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-

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; and FEDERAL HOME LOAN BANK OF SEATTLE (proposed intervenor-respondents),

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.

REPLY MEMORANDUM IN SUPPORT OF PETITION TO INTERVENE

The Bank of New York Mellon (BNYM), which initiated this proceeding, has stated that it takes no position on the petition of proposed intervenors Federal Home Loan Banks of Boston, Chicago, Indianapolis, Pittsburgh, San Francisco, and Seattle (collectively, the FHLBs) to intervene. And the 22 investor intervenors state that they do not oppose the petition. Thus, the FHLBs' petition to intervene is unopposed. Because the FHLBs have at least the same standing to intervene as did the 22 investors that have already been permitted to do so, the FHLBs respectfully request that the Court grant their petition without delay.

Both the 22 investors and BNYM filed memoranda in response to the FHLBs' petition, to which the FHLBs respond briefly below.

First, the 22 investors note correctly that none of the FHLBs has decided whether to object to the proposed settlement. For the avoidance of doubt, however, each of the FHLBs seeks to intervene as a party in this proceeding with the full rights of a party, including, of course, the right to oppose the proposed settlement should any of them ultimately decide to do so.

Second, BNYM states that the proposed order that it submitted on July 11 does not try to prevent investors like the FHLBs from intervening. That is an important clarification, because BNYM's proposed order appears to provide that any petition to intervene (such as the present petition) would be treated as an "objection." An objector, unlike an intervenor, would not be a party to the proceeding and would not have the rights of a party under the CPLR. The reason why the FHLBs are seeking to intervene, rather than merely filing "objections," is to gain the full rights to which a party is entitled. The FHLBs together own certificates in 73 of the trusts that are part of the proposed settlement, for which they paid more than $8.8 billion. The FHLBs believe that to protect those interests they must intervene as full parties to this proceeding. Moreover, BNYM argues that it wishes to "hold in abeyance any requests for additional information or other requests for relief, until . . . all potential objectors had an opportunity to object." But one of the express purposes of the FHLBs' petition to intervene is precisely to gather "additional information" through the disclosure process *before* deciding whether to object. BNYM

essentially is asking the Court to hold such requests for information "in abeyance" until the information would no longer be useful.

Third, BNYM notes that it has now released on a website "all of the expert reports submitted to the Trustee in connection with the Settlement" and implies that those reports may provide all the additional information that the FHLBs need to decide whether to object to the proposed settlement. Unfortunately, however, the expert reports raise more questions than they answer. By way of example, BNYM published a report from Mr. Brian Lin of RRMS Advisors about the reasonableness of the $8.5 billion that BNYM agreed to accept as part of the proposed settlement. Mr. Lin concluded that "a settlement figure somewhere between $8.8 and $11 billion is reasonable." But to reach that conclusion, Mr. Lin made certain assumptions, the bases for which are not fully disclosed in his report.

Mr. Lin started with the full remaining principal balance of the loans in the 530 trusts that would be covered by the proposed settlement, plus the amount that the trusts have lost on loans that have already been liquidated. Together, Mr. Lin calculates that to be $208.9 billion. Mr. Lin then assumed that (1) only a certain percentage of those loans would go into default and (2) even for those loans that went into default, the trusts would recover between 45% and 60% of the principal balance through foreclosure. Both of these assumptions are quite controversial, and the FHLBs need to understand Mr. Lin's basis for them. Using those assumptions, Mr. Lin concludes that the potential shortfall to the trusts, and therefore the amount that the trusts could potentially recover from Countrywide and Bank of America, is reduced from $208.9 billion to $61.3 billion.

To get from $61.3 billion to a "reasonable" settlement range of $8.8 to $11 billion, Mr. Lin made two more assumptions. He assumed that only 36% of loans that go into default will have breached Countrywide's representations and warranties about the quality of its underwriting. That assumption is difficult to understand. Mr. Lin did not do any independent analysis of this assumption. Instead, he simply adopted Bank of America's estimates of this percentage, which in turn appear to have been based on a completely different portfolio of loans that were subject to the underwriting standards imposed by Fannie Mae and Freddie Mac.

Moreover, Mr. Lin's assumption is inconsistent with widely publicized reports by professional loan auditors that even Countrywide loans that are merely delinquent (that is, behind on payments but not yet in default) have a "breach rate" of well over 60% and often as high as 90%. Finally, Mr. Lin assumed that only 40% of loans that both go into default *and* have breached Countrywide's representations and warranties could be successfully put back to Countrywide and Bank of America. This assumption similarly demands investigation. It is hard to imagine why a court would not require Countrywide and Bank of America to repurchase *all* loans, not just 40% of loans, that are both in default and have breached a representation or warranty.

Each of these assumptions has a great effect on Mr. Lin's estimate of the amount of a reasonable settlement. As an example, even if just the last assumption were changed from Countrywide and Bank of America having to repurchase all, rather than just 40%, of loans that were both in default and breached Countrywide's representations and warranties, then Mr. Lin's estimate of a reasonable settlement would rise from a range of $8.8 to $11 billion to a range of $22 to $27.5 billion. Modifying any of his other three assumptions would cause that range to rise much more.

Similarly, BNYM also published a report by Prof. Robert Daines about Bank of America's liability as a successor to Countrywide. But Prof. Daines's report leaves unanswered several critical legal and factual questions. Indeed, Prof. Daines admits that his opinion is "limited by the available factual record and certain assumptions that I make," and he concedes in several parts of his report that he relied on unverified information provided by Bank of America.

In short, although the expert reports that BNYM has now published do provide some additional information about the proposed settlement, they raise many new questions and certainly do not enable any of the FHLBs to decide whether or not to oppose the settlement.

CONCLUSION

For all of these reasons, the FHLBs respectfully request that the Court grant their petition and amend the caption to add the FHLBs as intervenors-respondents in this Article 77 proceeding.

Dated: New York, New York
July 20, 2011

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