UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) *et al.*,

Petitioners,

-against-

WALNUT PLACE LLC *et al.*,

Intervenor-Respondents.

2011-cv-5988(WHP)

MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO INTERVENE BY MARY ELLEN IESU

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Bank of New York Mellon ("BNYM" or "Trustee") serves as trustee for five hundred and thirty (530) residential mortgage-securitization Trusts. The trusts are evidenced by various contracts (collectively, the "Governing Agreements"). In the securitizations, a mortgage loan originator (the "Seller") sold portfolios of mortgage loans to a "Depositor." Generally, pursuant to the Governing Agreements, the Depositor conveyed the mortgage loans to the Trustee to hold in trust. Certificates evidencing various types of ownership interests in the Trusts were issued to investors (the "Certificateholders" or "Trust Beneficiaries"). Under the same agreements, the "Master Servicer" undertook to service the Trusts, including by collecting payments on the underlying mortgage loans and transferring those collections to the Trustee for distribution to Certificateholders.

BNYM, as Trustee, entered into a Settlement Agreement with Bank of America Corporation, BAC Home Loans Servicing, Countrywide Financial Corporation, and Countrywide Home Loans, Inc. (collectively, "Countrywide"), to settle claims that Countrywide breached various obligations under the Governing Agreements. If approved, the Settlement Agreement would require a payment of $8.5 billion to Trust Beneficiaries and improvements to Countrywide's mortgage servicing process. In exchange, the Settlement Agreement releases certain claims against Countrywide, which belong to the Trustee and arise under the Governing Agreements. The Certificateholders do not have any individual right to sue Countrywide; the Trustee, not the Certificateholders, is a party to the PSAs, and the PSAs expressly prohibit the Certificateholders from bringing direct claims in most circumstances. BNYM petitioned to have the Settlement approved in a proceeding brought pursuant to C.P.L.R. § 7701 *et seq* (the "Article 77 proceeding"), and gave notice to all Trust Beneficiaries, among others.

Four borrowers (the "Borrowers"), who are also representatives of a putative class, move to intervene. The crux of the Borrowers' claims is that Countrywide breached separate duties implied in their loan agreements by foreclosing on their mortgages rather than unilaterally reducing their loan balances, and that the Settlement Agreement does not right other wrongs that they attribute to the current servicing system. Intervention is not available to raise such extraneous claims. As this Court explained in *SEC v. Bear Stearns & Co.*,

> Intervention is not an avenue for advancing the competing agendas of non parties to a settlement, but instead is a procedural device that attempts to accommodate two competing policies: efficiently administering legal disputes by resolving all related legal issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy, or prolonged, on the other hand.

Nos. 03 Civ. 2937 (WHP) *et al.*, 2003 WL 22000340, at *2 (S.D.N.Y. Aug. 25, 2003).

Whatever claims the Borrowers may have over loan servicing would not be impaired here: they would not be bound by the Settlement Agreement or by any findings in the Article 77 proceeding. The Borrowers suggest that that is irrelevant, arguing that they have a right to block the Trustee and Countrywide from entering into any contract that does not include the servicing changes that they desire. But they cite no authority for that remedy, which cannot be reconciled with fundamental precepts of freedom of contract. Not only are the Borrowers' interests not impaired, but this proceeding also cannot afford the Borrowers any relief: they are not parties or third-party beneficiaries to any of the Governing Agreements, and the Trustee does not owe them any duties under those agreements.

Permissive intervention should be denied as well, because the Borrowers seek to radically expand and transform the proceeding. The Borrowers' fundamental objection is that the Settlement does not solve the entire "housing crisis." Of course, the Settlement was designed to resolve private disputes, not a confounding national problem, and that objection is irrelevant to

whether the Settlement should be approved. In short, the Borrowers whose loans secure the Trust Certificates have no place in this trust administration proceeding.

ARGUMENT

I. The Court Should Not Decide This Motion.

The Court should not decide this motion before reaching a decision on the Trustee's pending motion to remand. After all, "when an action is removed from state court, the district court first must determine whether it has subject matter jurisdiction over the claims before considering the merits of a motion to dismiss, for summary judgment, or for other relief." *Macro v. Independent Health Ass'n, Inc.*, 180 F. Supp. 2d 427, 431 (W.D.N.Y. 2001).

II. The Borrowers Cannot Intervene As-Of-Right Under F.R.C.P. 24(a)(2).

Intervention as-of-right under F.R.C.P. 24(a)(2) is permitted only if the movant has: (a) filed a timely application; (b) demonstrated an interest in the underlying action; (c) demonstrated that that interest could be impaired in the action; and (d) shown that the interest is not adequately protected by existing parties. The Borrowers fail to satisfy the second and third prongs.

A. The Borrowers Have No Valid Interest in This Proceeding.

An intervenor must show an interest in "the property or transaction that is the subject of the action." Fed. R. Civ. Pro. 24(a)(2). Rule 24 "requires that that interest be direct, substantial, and legally protectable." *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990); *see also Donaldson v. United States*, 400 U.S. 517, 531 (1971) ("What is obviously meant [in the Rule] is a significantly protectable interest.") (emphasis added).

The Borrowers breeze over the interest requirement with the assertion that "[t]he proposed Settlement tramples [their] right" under the covenant of good faith and fair dealing inherent in their loan agreements. Motion 4. They offer no explanation for that conclusion and say only that "it cannot seriously be disputed." *Id.* The Borrowers do not even mention the Rule's requirement of an interest in "the property or transaction that is the subject of the action."

The subject matter of the action is the Settlement Agreement, which would settle claims that belong to the Trustee and that arise under the Governing Agreements. The Borrowers are not parties or third-party beneficiaries to any of those documents. They could not bring the claims against the Defendants that the Trustee seeks to settle. Nor could they bring any claim against the Trustee under the Governing Agreements. The Article 77 petition seeks no findings relating to duties or claims under the Borrowers' loan agreements; the loan agreements are simply Trust assets. Where, as here, the intervenor "has not presented a 'direct' interest related to the subject matter of this action, it does not have a right to intervene under Rule 24(a)(2)." *Sharif by Salahuddin v. New York State Educ. Dept.*, 709 F. Supp. 365, 368 (S.D.N.Y. 1989); *see also Sierra Club v. Army Corps of Eng'rs*, 709 F.2d 175, 176 (2d Cir. 1983) ("But even if LMS's professional reputation were an interest cognizable under Rule 24, it is not an interest 'relating . . . to the subject of the action'").

The directness requirement has barred intervenors with interests far less attenuated than the Borrowers have here. In *United States v. New Jersey*, a firefighter whose promotion was barred by a consent decree sought to intervene in the proceeding that produced the decree. Explicitly treating the decree as a "contract," the Third Circuit affirmed the denial of intervention, because the intervenor "is not a party to the Consent Decree, the Consent Decree does not contemplate his participation in the proceedings as he proposes, and he is not an intended beneficiary of the

Consent Decree." 373 Fed. App'x 216, 220, 221–22 (3d Cir. 2010) (footnote omitted). The Borrowers here are not parties to the Settlement Agreement or the Governing Agreements; their participation in the Article 77 proceeding is not contemplated, in part because neither the Settlement Agreement nor the Article 77 proceeding would bind them; and they are not intended beneficiaries of the Settlement Agreement or the Governing Agreements.

More broadly, "[i]ntervenors must take the pleadings in a case as they find them," and "[i]ntervention cannot be used as a means to inject collateral issues into an existing action." *Washington Elec. Co-op.*, 922 F.2d at 97 ("WEC's complaint defined the general scope of the action and VDPS cannot now by intervention radically alter that scope to create a much different suit."). That is exactly what the Borrowers seek to do here. As their counsel explained to *The New York Times* in describing the Borrowers' related action that seeks to block the Settlement: "There is a growing realization that this settlement needs more scrutiny. . . . ***It needs to address the housing crisis itself***." Nelson Schwartz, *Bank of America Settlement Faces Growing Challenges*, N.Y. Times Dealbook (Aug. 30, 2011), *available at* http://dealbook.nytimes.com/-2011/08/30/homeowners-seek-to-block-bank-of-america-settlement/ (last visited Sept. 13, 2011) (emphasis added). Whatever the Borrowers' goals may be, they have no direct, substantial or legally protectable interest in the Article 77 proceeding that would permit intervention.

B. The Borrowers' Purported Interest Could Not Be Impaired by This Proceeding.

An intervenor's alleged "direct, substantial, and legally protectable" interest must be one that could be impaired by the proceeding. *See United States v. $7,206,157,717 on Deposit at JP Morgan Chase Bank, N.A.*, 274 F.R.D. 125, 126 (S.D.N.Y. 2011). The Borrowers identify five interests, none of which are affected by this proceeding.

First, they assert that the servicing improvements in the Settlement Agreement "only aim to accelerate the rate of foreclosures but fail to set standards to protect homeowners from wrongful or unnecessary foreclosure or abusive servicing." Borrowers' Memo. of Law ("Br.") 4. This proceeding will not limit the rights of Borrowers faced with a "wrongful" or "unnecessary" foreclosure or illegal "abusive" practices. If intervenors "remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied." *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230, 2011 WL 1706778, at *7 (D. Vt. May 4, 2011) (citations omitted); *see also Donaldson*, 400 U.S. at 531 (denying intervention where proposed intervenor, "to the extent that he has such a protectable interest . . . may always assert that interest or that claim in due course at its proper place in any subsequent trial"). As in *Allen*, the Borrowers "will possess the same legal rights . . . whether or not the settlement is approved," and so cannot intervene to block it. 2011 WL 1706778, at *7 (internal quotation marks and alteration omitted).

In any event, the Borrowers do not have a right to require the Trustee and Countrywide to enter into a contract to "protect homeowners from wrongful or unnecessary foreclosure or abusive servicing," let alone to bar their entry into a contract simply because it fails to confer benefits that the Borrowers might seek in another action. The impairment of a non-existent right obviously cannot support intervention. *See Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 361 (E.D.N.Y. 1982), *aff'd* 721 F.2d 881 (2d Cir. 1983) ("The short, and sole, answer is that no such entitlement exists. . . . [The] potential delay [in objectors being given apartments] is not legally significant and therefore does not provide a basis for disapproving the settlement.").

Second, the Borrowers complain that "[t]he referral to subservicers will not protect homeowners from illegal and abusive servicing" and that "nothing in the Settlement actually requires the responsible servicing of loans by subservicers." Br. 4. As discussed immediately above, a third party cannot block other parties from entering into a contract merely because that contract lacks certain terms deemed desirable by the third party. But as importantly, the Borrowers do not need the Settlement to protect them from "illegal and abusive servicing" or to "require[] the responsible servicing of loans," because, according to the Borrowers themselves, the covenant of good faith and fair dealing already does so. If that is correct, then regardless of what happens with the Settlement, the Borrowers are protected. To the extent that neither the implied covenant, nor the express contracts, nor any other applicable law protects Borrowers from a particular practice, their interest—by definition—is not "legally protected."

Third, the Borrowers allege that "the compensatory fee structure within the Settlement speeds up foreclosures without protecting Homeowners from wrongful foreclosure." Br. 4. That argument is essentially the same as the first and is defective for the same reasons.

Fourth, the Borrowers point to what they call a "lopsided incentive structure" (Br. 5) that they say would not prevent errors. Again, if "errors in servicing . . . harm homeowners" in a legally-cognizable way, the Borrowers will have legal remedies no matter what happens in this proceeding. If the "error" is merely a determination to proceed with a foreclosure that the Borrower unilaterally deems "unnecessary," then the Borrower has no legally protected interest.

Finally, the Borrowers assert that the Settlement "provides no exceptions for instances when a Homeowner and a servicer are in the midst of negotiating a loan modification or when

the borrower is performing under any loan modification." Br. 5.[1] What they cannot show, however, is that they have legally protected interests in receiving modifications. A Trial Plan Period agreement under the federal HAMP program "does not constitute a binding contract for permanent modification," and Borrowers also cannot enforce the contracts ("SPAs") between the servicers and the Government. *Costigan v. Citimortgage*, No. 10 Civ. 8776 (SAS), 2011 WL 3370397, at *6, *7 (S.D.N.Y. Aug. 2, 2011) ("Several district courts have held that borrowers have no third-party right to enforce the SPA. . . . Allowing Costigan [a borrower] to enforce the SPA would contradict the express terms of the agreement"). Loan modifications are never required by general contract law either, even where the lender has made an oral promise. *See RTC v. Lesal Assocs.*, No. 91 Civ. 2025, 1992 WL 98843, at *5 (MBM) (S.D.N.Y. May 6, 1992) ("even if plaintiff refused to modify the terms of the loan or reneged on an oral promise to modify the terms of the loan, that would not be enough to support a claim under the implied covenant of good faith and fair dealing"); *Chase Manhattan Bank, N.A. v. Reale*, No. 92 Civ. 1042 (JSM), 1992 WL 297576, at *4 (S.D.N.Y. Oct. 7, 1992) (plaintiffs "argue that Chase breached its obligation of 'good faith' by declining to extend the Letter of Credit's expiration date. The argument fails as a matter of law.").

There are two other reasons why none of these supposed impairments satisfies Rule 24. One is that, like the implied covenant, if these impairments exist at all, they relate only to the outcome of the litigation—the effectiveness of the Settlement Agreement—and not to its subject matter—the issues being litigated. In *Sharif*, for example, intervention was not allowed based on

[1] That assertion is undermined by the Borrowers' concession that the Settlement ***does*** have special provisions for modifications "mandated by law for a foreclosure sale" (Br. 5)—that is, any modification in which the Borrower has a legally protected interest—and for modifications under the federal HAMP program, even though the latter are not legally required. *See* Settlement Agreement, Sections 5(d) and (e).

an interest in "only the remedy stage of this litigation. The [intervenor] does not suggest that its concerns are relevant to the underlying subject of this litigation." 709 F. Supp. at 368; *see also Gould v. Alleco, Inc.*, 883 F.2d 281, 285 (4th Cir. 1989) ("In a sense, every company's stockholders, bondholders, directors and employees have a stake in the outcome of any litigation involving the company, but this alone is insufficient to imbue them with the degree of 'interest' required for Rule 24(a) intervention."). The other reason that the Borrowers' interests are not impaired, in any sense, is that they are not bound by either the Settlement Agreement or the Article 77 proceeding. *See Washington Elec. Co-op.*, 922 F.2d at 98 ("Disposition of the instant proceeding without the participation of VDPS therefore will not operate to bar under the doctrines of res judicata or collateral estoppel any future attempts by VDPS to pursue these concerns.").

All of the "interests" or "impairments" that the Borrowers point to are either not legally cognizable or not affected by this action. Intervention as-of-right is not available.

III. The Borrowers Are Not Eligible for Permissive Intervention.

Rule 24(b) permits, but does not require, the Court to allow intervention where the movant "has a claim or defense that shares with the main action a common question of law or fact." The "principal consideration," however, is "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *United States Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (quoting Rule 24). Thus, "permissive intervention will not be granted, even where there is a strong commonality of fact or law, where such intervention would cause undue delay, complexity or confusion in a case." *Bear Stearns*, 2003 WL 22000340, at *2.

This Article 77 proceeding has no common questions of law or fact with the issues raised by the Borrowers' motion to intervene. The Borrowers suggest that "the Settlement includes

terms that would cause the parties to breach their contracts with Homeowners." Br. 6. Nowhere do they explain how. The "interests" that they describe seem to involve an expectation that ***they*** can breach the loan agreements[2] and that the lenders either will forgive those breaches with modifications or will sleep on their right to foreclose. Because, as explained above, most of the purported interests are not even cognizable and the rest are unaffected by the Settlement Agreement and the proposed findings, those interests are no basis for finding that the Trustee acted unreasonably.

The Borrowers also assert in passing that the Settlement does not serve the interests of the Certificateholders (Br. 5–6), but that still does not give the Borrowers an interest in the litigation, and those interests are adequately represented by the dozens of investors who have already intervened.

Finally, intervention by Borrowers would substantially complicate and delay the proceeding. All of the parties that have intervened to date, on both sides, are either investors in or insurers of Certificates.[3] Whether the settlement is "reasonable and fair" to both Certificateholders and the Borrowers at the same time is a standard that has no basis in the contracts or any other applicable law; at a minimum, widening the proceeding to include that question would introduce a host of complex issues that would fundamentally alter the Article 77 proceeding. *See Washington Elec. Co-op.*, 922 F.2d at 98 ("VDPS would inject issues of Vermont regulatory law into a contractual dispute. The potential for delay and the complication

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[2] *See Costigan*, 2011 WL 3370397, at *6 ("Costigan therefore breached the mortgage agreement" through non-payment, "and Citi, by initiating foreclosure proceedings, merely exercised its rights under the mortgage agreement").

[3] Motions to intervene by the New York and Delaware Attorneys General have been filed and postponed pending a decision on remand. The Trustee opposes those interventions on grounds that overlap to some extent with those here.

engendered by the injection of such issues justify denial of the motion"). The Borrowers do not dispute this. They say only that their intervention would cause "no more delay than is ***necessary***" to meet the erroneous standard of review that they assert. Br. 6. Moreover, as in *Bear Stearns*, "the movants fail to explain why any [Borrower] or self-proclaimed interested individual would not have an identical claim to permissive intervention. Were this Court to grant this motion to intervene, it would be logic-bound to allow all [Borrowers] and interested members of the public with differing viewpoints to intervene in the underlying actions." 2003 WL 22000340, at *4. The delay and confusion that the Borrowers' intervention would engender is unnecessary, and requires denial of the motion.

CONCLUSION

For all of the foregoing reasons, the Court should deny the motion.

Dated: New York, New York
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