

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-

TM1 INVESTORS, LLC (proposed intervenor),

Respondent,

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

Index No.  
651786/2011

Assigned to:  
Kapnick, J.

Motion  
Sequence:  
005

**REPLY MEMORANDUM IN SUPPORT  
OF PETITION TO INTERVENE**

The Bank of New York Mellon, which initiated this proceeding, has stated that it takes no position on the petition of proposed intervenor TM1 Investors, LLC to intervene. And the 22 investor intervenors state that they do not oppose the petition. Thus, the petition to intervene is

unopposed. Because TM1 Investors has at least the same standing to intervene as did the 22 investors that have already been permitted to do so, it respectfully requests that the Court grant its petition without delay.

Both the 22 investors and BNYM filed memoranda in response to TM1 Investors's petition, to which TM1 Investors responds briefly below.

First, the 22 investors note correctly that TM1 Investors has not decided whether to object to the proposed settlement. For the avoidance of doubt, however, TM1 Investors 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 it ultimately decide to do so.

Second, BNYM argues that the proposed order that it submitted on July 11 does not try to prevent investors like TM1 Investors from intervening. But that is precisely what BNYM's proposed order would have accomplished, because it provided that any petition to intervene (such as the present petition) would be treated as an "objection." The reason why parties like TM1 Investors are seeking to intervene, rather than merely filing "objections," is to gain the full rights to which they are entitled under the CPLR. Any request by BNYM that proposed intervenors be treated as anything less than full parties is tantamount to an attempt to prevent such parties from intervening. 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 here BNYM simply ignores that one of the express purposes of TM1 Investors's petition to intervene is precisely to gather "additional information" in order to decide *whether* to object in the first place. BNYM essentially is asking the Court to hold such requests "in abeyance" until they 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 TM1 Investors needs to decide whether to object to the proposed settlement. Those reports are of little value because they appear to have been written after an agreement on the settlement was reached and with the benefit of hindsight. Moreover,

the expert reports raise more questions than they answer. By way of one brief 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 whose basis is not apparent, to say the least.

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, that is \$208.9 billion. Mr. Lin then assumed that (1) only an unreasonably low 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 TM1 Investors needs to understand Mr. Lin’s basis for them. Using those assumptions, Mr. Lin concludes that the potential shortfall to the trusts, and therefore its potential recovery 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 of \$8.8 to \$11 billion, Mr. Lin made two more assumptions. He assumed that (3) 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 very different 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%. Certainly TM1 Investors needs a great deal more information to understand Mr. Lin’s basis for this assumption.

Finally, Mr. Lin assumed that (4) 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 billion to \$27.5 billion. Modifying any of his other three assumptions would cause that range to rise much more.

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 TM1 Investors to decide whether or not to oppose the settlement.

**CONCLUSION**

For all of these reasons, TM1 Investors respectfully requests that the Court grant its petition and amend the caption to add it as an intervenor-respondent in this Article 77 proceeding.

Dated: New York, New York  
July 21, 2011

GRAIS & ELLSWORTH LLP



By: \_\_\_\_\_  
David J. Grais (DG 7118)  
Mark B. Holton  
Leanne M. Wilson

40 East 52nd Street  
New York, New York 10022  
(212) 755-0100  
(212) 755-0052 (fax)

Attorneys for Proposed Intervenor-Respondent