

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
Agreement and Indenture Trustee under various
Indentures) *et al.*,

Petitioners,

-against-

WALNUT PLACE LLC *et al.*,

Intervenor-Respondents.

2011-cv-5988 (WHP)

**MEMORANDUM OF LAW OF
THE INSTITUTIONAL INVESTORS IN SUPPORT OF AND JOINING
THE BANK OF NEW YORK MELLON'S MOTION TO REMAND**

Controlling Second Circuit precedent requires remand of this proceeding to the state court from which it was improvidently removed. *Greenwich Fin. Servs. Distressed Mortgage Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23 (2d Cir. 2010). For this reason, and those stated below, the Institutional Investors, intervenor-petitioners (22 of the largest holders of the certificates at issue in this Article 77 proceeding),¹ join in the motion to remand (Doc. # 55) filed by the Bank of New York Mellon (the "Trustee").

¹ The "Institutional Investors" are BlackRock Financial Management Inc., Kore Advisors, L.P., Maiden Lane, LLC, Maiden Lane II, LLC, Maiden Lane III, LLC, Metropolitan Life Insurance Company, Trust Company of the West and affiliated companies controlled by The TCW Group, Inc., Neuberger Berman Europe Limited, PIMCO Investment Management Company LLC, Goldman Sachs Asset Management, L.P., as adviser to its funds and accounts, Teachers Insurance and Annuity Association of America, Invesco Advisers, Inc., Thrivent Financial for Lutherans, Landesbank Baden-Wuerttemberg, LBBW Asset Management (Ireland) plc, Dublin, ING Bank fsb, ING Capital LLC, ING Investment Management LLC, New York Life

The Trustee's motion for remand sets out a host of independent, meritorious arguments as to why this proceeding must be remanded to state court. The Institutional Investors join in each of those arguments, but highlight one plainly dispositive argument here. Regardless of how the Trustee's Article 77 proceeding is characterized – as an action to instruct the Trustee as to its rights and duties under the Pooling and Servicing Agreements (“PSAs”), as an action to enforce repurchase claims arising under the PSAs, or as an action to decide the obligation of the Trustee to certificateholders under the PSA -- it is plainly one in which the “*source* of the right that the suit seeks to enforce,” *Greenwich*, 603 F.3d at 30, arises under the PSAs for the Covered Trusts. As such, it is indisputable that these claims fall under the securities exception to CAFA set forth in 28 U.S.C. § 1332(d)(9)(C), as interpreted by the Second Circuit a year ago in *Greenwich*. *Id.* at 29-30. For this reason alone, this proceeding must be remanded to state court.²

The Institutional Investors have a keen interest in the prompt resolution of this case by a court with unquestioned jurisdiction. They are 22 of the largest holders of the certificates at issue in the Article 77 proceeding. They hold tens of billions of dollars of certificates in the Covered Trusts, both for their own accounts and for accounts they manage on behalf of their clients. Their ranks include banks, insurance companies, investment banks, investment advisers, a faith based fraternal benefit society, a federal home loan bank, and three entities created and

Investment Management LLC, as investment manager, Nationwide Mutual Insurance Company and its affiliated companies, 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, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company.

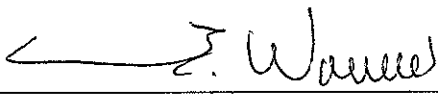
² The importance of remand in cases where CAFA has been improvidently invoked explains why Congress created a right to seek a discretionary appeal where a motion to remand based on CAFA is denied. *See* 28 U.S.C. § 1453(c)(1).

managed by the Federal Reserve Bank of New York to hold investments acquired during the financial crisis of 2008. Their sole interest in this matter is to maximize the recovery of certificateholders in the Covered Trusts, as is evidenced by the fact that they will receive no benefit from the Settlement that is not also received by all other certificateholders similarly situated. They have intervened in the Article 77 proceeding to support the settlement and to urge the state court to approve it without delay, so that the benefits of the settlement can flow to them, their clients, and all other certificateholders in the Covered Trusts.

The improvident removal of this proceeding, in the face of controlling Second Circuit precedent, harms certificateholders in the Covered Trusts by needlessly delaying the pending Article 77 proceeding and a determination regarding implementation of the Settlement. The Institutional Investors respectfully request that the Court therefore remand this proceeding to state court, pursuant to 28 U.S.C. § 1447, without further delay.

Dated: New York, New York
September 13, 2011

WARNER PARTNERS, P.C.

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