

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

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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), :

Index No. 651786/2011

Kapnick, J.

Petitioner, :

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

-against- :

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III :
LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT :
PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; :
WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE :
XI LLC (proposed intervenors), :

Respondents. :

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**THE BANK OF NEW YORK MELLON'S RESPONSE TO
WALNUT PLACE LLC'S PETITION TO INTERVENE**

Petitioner The Bank of New York Mellon (“BNY Mellon” or “Trustee”) submits this response to the Petition To Intervene (“Pet.”), dated July 5, 2011, filed by eleven Walnut Place LLC entities (collectively “Walnut Place”).¹

The Trustee takes no position with respect to Walnut Place’s request to intervene as respondents. Nonetheless, it notes that intervention is unnecessary given the pre-existing mechanism for Certificateholders (and other Potentially Interested Persons) to object to the Settlement.² In its June 29, 2011 order (“Preliminary Order”), the Court directed the Trustee to implement a robust notice program that involved a combination of individual notice of the Settlement, notice through the Depository Trust Company, advertising on the internet, and notice through a website created and maintained by the Trustee. (Ingber Aff. Ex. B.) That notice program is well underway and will be completed by the Court-imposed deadline of August 12, 2011. The Preliminary Order also directs any and all objectors to submit written objections shortly thereafter, by August 30, 2011. (*Id.*) That date was selected by the Trustee and approved by the Court to allow *all* potential objectors (among others) to receive notice of the Settlement and to consider whether, and how, they wished to object.

If the Court were to permit Walnut Place to intervene, the Trustee respectfully requests that the Court await completion of the notice period and the filing of responses by other objectors, pursuant to the Preliminary Order, before considering any specific requests by Walnut Place, including those relating to discovery. At that time, the Court can take into account requests from all objectors, consider the grounds for the objections, consider whether and to what

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in BNY Mellon’s Verified Petition, dated June 28, 2011 (“Verified Petition”) or the Affirmation of Matthew D. Ingber, dated June 28, 2011. The Verified Petition is attached to the Affirmation of Matthew D. Ingber, dated July 11, 2011 (“Ingber Affirmation” or “Ingber Aff.”) as Exhibit A.

² For this reason, there is no intervention as of right pursuant to CPLR § 1012. Walnut Place’s interests will be adequately represented. They will be represented by Walnut Place itself.

extent coordinated discovery is appropriate, and modify the Preliminary Order as necessary. Permitting individual Certificateholder groups to make piecemeal requests at this stage would be inefficient and disruptive to the process expressly contemplated in the Preliminary Order, and would be unfair to other Certificateholders who opt to follow the Preliminary Order. To that end, attached as Exhibit C to the Ingber Affirmation, is a proposed order directing that any petitions to intervene (as respondents) be treated as objections under the Preliminary Order, and that any requests by intervenors or other Potentially Interested Persons be considered only after all Certificateholders have an opportunity to object.³

Finally, the Trustee is compelled to briefly address the following points in Walnut Place's petition. *First*, Walnut Place states in its petition that the Trustee "secretly negotiated" a deal with Countrywide and Bank of America. (Pet. ¶ 7.) It states that the Trustee never sought to solicit the views of Walnut Place. (*Id.*) And it states that the Trustee never asked whether Walnut Place wished to be represented in settlement negotiations. (*Id.*) These statements are puzzling. Counsel for Walnut Place was well aware that settlement discussions were underway. He was actually quoted in published articles making comments about the settlement discussions. (*See* Ingber Aff. Exs. D and E.) On December 15, 2011, Bank of America disclosed in a press release that it was continuing "constructive dialogue" with the Trustee and the Institutional Investors concerning various trusts, including one in which Walnut Place holds certificates. (*Id.* Ex. F.) The Trustee, Bank of America and Countrywide *told* counsel for Walnut Place that they were negotiating a settlement. (*Id.* ¶ 10.) They offered to report to Walnut Place on a current and ongoing basis about settlement discussions, and to provide confidential information that the

³ The proposed order refers to the Petition to Intervene that was filed by both Walnut Place and the Policemen's Annuity & Benefit Fund of Chicago. BNY Mellon's response to the latter petition will be filed on July 12, 2011. The Trustee respectfully requests that the Court consider both responses before ruling on the proposed order.

parties were evaluating in connection with the settlement. (*Id.*) And they invited Walnut Place to provide input on settlement discussions. (*Id.*) Walnut Place refused, and instead filed a lawsuit asserting claims against Countrywide, Bank of America and BNY Mellon (as nominal defendant) that are intended to be released by the Settlement. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, No. 650497/2011 (Sup. Ct. N.Y. County) (Kapnick, J.). In short, the Trustee does not understand the source of Walnut Place’s contention that a settlement was “secretly negotiated.”

Second, Walnut Place states that the Settlement Agreement does not provide a clear mechanism for opting out of the Settlement. (Pet. ¶¶ 12-15.) That is true. The claims that are being settled are claims arising under the Governing Agreements that the Trustee – as a party to the Governing Agreements – has the power to assert on behalf of the Trusts. (*See Ingber Aff. Ex. A (Verified Petition) ¶¶ 48-57.*) The Certificateholders are not parties to the Governing Agreements, and any rights they have to pursue claims against Countrywide and Bank of America arise, if at all, only if (among other things) the Trustee refuses to take action. *See Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 215 (1st Dep’t 2004) (finding that authority to commence litigation on behalf of the certificateholders is committed to the trustee) (citing *LaSalle Bank Nat’l Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001)); *Sterling Federal Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09 C 6904, 2010 WL 3324705, at *2-5 (N.D. Ill. Aug. 20, 2010) (finding that certificateholder’s claim for breach of contract brought against servicer belongs to the trustee).⁴

The Trustee has not refused to take action. To the contrary, it entered into a global Settlement that it believes, in the exercise of its judgment, is in the best interests of the Trusts.

⁴ Walnut Place itself concedes the point. The *Walnut Place LLC* action purports to be a derivative action filed on behalf of two trusts, and is premised on the notion (disputed by the Trustee) that the Trustee “unreasonably refused” to file a lawsuit against Countrywide and Bank of America. (*Ingber Aff. Ex. G* at ¶¶ 1, 84-93, 143-53.)

That Settlement Agreement requires a payment of \$8.5 billion into the Trusts, and loan-servicing improvements that may be of even greater value than the Settlement Payment – improvements that would be difficult (if not impossible) to achieve through individual, piecemeal litigation contemplated by Walnut Place. If the Court approves the Settlement based on the standard of review that applies here – namely, whether the Trustee acted in good faith and within the bounds of reasonableness – as a matter of basic contract and trust law, all Certificateholders must be bound. *See In re Hunter*, 6 A.D.3d 117, 121-22 (2d Dep’t 2004), *aff’d*, 4 N.Y. 3d 260 (2005) (decree binding on all trust beneficiaries over whom jurisdiction was obtained); *O’Hagan v. Kracke*, 165 Misc. 4, 14 (Sup. Ct. Westchester County 1937), *aff’d*, 253 A.D. 632 (2d Dep’t 1938) (holding that a judgment granting an accounting to a trustee was *res judicata* to trust beneficiary who was served with the complaint). Any attempt by Walnut Place to suggest otherwise, or to analogize the Settlement to a class action settlement – with fairness hearings and opt-out clauses – would reflect a misunderstanding of trust law and Article 77 jurisprudence.

Finally, Walnut Place states that the Trustee had a conflict of interest because, among other things, it “received an indemnity from Countrywide that goes well beyond the scope of the indemnity that BNYM is otherwise entitled to under the PSAs.” (Pet. ¶ 20.) It then asserts that it is “very unusual, to say the least, for a trustee . . . to demand and obtain an indemnity from the very party that is adverse to the trust and its beneficiaries[.]” (*Id.*) All of this is incorrect. The Governing Agreements provide explicitly that “[t]he Trustee . . . shall be indemnified by the Master Servicer and held harmless against any loss, liability or expense (including reasonable attorney’s fees and expenses) (i) incurred in connection with any claim or legal action relating to (a) this [Governing] Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee’s duties hereunder[.]” (Ingber Aff. Ex. H ¶ 8.05.) The Trustee is settling

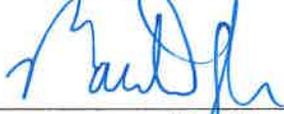
claims relating to and arising out of the Governing Agreements. It is receiving an indemnity from the Master Servicer that it was entitled to under the Governing Agreements – no more and no less – and has received a guaranty from the Master Servicer’s parent company because of the magnitude and associated costs of the Settlement. The side letter with the Master Servicer, which is attached to the Settlement Agreement for anyone to see, does not expand the indemnity; it simply acknowledges that the broad indemnity language of the Governing Agreements covers actions taken by the Trustee in connection with the Settlement.

There is nothing improper about a Trustee seeking indemnification under these circumstances. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (“The Court concludes that there is no showing of an actual conflict of interest on this record. As to the indemnifications, the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability . . . so it was reasonable for U.S. Bank to seek indemnification once it became clear that there was a dispute.”).

There are various other substantive misstatements in Walnut Place’s petition. At the appropriate time, the Trustee will respond to each of them.

Dated: New York, New York
July 11, 2011

MAYER BROWN LLP

By:  _____

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