 1332(d)(9)(C), this Court's holding in *Pew*, and from the fact that this action is based solely on a provision of the PSAs that create and define plaintiffs' securities, it is clear that this action falls under the exception to diversity jurisdiction in § 1332(d)(9)(C).

To argue otherwise, Countrywide is forced to contort both this Court's holding in *Pew* and the legislative history of § 1332(d)(9)(C). *First*, Countrywide argues that § 1332(d)(9)(C) does not apply to this action because the particular *provision* of the PSAs that plaintiffs are suing to enforce does not itself "define" plaintiffs' certificates, even though it is undisputed that the PSAs created plaintiffs' securities and define the rights, duties, and obligations of the parties to them. *Second*, Countrywide argues from the legislative history of § 1332(d)(9)(C) that Congress intended it to apply only to disputes over "internal corporate governance." *Third*, according to Countrywide, even if the only claim in an action is indisputedly based on the terms of a "security," that action still does not "solely involve" such a claim if *any* other "substantive issue" may be involved in the case, including potential affirmative defenses. All three of these arguments are wrong.

A. Section 1332(d)(9)(C) Applies to an Action under the PSAs because the PSAs "Create and Define" Plaintiffs' Certificates.

In its brief to the district court, Countrywide argued that *Pew* "should be read as restricting CAFA's third exception [§ 1332(d)(9)(C)] to claims based on language contained in the four corners of the certificates." (SPA 8.) Countrywide argued that this action is not covered by § 1332(d)(9)(C) because the action is based on a provision of the PSAs that created the certificates, rather than on the text of the certificates themselves. The district court held that Countrywide was "selectively, and misleadingly, quoting from *Pew*" and that Countrywide "ignore[d] *Pew*'s references to documents outside of the four corners of the securities such as 'a certificate of incorporation' or 'an indenture.'" (SPA 8-9.)

Apparently Countrywide has abandoned the argument that § 1332(d)(9)(C) applies only to suits based on the text of a security (*i.e.*, the certificate) itself. Countrywide now concedes that, under *Pew*, claims based on instruments like PSAs that are not themselves securities, but that "create and define" securities, also fall under § 1332(d)(9)(C):

> Thus, *Pew* recognizes, a suit falling within the security exception may involve the "formative document[s] of [a] business," such as a "certificate of incorporation, an indenture, a note or some other corporate document." But those documents are relevant only insofar as they give meaning to the "terms of the security" being interpreted in a particular case.

(Countrywide Br. 17 (citations omitted).)

Countrywide does not suggest that the PSAs did not *create* plaintiffs' certificates, and it concedes that the PSAs define certain terms of those certificates. (*See* Countrywide Br. 24 (conceding that plaintiffs' certificates "incorporate[] the PSA terms setting forth the formula for monthly distributions").) Indeed, Countrywide does not dispute the district court's finding that:

> [I]t is hard to see how the PSAs do not constitute instruments that create and define plaintiffs' certificates. In the sample PSA provided by defendants, "Article V" is devoted entirely to the certificates, including sections relating to their issuance, registration, mutilation, and ownership.

(SPA 7).[5]

Conceding that the PSAs create and define the terms of plaintiffs' securities, Countrywide argues only that § 1332(d)(9)(C) does not apply to this action because the particular *provision* of the PSAs that plaintiffs sue to enforce does not itself define a relevant term of plaintiffs' certificates. "[T]he PSA terms on which plaintiffs rely do not define any term in the certificates at issue in this suit." (Countrywide Br. 21.) Thus, Countrywide argues that actions based on certain provisions of a PSA may fall within § 1332(d)(9)(C), but that actions based on other provisions of the same PSA somehow do not.

[5] Countrywide argues that "plaintiffs' claims do not concern those ministerial terms" in the certificates that the district court found were defined by the PSAs. (Countrywide Br. 21-22.) But Countrywide does not dispute that Article V of the PSAs defines these terms in plaintiffs' certificates.

There are three fallacies in Countrywide's argument. *First*, the distinction between provisions of formative instruments that give meaning to the terms of a security and others that do not, appears nowhere in *Pew* or in any other reported decision of this or any other Court. *Second*, even if this Court were to draw this distinction, the provision of the PSAs that plaintiffs are suing to enforce does indeed define one of the most important terms of their certificates – how much the certificateholders are entitled to be paid. *Third*, Countrywide misinterprets the legislative history of § 1332(d)(9)(C). As this Court has already held in *Pew*, § 1332(d)(9)(C) is *not* restricted to disputes about "internal corporate governance."

1. *Pew* does not distinguish between provisions of instruments that "define" securities and others that do not.

Countrywide argues that, to come within § 1332(d)(9)(C), a claim must be based not only on an *instrument* that "creates and defines" a security (and all agree that the PSAs are such instruments) but also on a specific *provision* of that instrument that defines the term of the security on which plaintiffs are suing. (Countrywide Br. 18 ("that *provision* [of the PSAs that plaintiffs are suing under] also does not define any term in the certificates *that plaintiffs seek to enforce*" (emphasis added).) Countrywide thus concedes that the district court was correct that the PSAs define certain terms in plaintiffs' certificates. Instead, Countrywide proposes a new rule that the very provision under which plaintiffs are suing must

itself define a term in the certificates. There is not a word in *Pew* or in any other reported decision to support such a rule.[6]

Countrywide purports to base its argument on *Pew*, but, to do so, Countrywide engages again in the same misleadingly selective quotation that the district court criticized. Countrywide argues that "[i]n *Pew*, the Court held that the exception 'appl[ies] only to suits that seek to enforce the terms of the instruments' that both 'create and define securities.'" (Countrywide Br. 15.) It was Countrywide, not this Court in *Pew*, that inserted the crucial words "that both" in the previous sentence. More important, Countrywide leaves out the second half of this Court's actual sentence in *Pew*. Here is the complete passage of *Pew* from which Countrywide took most of what it excerpts in the sentence of its brief just quoted.

> These passages demonstrate that Congress intended that § 1332(d)(9)(C) and § 1453(d)(3) should be reserved for "disputes over the meaning of the terms of a security," such as how interest rates are to be calculated, and so on. This is entirely consistent with our interpretation of § 1332(d)(9)(C) and § 1453(d)(3) as applying only to *suits that seek to enforce the terms of instruments that create*

[6] Countrywide repeatedly argues that "[p]laintiffs read *Pew* to . . . extend[] § 1332(d)(9)(C) to any suit concerning a document that merely *creates* [but does not also define] a security." Plaintiffs made no such argument. What plaintiffs actually argued is that there is nothing in *Pew* (or any other reported decision) to support Countrywide's argument (Countrywide Br. 18) that the exception to diversity jurisdiction in § 1332(d)(9)(C) may apply to certain *provisions* of a document (those provisions that define the terms of a security) but not to other provisions *of the same document* (that do not define the terms of a security).

> *and define securities, and to duties imposed on persons who administer securities.*

Pew, 527 F.3d at 33 (emphasis added).

Read as a whole, this passage in *Pew* belies Countrywide's distinction between different provisions of instruments that create and define securities. The passage construes § 1332(d)(9)(C) to cover all – not some – "suits that seek to enforce the terms of instruments that create and define securities," as well as actions to enforce "duties imposed on persons who administer securities" (like master servicers such as Countrywide). Thus, when read as a whole and not in snippets, *Pew* reads § 1332(d)(9)(C) to cover all actions based on any provision of an instrument that creates and defines a security.

Pew distinguishes not between provisions of instruments like PSAs, but rather between actions based on duties imposed by an instrument that created a security, on the one hand, and duties imposed by other sources of law, like statutes, on the other. Indeed, this Court's actual holding in *Pew* was that a suit based on a consumer protection statute did not fall under § 1332(d)(9)(C). (*See* SPA 7 ("[T]he right to sue for fraud is created by state law, not the terms of the securities. Hence, the exception did not apply, and the Court of Appeals reversed the trial court's remand order.").)

This interpretation of Pew is underscored further by this Court's observation in *Pew* that § 1332(d)(9)(C) applies only to suits by "holders as holders." 527 F.3d

at 32. This observation is an allusion to the classic distinction between "purchaser" claims, in which the basis of the action is an alleged violation of law by the seller of the security either before the plaintiff bought the security or during the course of the sale itself (*e.g.*, a claim for securities fraud), and "holder" claims, in which a holder of a security alleges that the defendant violated a duty created by the security itself or by one of the instruments that created the security. Plaintiffs make only one claim in this case: to enforce a provision of the PSAs that requires Countrywide to repurchase from the trusts any loan that it modifies. By Countrywide's own admission, this duty is a creature of the instruments that created plaintiffs' securities, the PSAs. (*See* Countrywide Br. 15 ("Plaintiffs . . . assert claims based on an obligation Countrywide allegedly owes a third party 'under the PSAs.' But Countrywide owes that alleged obligation to the trusts, not to plaintiffs, who are not parties to the PSA.") (citations omitted).) Thus, just as this Court observed in *Pew*, this action is one by "holders as holders."

For these reasons, the district court correctly followed *Pew* and held that § 1332(d)(9)(C) applies to this case.

2. The provision of the PSAs under which plaintiffs are suing does define the meaning of their certificates.

Even if Countrywide were right that § 1332(d)(9)(C) applies only to actions under the particular provisions of a PSA that define the "terms of a security," still the district court was correct in remanding this case to state court.

Countrywide argues that the provision of the PSA that plaintiffs are suing to enforce does not "define[] *any* term of their securities upon which they seek to sue." (Countrywide Br. 15.) In fact, that provision does define a term of the certificates. These words are printed on each certificate that plaintiffs own: "[R]eference is made to the [PSA] for the interests, rights and limitations of rights, benefits, obligations and duties evidenced thereby . . . ." (JA 589.)[7] Thus, "rights, benefits, obligations and duties" all are "terms of the security," and the meaning of those terms is spelled out by the entire PSA.

Perhaps the most fundamental "term" of the certificates – the amount the certificateholder is entitled to be paid – is defined by the PSA. Plaintiffs' certificates state that:

> Pursuant to the terms of the [PSA] Agreement, a distribution will be made on the 20th day of each month . . . to the Person in whose name this Certificate is registered . . . .

(*Id.*) This payment term is defined by the PSA. By enforcing Countrywide's duty to buy back any mortgage loan that it modifies, plaintiffs will increase the funds in the trust, which will in turn increase the distributions that certificateholders receive. Thus, the provision of the PSA that plaintiffs are suing to enforce helps to "define" the distribution of funds stated on the face of the certificates.

[7] References to "JA" are to the Joint Appendix.

Countrywide argues that this key term of the certificates, which is plainly "defined" by the PSAs, somehow is irrelevant. *First*, Countrywide argues that this provision "is not premised on any obligation the Trustee owed to [plaintiffs] under the security; instead, it rests on an obligation that Countrywide allegedly owes to the Trust under the PSA, to which plaintiffs are not a party." (Countrywide Br. 24.) As the district court correctly noted, however, the fact that plaintiffs are not parties to the PSAs is irrelevant:

> [J]ust as bondholders are beneficiaries of, but not parties to, indentures, so too are the certificateholders beneficiaries of, but not parties to, the PSAs . . . the Article of the PSA containing Section 3.11(b)—the provision on which plaintiffs sue—specifies that "[Countrywide Servicing] shall service and administer the Mortgage Loans in accordance with the terms of this agreement" "[f]or and on behalf of the Certificateholder," i.e., the plaintiffs. The PSAs' plain language creates obligations for defendants, relating to the securities, whose benefits run to the plaintiffs. Because defendants are suing on those obligations, they fall within the third exception to CAFA jurisdiction.

(SPA 8.)[8]

[8] Countrywide also argues that plaintiffs do not have the "right" to enforce Countrywide's obligations under the PSAs, because Countrywide is not a party to plaintiffs' certificates. (Countrywide Br. 24.) That is plainly wrong because, as the district court held, plaintiffs are identified as third party beneficiaries of Countrywide's obligations under the PSA. (SPA 8.) Moreover, the district court also noted that Countrywide is a party to the PSA, which is incorporated by reference in the certificates. (*See* SPA 10.) But even if Countrywide were correct that plaintiffs do not have standing to enforce the provision of the PSAs under which they purport to sue, that would perhaps be an argument for dismissal on the merits; it has entirely irrelevant to the question before this Court – *i.e.*, whether § 1332 (d)(9)(C) applies to this action.

Second, Countrywide argues that the language in plaintiffs' certificates is irrelevant also because plaintiffs are suing the master servicer (Countrywide) rather than the trustee:

> [s]uits involving the relationship between an investor and the manager of his investment—the relationship that would be at issue in suits involving a 'default on principal' or a bond-series discontinuance—could fall [under § 1332(d)(9)(C)]. Suits arising out the relationships between a securities issuer and other commercial entities that might have obligations to it, however, do not.

(Countrywide Br. 16.) Countrywide's argument is based on a fundamental misunderstanding of securitization. The master servicer is not a mere third-party "commercial entity" that has an obligation to the trust. For all intents and purposes, the master servicer is the "manager of [plaintiffs'] investment." The master servicer is responsible for maintaining the assets of the trust, collecting payments on the mortgage loans, and foreclosing on delinquent loans. Countrywide cannot seriously argue that a dispute between the certificateholders and the master servicer is not a dispute between investors and the "manager of their investment."

In short, the PSAs are precisely the same as indentures for traditional debt securities, which, as this Court in *Pew* specifically held, fall squarely within § 1332(d)(9)(C) because they create and define securities. *See* 527 F.3d at 31 (holding that the word "obligations" in § 1332(d)(9)(C) means "those created in

instruments, such as a certificate of incorporation, an indenture, a note, or some other corporate document.")

B. Countrywide Misconstrues the Legislative History of § 1332(d)(9)(C).

Countrywide argues that "the history of § 1332(d)(9)(C) confirms that Congress did not intend the security exception to extend beyond "corporate governance cases . . . of the sort that involved 'disputes over the meaning of terms of a security.'" (Countrywide Br. 27.) Misleadingly, Countrywide relies on statements made in congressional hearings when a draft of § 1332(d) was first introduced in 1999, more than five years before the eventual bill was passed. But Congress made fundamental changes to the structure of the statute before enacting it in 2005. In particular, as Countrywide notes, the original "*then-pending bill* [. . .] placed the security exception [that ultimately became § 1332(d)(9)(C)] under the heading of 'Internal Corporate Governance Exception.'" (Countrywide Br. 27-28 (emphasis added).) Countrywide does not mention, however, that Congress ultimately rejected the heading "Internal Corporate Governance Exception." Instead, § 1332(d)(9)(C) became its own, separate exception, leaving § 1332(d)(9)(B) as the sole "corporate governance" exception. Thus, in the statute as Congress actually enacted it, neither the language of § 1332(d)(9)(C) nor the structure of the statute suggests in any way that § 1332(d)(9)(C) was intended to be limited to disputes regarding "corporate governance."

The 2005 Senate Judiciary Committee Report, which was published just after § 1332(d) was enacted, proves that the final version of § 1332(d)(9)(C) was not intended to be limited to disputes about "corporate governance." The Senate Report first discusses § 1332(d)(9)(B), which applies to "those class actions that solely involve claims that relate to matters of corporate governance arising out of state law." (SPA at 74 (S. Rep. No. 109-14 (2005).)

> By corporate governance litigation, the Committee means only litigation based solely on (a) state statutory law regulating the organization and governance of business enterprises such as corporations, partnerships, limited partnerships, limited liability companies, limited liability partnerships, and business trusts; (b) state common law regarding the duties owed between and among owners and managers of business enterprises; and (c) the rights arising out of the terms of the securities issued by business enterprises.

(*Id.*) The Senate Report then goes on to describe § 1332(d)(9)(C) as a separate exception that is "*also intended* to cover disputes over the meaning of the terms of a security, which is generally spelled out in some formative document of the business enterprise, such as a certificate of incorporation or a certificate of designations." (*Id.* (emphasis added).) It is clear from the Senate Report that § 1332(d)(9)(C) was intended to exclude from diversity jurisdiction under CAFA disputes regarding the terms of securities (and documents that create and define securities), regardless of whether those disputes concerned "corporate governance."

The Senate Report is the only legislative history that this Court relied on in *Pew*, 527 F.3d at 33. The Court quoted both the part of the Report that refers to the "corporate governance" exception and the subsequent part of the Report that refers to "disputes over the meaning of the terms of a security." *Id.* And this Court concluded in *Pew* that § 1332(d)(9)(C) was *not* intended to be restricted to disputes about corporate governance, but was intended instead to apply to "suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities." *Id.*

C. The District Court Held Correctly that Possible Defenses and Other Possible Issues Should Not be Considered in Determining Whether § 1332(d)(9)(C) Applies.

Countrywide argues that "any class action that 'involves' a substantive issue in addition to the proper interpretation of a security—including a federal defense—falls outside of the limited exception in § 1332(d)(9)(C)." (Countrywide Br. 31-32.) Although Countrywide relies on its anticipated affirmative defenses based on federal law and on issues of "alter ego" liability to take this action outside of § 1332(d)(9)(C),[9] there is nothing unique about those two examples. Countrywide

[9] Countrywide argues that "the action undisputedly 'involves' the application of substantive state alter-ago law." (Countrywide Br. 35.) Countrywide is wrong. There are three defendants in this action. Two of the defendants, Countrywide Home Loans, Inc. and Countrywide Home Loans Servicing LP, are specifically required by the PSAs to purchase modified loans. Those defendants are direct, wholly owned subsidiaries of the third defendant, Countrywide Financial Corporation. The relief that plaintiffs are seeking in this action, however, does not

concedes that its argument would apply with equal force whenever there is *any* substantive issue (under federal or state law) other than the meaning of a security or an instrument that created the security. *See id.*

If this is, as Countrywide suggested in its petition for permission to appeal, a question of "first impression for this, and . . . any appellate court," (Countrywide Remand Pet. 10-11), that can be only because the answer to the question is obvious. The text of § 1332(d)(9)(C) states that diversity jurisdiction under CAFA "shall not apply to any class action that solely involves a *claim* . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security." (Emphasis added.) The only plausible interpretation this sentence is that the word "solely" applies to the word "claim," not, as Countrywide suggests, that it makes the word "claim" synonymous with the word "issue."

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require, or even contemplate, a determination as to whether Countrywide Financial is an "alter-ego" of its subsidiaries, nor are Plaintiffs seeking a declaration of any kind against Countrywide Financial. Plaintiffs named Countrywide Financial as a defendant for only one reason. Under New York law, Countrywide may be a necessary party to this lawsuit because it may be affected by the declaratory relief that plaintiffs seek if it ultimately is held liable for the debts of its subsidiaries. *See Manhattan Storage & Warehouse Co. v. Movers & Warehousemen's Ass'n of Greater N.Y.*, 289 N.Y. 82, 88, 43 N.E.2d 820 (1942) (requiring all parties to be bound by declaratory judgment to be named as parties to action); *State v. Wolowitz*, 96 App. Div. 2d 47, 55-56, 468 N.Y.S.2d 131 (2d Dep't 1983) (dismissing declaratory judgment action where all necessary parties not named); *United Services Auto. Ass'n v. Graham*, 21 App. Div. 2d 657, 657, 249 N.Y.S.2d 788 (1st Dep't 1964) (permitting insurer to intervene in declaratory judgment action to "facilitat[e] the disposal in one action of all claims involved [in the case]").

1. Countrywide's interpretation of "solely" would eviscerate § 1332(d)(9)(C).

Countrywide's argument proves too much. If CAFA were read as Countrywide suggests, then all three exceptions in § 1332(d)(9) would be eviscerated. *See Garcia-Villeda v. Mukasey*, 531 F.3d 141, 147 (2d Cir. 2008) ("There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective." (quoting *United States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968))). Virtually every case in which a plaintiff makes a claim based on a security or related document will also "involve" at least one other substantive issue. By Countrywide's logic, § 1332(d)(9)(C) would not apply if, to name just a few examples, the defendant made a statute-of-limitations defense, a counterclaim of any kind, a claim of offset, or any defense based on federal law. Moreover, Countrywide's proposed reading of CAFA would complicate greatly the work of the federal courts to determine whether diversity jurisdiction exists under CAFA. Courts would have to anticipate every possible substantive issue that could arise to determine whether the action "solely involves" a claim that falls under § 1332(d)(9)(C).

2. Neither the text nor the legislative history of CAFA support Countrywide's reading of the statute.

Countrywide contends that CAFA's "text and legislative history" support its reading of the statute. (Countrywide Br. 11). Neither of these sources supports Countrywide's argument.

First, Countrywide states the truism that "[t]he 'well-pleaded complaint' rule applies *only* to statutory 'arising under' cases," and that "[t]his is not such a case." (Countrywide Br. 39 (citations omitted).) Countrywide is correct that the word "involving" in § 1332(d)(9)(C) is broader than the words "arising under" in 28 U.S.C. § 1331, the federal-question jurisdictional statute. But that difference undermines Countrywide's position. An exception that uses "broad" language necessarily applies to more cases than an exception that uses "narrow" language. If § 1332(d)(9)(C) uses *broader* language than § 1331, then it must apply to *more* cases. Certainly the language does not prove that § 1332(d)(9)(C) must be interpreted so narrowly that it would not apply to any case that could involve an issue of federal or state law other than a claim that arises out of the terms of a security.

Second, Countrywide attempts a textual analysis of § 1332(d)(9)(C) to prove that it does not cover this case because the case does not "solely" involve a claim relating to a security.

> If, as plaintiffs argue, Congress had intended to limit the jurisdictional inquiry to plaintiffs' claims, exclusive of any defenses or other substantive issues raised by a case, it would have created an exception for "any class action that involves a claim . . . that solely relates to" a security, rather than an exception for "any *class action* that solely involves a claim . . . that relates to" a security. By focusing on what a *class action* solely involves, rather than what a *claim* solely involves, Congress made the exception inapplicable when a class action involves not only a security claim, but also substantive issues of state and federal law.

(Countrywide Br. 43.)

This argument is belied by common sense and basic grammar. The purpose of "solely" or "only" in a sentence is to "focus" on a particular word and exclude other alternatives to that word.[10] The word on which "solely" focuses in a given sentence depends on the context of the sentence, not on a mechanical counting of words on either side of "solely." Thus, the location of the word "solely" in § 1332(d)(9)(C) does not dictate one way or the other how the statute is to be interpreted. Certainly, it does not require this Court to adopt Countrywide's nonsensical suggestion that § 1332(d)(9)(C) does not apply to a "class action that solely involves a claim" related to a security, just because it may also involve a defense that is not.

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[10] "[P]utting focus on an element makes salient all of the (contextually relevant) alternatives to that element. *Only* is a quantifier which takes as an argument a clause with a focused element and asserts that replacing the focused element with one of its alternatives will not return a clause that is both distinct and true." Jonathan Brennan, Only *Finally* at 3, NYU WORKING PAPERS IN LINGUISTICS, Vol. 1, Spring 2007, *available at* http://www.nyu.edu/gsas/dept/lingu/nyuwpl/2007spring/brennan-2007-nyuwpl.pdf

Third, Countrywide argues that potential defenses must be considered to determine whether the exception in § 1332(d)(9)(C) applies because "courts determining whether a CAFA suit satisfies the requirements of Federal Rule of Civil Procedure 23 must consider both the claims and *defenses* presented in the case." (Countrywide Br. 40.) This argument is a non sequitur. Class certification has nothing to do with whether a case falls under an exception to diversity jurisdiction under CAFA. There is, of course, no requirement that a federal court decide class certification *before* it determines whether there is federal jurisdiction under CAFA. To the contrary, CAFA states expressly that it "shall apply to any class action before or after the entry of a class certification order by the court with respect to that action." 28 U.S.C. § 1332(d)(8). The fact that a defense may be relevant months later in considering the entirely different question of class certification has no bearing on whether defenses must be considered in deciding whether the district court has jurisdiction at all.[11]

Fourth, Countrywide argues that statements in the legislative history of CAFA show that § 1332(d)(9)(C) is to be interpreted narrowly and should

[11] Indeed, if Countrywide's point about class certification is relevant at all, it is simply another example to demonstrate why Countrywide's proposed reading of CAFA would eviscerate the exceptions. Every CAFA case is by definition a class action or a putative class action. And every class will have to be certified. Under Countrywide's reading, the fact that defendants may raise defenses to class certification that are based on anything other than the text of the certificates or the PSA would, itself, be sufficient grounds to find federal jurisdiction. Again, such an interpretation defies logic.

"provid[e] for Federal court consideration of interstate cases of national importance." (Countrywide Br. 41 (citation omitted).) These general statements in the legislative history do not, however, override the plain meaning of the text of the statute as enacted by Congress and interpreted by this Court in *Pew*.

II. This Court Should Decline to Review, or, in the Alternative, Should Affirm, the District Court's Ruling on Federal-Question Jurisdiction.

Countrywide argues that the district court erred in finding no federal-question jurisdiction of this case under 28 U.S.C. § 1331 because "the Complaint itself presents a substantial federal question that confers jurisdiction." (Countrywide Br. 45.) This Court need not consider the issue, however, because the issue of federal-question jurisdiction cannot affect the outcome of this appeal. *See United States v. Huerta*, 371 F.3d 88, 91 (2d Cir. 2004) (declining to address a question "because we would reach the same result irrespective" of the answer to that question). Moreover, the district court held correctly that what Countrywide has identified is, at most, a potential defense based on federal law, not a substantial federal question that is "an essential element" of plaintiffs' contract claims.

A. The District Court's Holding on Federal-Question Jurisdiction Cannot Affect the Outcome of this Appeal and Should Not be Reviewed.

"Ordinarily, an order of remand is unappealable." *Pew*, 527 F.3d at 28. The only authority that permits an appeal of the district court's order of remand is 28

U.S.C. § 1453, which gives this Court discretion to accept an appeal of an order remanding a case that is a "class action" as defined by CAFA:

> [N]otwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

28 U.S.C. § 1453(c)(1). The same three exceptions that appear in § 1332(d)(9) are reproduced word for word in § 1453(d). This Court held in *Pew* that its jurisdiction under § 1453 therefore is subject to the same three exceptions that apply to diversity jurisdiction under CAFA.

> The plain language of subsection (d) ("This *section* shall not apply . . . ." (emphasis added)) limits all of § 1453, including subsection (c), which delineates the scope of our authority to "accept an appeal" from a remand order. Therefore, § 1453(d) limits our jurisdiction to review the district court's remand order.

527 F.3d at 29.

Thus, to determine whether it has jurisdiction to decide an appeal of the district court's order, this Court must decide first whether this action falls under § 1332(d)(9)(C) or the equivalent provision in § 1453(d)(3). *See Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 309 (2d Cir. 2005) ("As a threshold matter, we must determine whether we have jurisdiction to hear this appeal."). If the Court determines that § 1332(d)(9)(C) does apply, then the Court lacks jurisdiction and the entire appeal (including any appeal of the district court's ruling on federal-

question jurisdiction) must be dismissed. If, on the other hand, the Court determines that § 1332(d)(9)(C) does not apply, then the Court will already have resolved the appeal on its merits (finding federal jurisdiction under CAFA and thus reversing the district court), and there would be no reason then to review the district court's decision on federal-question jurisdiction. *See Rubinstein v. Adm's of Tulane Educ. Fund*, 218 F.3d 392, 403 (5th Cir. 2000) ("Simply stated, this is not the case to decide a matter of first impression, when it is not clearly presented and it is unnecessary to our decision on the issues before us.").

B. The District Court Held Correctly That the Complaint Does Not Present a Substantial Federal Question.

Even if this Court were to consider the substance of the district court's ruling on federal-question jurisdiction, the district court correctly held that nothing in plaintiffs' complaint requires an interpretation of federal law as an "essential element" of plaintiffs' purely state-law claims. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310 (2005) (emphasis added).

Countrywide's sole argument is that the district court "failed to consider § 3.01 of the PSA, which authorizes Countrywide to modify loans, without repurchase, under the 'customary and usual standards of practice' of prudent servicers." (Countrywide Br. 46.) According to Countrywide, this provision of the PSA confers federal jurisdiction because 15 U.S.C. § 1639(a) "defines standard industry practice for servicers" and "thus provides a rule of construction on which

plaintiffs' claims necessarily depend." (Countrywide Br. 46-47 (internal quotations omitted).)

Countrywide's argument is based on a faulty premise. § 3.01 is irrelevant to plaintiffs' claims because it does not "authorize Countrywide to modify loans." § 3.01 states only that the "Master Servicer shall *service and administer* the Mortgage Loans in accordance with customary and usual standards of practice of prudent mortgage loan lenders." (JA 84-85 (emphasis added).) § 3.01 goes on to list the ways in which the master servicer may service and administer the loans, not one of which even mentions any modification of those loans.[12] Thus, § 3.01 authorizes Countrywide to "service and administer," but not to modify, the mortgage loans in the trusts.

Some PSAs, but not Countrywide's, actually do authorize the master servicer to modify mortgage loans when it is "in the best interests of investors" to do so. The PSA from a Goldman Sachs securitization, for example, expressly

[12] "[T]he Master Servicer shall have full power and authority . . . (i) to execute and deliver, on behalf of the Certificateholders and the Trustee, customary consents or waivers and other instruments and documents, (ii) to consent to transfers of any Mortgaged Property and assumptions of the Mortgage Notes and related Mortgages (but only in the manner provided in this Agreement), (iii) to collect any Insurance Proceeds, other Liquidation Proceeds (which for the purpose of this Section 3.01 includes any Subsequent Recoveries), and (iv) to effectuate foreclosure or other conversion of the ownership of the Mortgaged Property securing any Mortgage Loan; provided that the Master Servicer shall take no action that is inconsistent with or prejudices the interests of the Trust Fund or the Certificateholders in any Mortgage Loan or the rights and interests of the Depositor, the Trustee and the Certificateholders under this Agreement." (JA 85.)

authorizes the master servicer to "waive, modify or vary any term of any Mortgage Loan or consent to the postponement of strict compliance with any such term or in any manner grant indulgence to any Mortgagor if, in the Servicer's reasonable and prudent determination, such waiver, modification, variation, postponement or indulgence is in the best interests of and is not materially adverse to the [investors]." (JA 212.) If the parties to Countrywide's PSAs had intended to grant the master servicer similar authority to modify mortgage loans, they would have said so in similarly explicit language. But they did not.

Moreover, Countrywide's reading of § 3.01 is inconsistent with § 3.11(b) of the PSA – the section under which plaintiffs are actually suing. (JA 95.) That is the only section that actually authorizes the master servicer to modify loans (proving that, when the parties to Countrywide's PSAs wanted to authorize the master servicer to modify loans, they knew how to do so explicitly) but on the important condition that Countrywide purchase the modified loans from the trusts.

For these reasons, Countrywide is mistaken that "§ 3.01 . . . authorizes Countrywide to modify loans, without repurchase." (Countrywide Br. 46.) § 3.01 says nothing about modifications at all. Because § 3.01 is thus irrelevant to plaintiffs' lawsuit, § 1639a – which, according to Countrywide, is relevant only as a "rule of construction" for § 3.01 – obviously cannot be an "essential element" of plaintiffs' claims.

CONCLUSION

For the reasons argued above, this Court affirm the order of the district court.

Dated: January 15, 2009
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDUER 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the number of the words in the brief total 7,472, excluding the parts of the brief exempted by that rule.

2. This brief complies with the typeface requirements of the Fed. R. of App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

Dated: January 15, 2010
New York, New York

David J. Grais

Exhibit F

FILED: NEW YORK COUNTY CLERK 07/07/2011
NYSCEF DOC. NO. 38

INDEX NO. 651786/2011
RECEIVED NYSCEF: 07/07/2011

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),

Petitioner,

-against-

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC (proposed intervenors),

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.

NOTICE OF PETITION TO INTERVENE

PLEASE TAKE NOTICE that, upon the affirmation of Owen L. Cyrulnik dated July 5, 2011, the petition of the Trustee, the petition filed herewith, and all previous papers and proceedings in this proceeding, the proposed intervenors listed below (referred to as Walnut Place) will move this Court on July 13, 2011, at 9:30 a.m., in submission part room 130 at 60 Centre Street, New York, New York, or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 401, 1012, and 1013 permitting Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC to intervene as respondents in this proceeding, directing that the Walnut Place entities be added as respondents, directing that the Trustee's petition and notice of petition be amended by adding the Walnut Place entities as intervenors-respondents, and granting such other and further relief as may be just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 403(b), answering papers, if any, must be served on the undersigned no later than two days before the return date of this motion.

Dated: New York, New York
July 5, 2011

GRAIS & ELLSWORTH LLP

By:_____
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Attorneys for Proposed Intervenor-Respondents

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),

Petitioner,

-against-

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC (proposed intervenors),

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.

VERIFIED PETITION TO INTERVENE

For their petition pursuant to CPLR 401, 1012, and 1013 to intervene as respondents in this proceeding, which seeks the Court's approval of a settlement by which 22 self-appointed investors, many of which have extensive other business relationships with Bank of America Corporation and its subsidiaries, and a trustee that likewise has serious conflicts of interest, would extinguish the legal rights of hundreds of other investors, including the proposed intervenors, proposed intervenors Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC state and allege:

1. To continually raise new money with which to make its now-notorious mortgage loans to borrowers across the United States, 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 mortgage loans, those trusts in turn sold securities called certificates,

which were 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, Countrywide made numerous representations and warranties about those loans. And to put teeth into those representations and warranties, Countrywide agreed to repurchase from the trusts loans that did not comply with the representations and warranties.

2. The Walnut Place entities own securities issued by three of Countrywide's trusts. Concerned by widespread reports about the poor quality of Countrywide's loans, Walnut Place spent many months and hundreds of thousands of dollars to investigate the true quality of the loans in three of those trusts. It found that hundreds of loans in each trust were actually not of good quality and breached several of the representations and warranties that Countrywide had made about them.

3. The Bank of New York Mellon is the trustee for 530 of the trusts that Countrywide created, including all three of the Countrywide trusts that issued the certificates that Walnut Place owns.

4. On August 3, 2010, almost a year ago, Walnut Place presented to BNYM the detailed evidence that it uncovered in its investigation of one of those three trusts, Alternative Loan Trust 2006-OA10 (referred to as OA10). That evidence proved that many of the loans in that trust breached the representations and warranties that Countrywide had made about them. Walnut Place demanded that Countrywide repurchase those loans as it had agreed. When it refused, Walnut Place and other investors – which collectively owned more than 25% of the voting rights in that trust – demanded that BNYM sue Countrywide to enforce its promise to repurchase the defective loans. As it has in many cases in which it has been presented with evidence of Countrywide's breaches, BNYM did nothing. On February 23, 2011, Walnut Place then filed an action in this Court, derivatively on behalf of the OA10 Trust, to enforce Countrywide's obligation to repurchase the defective loans.

5. Walnut Place conducted the same investigation and made the same demands with respect to two other trusts. On April 12, 2011, Walnut Place amended its complaint to add Alternative Loan Trust 2006-OA3 (referred to as OA3). And Walnut Place has already begun to prepare a lawsuit on a third trust, Alternative Loan Trust 2006-OA21.

6. Months after Walnut Place filed its action in this Court, BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent and successor by *de facto* merger, Bank of America Corporation,[1] to settle all "potential claims belonging to the [530] trusts" for which BNYM serves as trustee. 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 Walnut Place's lawsuit. (*See* BNYM Request for Judicial Intervention ("if approved, the Settlement will resolve the claims raised by the plaintiffs in *Walnut Place LLC*.").)

7. The terms of the proposed settlement would release the claims of all 530 trusts for breaches of representation and warranties against Countrywide and Bank of America. Although BNYM concedes (BNYM Petition ¶ 13, 15) that it knew that Walnut Place and other certificateholders were likely to object to the proposed settlement, BNYM nevertheless made no effort to inform Walnut Place or the hundreds of investors in Countrywide trusts other than the 22 self-appointed investors that BNYM was secretly negotiating a deal with Countrywide and Bank of America, much less to solicit the views of those investors about what terms of settlement would be fair or whether they wished to be "represented" in those negotiations by the 22 self-appointed investors.[2]

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[1] On January 11, 2008, Bank of America Corporation agreed to acquire Countrywide Financial Corporation (the parent company of Countrywide Home Loans) in a reverse triangular merger. The transaction closed on July 1, 2008, and on October 6, 2008, Bank of America announced that Countrywide would transfer all or substantially all of its assets to unnamed subsidiaries of Bank of America. Walnut Place elaborates on these facts in paragraphs 154-176 of its amended complaint in *Walnut Place LLC v. Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. County) (attached as Exhibit A).

[2] Bank of America stated publicly that it was negotiating with certain investors about specific trusts in which those investors owned 25% or more of the voting rights. Those trusts did not include any of the three

8. In short, despite the fact that BNYM owes at least the same duties to Walnut Place that it owes to every other certificateholder in the 530 Countrywide-sponsored trusts, BNYM is asking this Court to approve a settlement that it negotiated in secret and that would release Walnut Place's claims without its consent while it is in the middle of an active litigation, which it brought on behalf of all cerificateholders in the OA10 ad OA3 Trusts when BNYM failed to do so.

9. On June 29, 2011, BNYM appeared *ex parte*, without notice to any potentially adverse parties like Walnut Place, and obtained from this Court an Order to Show Cause that sets forth a procedure for the approval of the proposed settlement.

10. BNYM did not name any adverse parties when it filed this proceeding, but its petition expressly contemplates that adverse parties may be added. "There currently are no adverse parties in this proceeding. To the extent that certain Certificateholders or other interested parties may wish to be heard on the subject of the Settlement or the judicial instructions sought through this Petition, those parties may become adverse." (BNYM Petition ¶ 18.)

11. Walnut Place is directly affected by this proceeding and seeks to intervene for at least two reasons. First, Walnut Place intends to ask the Court to provide a mechanism to permit certificateholders to exclude their trusts from the proposed settlement. Second, Walnut Place has serious concerns about the secret, non-adversarial, and conflicted way in which the proposed settlement was negotiated and about the fairness of the terms of the proposed settlement. If Walnut Place is not permitted to exclude the OA10, OA3, and OA21 Trusts from the proposed settlement, then Walnut Place will seek the necessary disclosure to evaluate these concerns and to bring them and the facts that support them to the attention of the Court. Walnut Place must seek this relief by intervening as a party because the procedures provided by the Order to Show

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trusts in which Walnut Place owns certificates. Moreover, neither Bank of America nor BNYM ever disclosed that BNYM was participating in negotiations to release the rights of all certificateholders in 530 Countrywide trusts.

Cause that BNYM proposed and obtained are wholly inadequate to protect the interests of certificateholders other than the 22 self-appointed investors.

A. The Settlement Agreement and the Order to Show Cause Do Not Provide a Clear Mechanism for Excluding Trusts From the Proposed Settlement.

12. Section 4(a) of the Settlement Agreement, which is attached as Exhibit B to BNYM's petition, expressly contemplates that one or more trusts may be excluded from the proposed settlement. Section 4(b) of the agreement even provides that Bank of America and Countrywide may scuttle the entire settlement if the unpaid principal balance of "Excluded Trusts" exceeds a certain "confidential percentage" of the total unpaid principal balance of all 530 trusts.

13. But neither the Settlement Agreement nor the Order to Show Cause provides any mechanism for certificateholders in a particular trust to elect to exclude that trust from the settlement. Indeed, certificateholders have no rights whatsoever under the Order to Show Cause except to submit "written objections" to the proposed settlement. The Order to Show Cause states that those objections will be heard on November 17, 2011, the same day on which the Court is to consider whether to approve the proposed settlement.

14. It is unreasonable to expect certificateholders to wait until the final approval hearing on November 17 before knowing what conditions they must satisfy to exclude their trusts from the proposed settlement and whether they have fulfilled those conditions. At the very least, certificateholders that object to the settlement must have sufficient notice that their request to be excluded has been denied so as to permit them to challenge the settlement in other ways.

15. Walnut Place intends to file a motion to modify the Order to Show Cause to provide – well in advance of the hearing on November 17 – a clear mechanism for a certain percentage of the certificateholders in any trust to "opt out" of the proposed settlement on behalf of that trust.

B. The Settlement Agreement and the Order to Show Cause Do Not Provide Enough Time for Certificateholders to Bring to the Attention of the Court their Serious Concerns about the Fairness of the Settlement.

16. Walnut Place has serious concerns about the fairness of the proposed settlement and the process by which it was negotiated. If Walnut Place cannot exclude the OA10, OA3, and OA21 Trusts from the proposed settlement, then, by intervening as a party in this proceeding, Walnut Place will have standing to seek disclosure to develop the information necessary to bring these concerns and the facts behind them to the attention of the Court. Moreover, Walnut Place respectfully submits that adverse certificateholders cannot possibly be expected to obtain the necessary disclosure and evaluate the proposed settlement in time to file objections in August and be ready for a hearing in November. BNYM, Bank of America, Countrywide, and the 22 self-appointed investors took many months to negotiate this proposed settlement and had unlimited access to the information with which to do so. Walnut Place intends to seek a modification of the Order to Show Cause to permit a reasonable time for adverse certificateholders to gather through disclosure the information necessary to evaluate the fairness of the settlement, and then to present that information to the Court before the Court decides whether to approve the proposed settlement.

17. Below are a few of many questions that Walnut Place believes must be answered about the fairness of the proposed settlement and the process by which it was negotiated.[3]

a. BNYM's conflicts of interest

18. BNYM negotiated the proposed settlement in secret, without soliciting the reviews of certificateholders other than the 22 self-appointed investors discussed below. In doing so, BNYM ignored established procedures that trustees of similar trusts have followed to solicit the views of certificateholders before taking action on behalf of a trust.

[3] Moreover, even if the settlement were reasonable, BNYM's proposal to release the rights of hundreds of certificateholders through an Article 77 proceeding is without precedent. Walnut Place has not yet had enough time to study the legal issues but reserves the right to argue that BNYM is misusing Article 77. Nor is it clear that BNYM even has the legal authority under the PSAs unilaterally to settle and release all of the rights of the trusts for breaches of the representations and warranties without at least soliciting the approval of all certificateholders in each trust.

19. BNYM purports to have the right to bind all trusts and all investors to this settlement. But BNYM has at least three conflicts of interest that raise serious doubts about its motives in negotiating the settlement.

20. *First*, under the Pooling and Servicing Agreements, BNYM is indemnified by the Master Servicer of each trust, Countrywide Home Loans Servicing, LP (another predecessor-in-interest of Bank of America Corporation), for costs and liabilities that arise out of certain duties that BNYM is to perform for the trusts. As part of the proposed settlement, BNYM negotiated for itself an indemnity from Countrywide that goes well beyond the scope of the indemnity that BNYM is otherwise entitled to under the PSAs. In particular, Countrywide agreed to indemnify BNYM for all costs and liabilities that BNYM may incur as a result of its participation in the very unusual process of negotiating the proposed settlement. This expanded indemnity is embodied in a "side letter" to the Settlement Agreement. It is very unusual, to say the least, for a trustee that says it is representing the interests of the beneficiaries of a trust, to demand and obtain an indemnity from the very party that is adverse to that trust and its beneficiaries (in this case, the certificateholders). BNYM concedes in its petition that it was concerned about its liability for the way in which it was handling (or, more accurately, ignoring) the demands of its beneficiaries that it take legal action for their benefit against Countrywide and Bank of America. For example, BNYM referred to "reports that a group of Certificateholders has considered taking action against BNY Mellon for its participation in the Settlement process." (BNYM Petition ¶ 13.) BNYM also states that "the Trustee also may be subject to claims by individual Certificateholders who believe that the Settlement, though benefiting thousands of Trust Beneficiaries now and in the future, may not be in their individual best interests." (BNYM Petition ¶ 15.) The proposed settlement protects BNYM from these liabilities by means of an indemnity from the party against which it was supposed to protect the interests of its beneficiaries and now anticipates that it may be liable for its failure to do so.[4]

[4] Walnut Place also has serious doubts about the validity of the indemnity agreement. The Court of Appeals has held that indemnity agreements that purport to provide indemnification for punitive damages are

21. *Second*, under the PSAs, BNYM is indemnified solely by Countrywide Home Loans Servicing, yet the parent and successor of that entity, Bank of America Corporation, guaranteed that indemnity to BNYM. The guarantee does nothing for the trusts or the certificateholders, but it provides a great benefit to BNYM. Indeed, BNYM states expressly in its petition that it doubts the solvency of Countrywide, so much so that it argues that Countrywide's supposed inability to pay a large judgment is a reason to accept the proposed settlement. (*Id.* ¶¶ 78-81.) Thus, the guarantee from Bank of America puts BNYM in a substantially better position than it was in before negotiating the proposed settlement, at the direct expense of the certificateholders whose interests BNYM purports to protect.

22. *Third*, BNYM cannot objectively evaluate the fairness of the proposed settlement because BNYM has duties to – and (as BNYM itself acknowledges) is potentially liable to – the certificateholders of all 530 trusts. It is obviously in BNYM's own interest to "settle" the claims of all 530 trusts at the same time on substantially identical terms. Otherwise, BNYM could be liable to certificateholders that believe they were treated less favorably than others. But not all of the trusts are identically situated. For example, Walnut Place is the only certificateholder in any Countrywide trust that has yet invested the time and money to conduct an independent investigation and actually sue Countrywide and Bank of America for breaches of representations and warranties. (None of the 22 self-appointed investors has ever done so, despite their claim to represent the interests of other certificateholders.) If BNYM were not hopelessly conflicted, it would have insisted that the proposed settlement take into account the far greater recovery that all certificateholders in the OA10, OA3, and OA21 trusts can expect because of Walnut Place's diligence.

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void as a matter of public policy. *See Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y. 2d 309, 316 (1994). Public policy also would prohibit a trustee that owes duties to the beneficiaries of a trust from enjoying an indemnity for the breach of those duties from a party that is adverse to the interests of those beneficiaries.

b. The conflicts of interest of the 22 self-appointed investors

23. BNYM's petition and the Settlement Agreement state that a group of 22 investors was heavily involved in the negotiation of the proposed settlement. (BNYM Petition ¶ 35.) The Settlement Agreement specifically refers to these 22 investors – which apparently appointed themselves to represent the interests of hundreds of other investors in Countrywide-sponsored trusts – and requires that they intervene in this proceeding to support the proposed settlement. The Settlement Agreement and BNYM's petition omit to state, however, that many of these 22 investors have substantial ongoing business relationships with Bank of America other than their ownership of certificates in Countrywide-sponsored trusts. For example, BlackRock Financial Management, Inc., is one of the 22 investors. During the time in which the Settlement Agreement was being negotiated, Bank of America *owned* up to 34 percent of BlackRock. BlackRock announced an agreement to repurchase Bank of America's remaining stake on July 1, 2011, just two days after the settlement was announced. Moreover, during some of that same time, BlackRock was a large shareholder in Bank of America Corporation. Thus, just when BlackRock says it was negotiating at "arm's length" to settle the claims of hundreds of other certificateholders, it and Bank of America owned large parts of each other and it was negotiating its own deal to buy out Bank of America's remaining stake. Many other of the 22 investors also have substantial business dealings with Bank of America or its subsidiaries other than their ownership of certificates in Countrywide-sponsored trusts. At a minimum, certificateholders should be permitted to take the discovery necessary to illuminate and bring to the Court's attention the serious conflicts of interest among the 22 investors that appointed themselves to represent the interests of hundreds of others.

c. The inadequacy of BNYM's evaluation of the proposed settlement

24. Bank of America stated in its press release announcing the proposed settlement that the Countrywide mortgage loans in the 530 trusts currently have an unpaid principal balance

of $221 billion.[5] An additional $48 billion of loans have been liquidated from those trusts by foreclosure or similar procedures. Under the PSAs, Countrywide is required to repurchase defective loans even if they have been liquidated. Thus, the total principal value of loans that Countrywide could be required to repurchase is approximately $269 billion. Audits of Countrywide loan files have revealed that as many as 90% of those loans breached representations and warranties. Walnut Place's own analyses of the loans in the OA10 and OA3 Trusts, which were performed without Walnut Place even having access to the loan files themselves, found that 66% and 58% of those loans, respectively, breached representations and warranties. Thus, Countrywide may be liable to repurchase loans with unpaid principal balances of as much as $242 billion. The $8.5 billion that Countrywide and Bank of America have agreed to pay is therefore only a small fraction of the potential liability that they would have faced in litigation on behalf of the trusts.

25. To defend this inadequate settlement, BNYM states that it engaged unidentified "financial experts" who "analyzed the various ways in which a settlement payment could be calculated" and advised BNYM on what range of settlements they would consider reasonable. (BNYM Petition ¶ 64.) Neither the Settlement Agreement nor the Order to Show Cause provides any procedure for a certificateholder to gather the information necessary to conduct an independent analysis of the same facts that BNYM and its "financial experts" considered in concluding that the proposed settlement is reasonable. Moreover, BNYM does not even disclose whether it audited a sample of the origination files of the mortgage loans in any of the 530 trusts, a procedure approved by Justice Bransten in litigation against Countrywide to determine how many of the loans that it sold were in breach of representations and warranties. *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.,* Index. No. 602825/2008, slip op. (Sup. Ct. N.Y. County Dec. 22, 2010) (attached as Exhibit B). The apparent omission of that obvious step itself casts serious doubt on BNYM's motives in agreeing to the proposed settlement.

[5] The press release is available at http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle_pf&ID=1580643.

d. Countrywide's ability to satisfy a judgment and Bank of America's liability as a successor to Countrywide

26. BNYM argues that the proposed settlement is reasonable because "the Trustee has concluded that Countrywide will be unable to pay any future judgment that exceeds, equals or even approaches the Settlement Payment." (BNYM Petition ¶ 81.) BNYM also states that it believes there would be "obstacles to the Trustee of holding Bank of America liable for the alleged breaches by Countrywide." (*Id.* ¶ 92.) Without appropriate discovery, neither the Court nor certificatcholders like Walnut Place have access to the necessary information to test the validity of those conclusions. But Justicc Bransten's denial of Bank of America's motion to dismiss similar allegations against it, *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, Index. No. 602825/2008, slip op. at 11-15 (Sup. Ct. N.Y. County Apr. 29, 2010) (attached as Exhibit C), the fact that Bank of America picks and chooses which of Countrywide's obligations it will honor or guarantec, and the fact that Bank of America is willing to pay $8.5 billion to settle liabilities that BNYM thinks that Bank of Amcrica does not even have, all suggest that BNYM is exaggerating the difficulty of holding Bank of America liable for Countrywide's obligations.

*

27. For all of the reasons discussed above, Walnut Place respectfully submits that it and other certificateholders should be permitted the time and disclosure nccessary to investigate, and then to bring to the attention of the Court these important concerns about the proposed settlement.

RELIEF REQUESTED

Walnut Place respectfully requests that the Court grant Walnut Place's petition to intervene.

Dated: New York, New York
July 5, 2011

GRAIS & ELLSWORTH LLP

David J. Grais

By:_____
David J. Grais (DG 7118)
Owen L. Cyrulnik
Leanne M. Wilson

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New York, New York 10022
(212) 755-0100
(212) 755-0052 (fax)

Attorneys for Proposed Intervenors-Respondents

VERIFICATION

I, Owen L. Cyrulnik, hereby affirm under the penalty of perjury that the following is true and correct:

I am a member of the bar of this Court and of Grais & Ellsworth LLP, attorneys for proposed intervenors Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC. I have read the foregoing Verified Petition and know the contents thereof. All statements of fact therein are true and correct to the best of my knowledge and belief. I am making this affirmation in lieu of a verification by the proposed intervenors because the proposed intervenors are not within New York County, where Grais & Ellsworth LLP maintains its offices.

Executed this 5th day of July 2011, in New York, New York.

Owen L. Cyrulnik

Exhibit G

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-

WALNUT PLACE LLC, WALNUT PLACE II LLC, WALNUT PLACE III LLC, WALNUT PLACE IV LLC, WALNUT PLACE V LLC, WALNUT PLACE VI LLC, WALNUT PLACE VII LLC, WALNUT PLACE VIII LLC, WALNUT PLACE IX LLC, WALNUT PLACE X LLC, WALNUT PLACE XI

Index No. 651786/2011

Assigned to: Kapnick, J.

ORDER TO SHOW CAUSE

LLC, POLICEMEN'S ANNUITY & BENEFIT FUND OF CHICAGO, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, TM1 INVESTORS, LLC, 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, FEDERAL HOME LOAN BANK OF SEATTLE, V RE-REMIC, LLC, THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, WESTERN-SOUTHERN LIFE ASSURANCE COMPANY, COLUMBUS LIFE INSURANCE COMPANY, INTEGRITY LIFE INSURANCE COMPANY, NATIONAL INTEGRITY LIFE INSURANCE COMPANY, FORT WASHINGTON INVESTMENT ADVISORS, INC. on behalf of FORT WASHINGTON ACTIVE FIXED INCOME LLC, CRANBERRY PARK LLC, and CRANBERRY PARK II LLC

Proposed Intervenor-Respondents,

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

Upon the accompanying Affirmation of Owen L. Cyrulnik, dated August 4, 2011, the accompanying Memoranda of Law in Support of Respondents' Order to Show Cause for an Amendment to the Preliminary Order, and all previous papers and proceedings in this proceeding,

SUFFICIENT CAUSE THEREFOR BEING ALLEGED, IT IS HEREBY

ORDERED, that petitioner The Bank of New York Mellon and the 22 intervenor-petitioners show cause before this Court at IAS Part 39, to be held at the Courthouse located at 60 Centre Street, New York, New York, 10007, on the ____ day of _____, 2011, at ____ o'clock, or as soon thereafter as counsel may be heard, why the following provisions should not be added to the Preliminary Order that this Court entered in this proceeding on June 29, 2011.

(1) The Bank of New York Mellon and each of the 22 intervenor-petitioners shall have 45

days to produce to an electronic document repository to be agreed upon by the parties all documents that are responsive to the notice to produce attached as Exhibit A.

(2) Bank of America Corporation, BAC Home Loans Servicing, LLP, Countrywide Financial Corporation, and Countrywide Home Loans, Inc., shall have 45 days to produce to that electronic document repository all documents that are responsive to the subpoena attached as Exhibit B.

(3) RRMS Advisors and Mr. Brian Lin shall have 45 days to produce to that electronic document repository all documents that are responsive to the third-party subpoena attached as Exhibit C.

(4) The deadline for investors in the 530 Trusts to file objections to the proposed settlement shall be extended until the later of December 30, 2011, or 75 days after the parties and third parties have substantially completed production of the documents that are called for in paragraphs (1), (2), and (3) above.

(5) The hearing in this proceeding shall be adjourned until at least 30 days after the deadline for objections.

(6) Certificateholders that own 20 percent or more of the voting rights evidenced by the certificates in any of the 530 Trusts that are part of the proposed settlement may cause that Trust to be excluded from the proposed settlement by filing a notice of exclusion with the Court and serving that notice on all parties.

SUFFICIENT REASON APPEARING THEREFOR, let service of a copy of this Order, together with the papers upon which it was granted, upon counsel for The Bank of New York Mellon, Matthew D. Ingber, or his designees, and counsel for the 22 intervenor-petitioners, Kathy D. Patrick, or her designees, personally or by email, on or before the __ day of August, 2011, be deemed good and sufficient service. Any answering papers shall be served personally or by email, at or before ___ o'clock on _____, 2011, and reply papers shall be served personally or by email at or before ___ o'clock on _____, 2011.

Dated: New York, New York

August __, 2011

ENTER,

_____

J.S.C.