

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Maiden Lane II, LLC (intervenor), Maiden Lane III, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisers, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), New York Life Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor)

Petitioner,

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 accompanying Memorandum of Law, Verified Petition, the exhibits annexed and thereto, and all previous papers and proceedings in this action, the undersigned will move this Court (Barbara Kapnick, J.) on August 23, 2011, at 9:30 a.m., in submission part room 130 at 60 Centre Street, New York, New York, on August 23, 2011, or as soon thereafter as Counsel may be heard, for an order granting the State of Delaware permission to intervene as a respondent in this proceeding, directing that the State of Delaware be added as a respondent, directing that the Trustee's petition and notice of petition be amended by adding the State of Delaware as an intervenor-respondent, and granting such other and further relief as may

be just, proper, and equitable. The grounds for this petition are set forth more fully in the accompanying Memorandum of Law filed herewith.

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: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: 
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To: Service List

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Index No.
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Assigned to:
Kapnick, J.

**VERIFIED PETITION
TO INTERVENE**

For its petition pursuant to CPLR 401, 1012, and 1013 to intervene as respondent in this proceeding, proposed intervenor the State of Delaware by JOSEPH R. BIDEN, III, Attorney General of the State of Delaware (the “Delaware Department of Justice”), states and alleges upon information and belief as follows:

INTRODUCTION

1. In this proceeding pursuant to CPLR Article 77, the Bank of New York Mellon (“BNYM”), as trustee for 530 trusts (“Covered Trusts”) comprised of billions of dollars in residential mortgage backed securities (“RMBS”), seeks the Court’s approval of a proposed

settlement of claims against Countrywide Home Loans, Inc. and Countrywide Financial Corporation (collectively “Countrywide”), who acted as loan originators and servicers to the Covered Trusts, and Bank of America (“BoA”) and its affiliated entities who acted as servicers to the Covered Trusts.¹

2. The claims that would be resolved by the proposed settlement are related to Countrywide and BoA’s pervasive failure to comply with the standards of conduct governing the creation and administration of the covered trusts. These failures contributed to the massive collapse of the market for RMBS, causing substantial harm to mortgage loan borrowers, investors and the integrity of the securities markets.

3. If approved, the terms of the proposed settlement would fully and finally release the claims of the Covered Trusts and would be binding on all of the trust beneficiaries, whether or not they are represented in this special proceeding.

4. The Delaware Department of Justice seeks permission to intervene in this proceeding: (i) to ensure that the interests of Delaware investors who are beneficiaries of the Covered Trusts are represented and protected; (ii) to preserve the Delaware Department of Justice’s ability to pursue potential Delaware state law claims against BNYM, BoA, or Countrywide arising out of the conduct covered by the proposed settlement; and (iii) and to ensure that the trusts covered by the proposed settlement that were created pursuant to the provisions of the Delaware Statutory Trust Act and are governed by Delaware Law are appropriately addressed.

5. The Delaware Department of Justice objects to the proposed settlement on the basis that it does not have sufficient information to evaluate the reasonableness of the proposal.

¹ BoA acquired Countrywide in a transaction that was finalized on July 1, 2008, and later announced that Countrywide would transfer all of its assets to unnamed subsidiaries of BoA.

I. BACKGROUND

6. On June 29, 2011, BoA announced that it had entered into an agreement with BNYM to settle all potential claims belonging to the [covered] trusts” for which BNYM serves as trustee.

7. On the same day, BNYM commenced the instant special proceeding by filing a verified petition pursuant to CPLR § 7701 seeking judicial instructions and approval of the proposed settlement.

8. BNYM also appeared *ex parte* on July 29, 2011, without notice to any of the trust beneficiaries or other potentially adverse parties, and obtained an Order to Show Cause setting forth a procedure for the approval of the proposed settlement.

9. The terms of the proposed settlement include a cash payment to the trust beneficiaries of 8.5 billion dollars, provisions requiring the master servicers to implement certain servicing improvements, and provisions addressing the cure of document exceptions.²

10. The proposed settlement, on behalf of the Trustee, Investors, the Covered Trusts, or any Person acting on behalf of the Trustee or Investors of the Covered Trusts, contemplates the full and final release of a number of claims including those related to: 1) the breach of the representations and warranties governing the sellers of mortgage loans to the Covered Trusts and the master servicers of the Covered Trusts, 2) the breach of the recordkeeping requirements contained in the Pooling and Servicing Agreements and Sales and Servicing Agreements (collectively “PSAs”) governing the trusts including the requirement that deficiencies in

² Proposed Settlement at ¶¶ 3, 5, and 6.

mortgage files be identified and corrected, and 3) claims that BoA and Countrywide charged excessive fees and costs for their inadequate services.³

11. The proposed settlement with BoA was negotiated by a group of 22 institutional investors and BNYM. No other trust beneficiaries took part in the settlement negotiations. The proposed settlement is undoubtedly complex and billions of dollars are at stake. There is limited access to the information exchanged between the parties to the proposed settlement during settlement negotiations. In light of this, the Delaware Department of Justice does not have sufficient information to evaluate the adequacy of the settlement or its full impact on the interest of the State of Delaware.

II. INTERESTS OF THE DELAWARE DEPARTMENT OF JUSTICE

12. The Delaware Department of Justice has both common law and statutory authority to protect the interest of the State of Delaware generally, and the interests of Delaware citizens and investors more specifically, and should be permitted to intervene to ensure those interests are properly represented and that a fair and reasonable settlement of this matter is achieved.

A. THE PROPOSED SETTLEMENT MAY NOT ADEQUATELY ADDRESS HARM TO DELAWARE INVESTORS

13. The Delaware Department of Justice, based upon the review of the extremely limited universe of available facts concerning the proposed settlement, has significant concerns that the proposed settlement does not adequately remedy the harm suffered by the beneficiaries of the Covered Trusts, some of whom are undoubtedly Delaware investors. Many of these investors have not intervened in this litigation and, indeed, may not even be aware of it. The PSAs that govern the creation and administration of the Trusts permit such participation only by

³ Proposed Settlement at ¶ 9.

investors who individually or jointly hold a twenty five percent or greater interest in the trust, typically representing hundreds of millions of dollars. With its intervention, the Delaware Department of Justice will ensure that the interests of absent Delaware investors are adequately represented.

14. The Delaware Department of Justice's intervention is particularly important given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a conflict of interest. The proposed settlement confers substantial direct benefits to BNYM, primarily by a provision, contained in a side letter to the proposed settlement agreement, in which BoA agrees to expressly guarantee the indemnification obligations of Countrywide to BNYM under the terms contained in the PSAs. This expanded indemnification provision also covers BNYM's negotiation and implementation of the terms of the settlement. The potential conflicts of BNYM go directly to the heart of the issue in this special proceeding, which is "did BNYM act reasonably in negotiating this settlement?"

B. PRESERVING CLAIMS OF THE DELAWARE DEPARTMENT OF JUSTICE

15. The Delaware Department of Justice also has a significant interest in preserving its potential claims against the parties to the proposed settlement that arise out of the conduct covered by the proposed settlement. The Delaware Department of Justice seeks to intervene pursuant to its statutory and common law authority to protect Delaware investors. The Delaware Department of Justice has statutory authority to "remedy any harm caused by securities law violations." 6 *Del. C.* § 7301(b). The Delaware Department of Justice also has statutory authority to pursue remedies for deceptive trade practices that are harmful to Delaware residents or consumers. 6 *Del. C.* § 2533(d). The Delaware Department of Justice is charged with

protecting the interests of all Delaware investors, including those Delaware investors who are beneficiaries (directly or indirectly) of the covered trusts.

16. While the Department's investigation of BNYM is still in preliminary stages, potential violations of Delaware law by BNYM in connection with the settlement may have occurred, to include but not limited to the following:

A) The acts and practices of BNYM alleged herein may have violated 6 *Del. C.* § 7303(2), in that BNYM may have made untrue statements of material fact and/or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading. BNYM's conduct as described above may have violated the Delaware Securities Act insofar as the Trust PSA requires the Trust annually to certify the following "servicing criteria":

- "Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents."
- "Mortgage loan and related documents are safeguarded as required by the transaction agreements;" and
- "Any addition, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements." [*See generally*, Trust PSA, [Ex W to NY Petition]].

The Delaware investors in the Trusts may have been misled by BNYM into believing that BNYM would review the loan files for the mortgages securing their investment, and that any deficiencies would be cured.

B) The acts and practices of BNYM alleged herein also may have violated Delaware's Deceptive Trade Practices Act, 6 *Del. C.* § 2432(12), in that BNYM's conduct created "a likelihood of confusion or misunderstanding" in the investors in the Trusts, for the reasons cited above.

C. TREATMENT OF DELAWARE STATUTORY TRUSTS

17. Delaware has a substantial interest in ensuring that Delaware vehicles, including Delaware statutory trusts, are not being utilized to facilitate violations of the law. Delaware has a substantial interest in ensuring that claims related to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure under the Act.

18. Delaware trusts may not subject to the jurisdiction of the New York courts in connection with a special proceeding brought under Article 77 dealing with express trusts governed by New York law.

19. This is particularly true when, as in this case, the trust agreements that create and govern trusts formed under the Delaware Statutory Trust Act contain specific provisions indicating that Delaware law governs those agreements and that the trusts will be located and administered in Delaware.

20. In fact, by default, a Delaware statutory trust, pursuant to Title 12, § 3809 of the Delaware Code, is governed by Delaware law absent a provision in the Trust Agreement indicating otherwise.

21. In the matter *sub judice*, at least two of the 530 trusts covered by the proposed settlement are Delaware Statutory Trusts and governed by Delaware law:

a. CWHEQ 2006-A

a.i) Exhibit A to the Executed Proposed Settlement Agreement indicates that CWHEQ 2006-A is a trust covered by the settlement;

a.ii) The Trust Agreement, relevant excerpts attached as Exhibit A, contains a specific provision that the agreement is governed by Delaware law and that the trust is to be located and administered in Delaware;

b. CWHEQ 2007-G

a.i) Exhibit A to the Executed Proposed Settlement Agreement indicates that CWHEQ 2007-G is a trust covered by the settlement;

a.ii) The Trust Agreement, relevant excerpts attached as Exhibit B, contains a specific provision that the agreement is governed by Delaware law and that the trust is to be located and administered in Delaware.

RELIEF REQUESTED

The Delaware Department of Justice respectfully requests that the Court grant its petition to intervene.

Dated: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: 

Jeremy D. Eicher (NY Bar No. 4643573)

Deputy Attorney General

Delaware Department of Justice

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VERIFICATION

I, Jeremy D. Eicher, hereby affirm under penalty of perjury that the following is true and correct:

I am a member of the New York and Delaware Bars in good standing and a Deputy Attorney General for the Delaware Department of Justice. 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.

Executed this 9th day of August 2011, in Wilmington, Delaware

By: 
Jeremy D. Eicher


NOTARY PUBLIC

SHERRY V. HOFFMAN
NOTARIAL OFFICER
Attorney No. 2031
Pursuant to 29 Del. C. #4323(a)(3)