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), Western Asset Management Company (intervenor)

Petitioner,

-against-

POLICEMEN'S ANNUITY & BENEFIT FUND OF CHICAGO, WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, AND CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM (proposed intervenors),

Respondents,

for an order, pursuant to CPLR § 770 I, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/11

Assigned to:
Kapnick, J.

THE PUBLIC PENSION FUND COMMITTEE'S
REPLY TO THE CORPORATE INVESTORS

A self-selected group of twenty-two corporate investors in Countrywide MBS (collectively, the "Corporate Investors"), without being appointed as derivative or "lead plaintiffs" or otherwise obtaining authorization from this Court to proceed on behalf of all Countrywide MBS investors, negotiated the pending Settlement Agreement with Bank of America and Countrywide. A group of four public pension funds who purchased well over 150,000 Countrywide MBS shares, the Public Pension Fund Committee, has petitioned to intervene to take discovery to review the fairness of the terms of the pending Settlement.[1] On July 12, 2011, the Corporate Investors filed an opposition to the Public Pension Fund Committee's petition.[2]

In their opposition, the Corporate Investors argue that the Public Pension Fund Committee should be denied access to the information necessary to conduct an informed review of the Settlement's terms because the Committee and other investors are receiving notice -- meaning that they can be bound to the Settlement without the usual protections provided in derivative or class action litigation and have their rights extinguished, without the right to "opt-out" -- and can file objections to the Settlement. This misses the whole point of the Committee's petition. Critically, the members of the Public Pension Fund Committee, like the vast majority of investors in Countrywide MBS, were not privy to the private negotiations between their self-appointed representatives, the Corporate Investors, and the Settling Parties and, therefore, the Public Pension Fund Committee needs discovery so that its members can kick the tires on the Settlement and decide

[1] As discussed below, the Public Pension Fund Committee currently holds Countrywide MBS shares and has standing to intervene.

[2] Bank of New York Mellon ("BNY Mellon") has filed a separate response in which it seeks to delay the onset of discovery until after the due date for objections, but takes no position with respect to the Public Pension Fund Committee's petition to intervene.

whether or not to object.[3] This is particularly important because this Court has never considered whether the Corporate Investors are adequate representatives of all Countrywide MBS investors, nor appointed them as fiduciaries to represent interests other than their own.

The amount and diversity of the claims that are being resolved by the proposed Settlement itself are staggering – it purports to extinguish claims relating to ***hundreds of billions*** of dollars worth of MBS issued through 530 covered trusts (the "Covered Trusts") over a period of several years. Given the size and complexity of the issues addressed by the Settlement, one would expect that persons truly representing the interests of all investors would not seek to thwart an informed review particularly where, as here, there is no opportunity for investors to opt out of the Settlement. Moreover, there are several "red flags" that suggest that an independent review, including by outside

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[3] The Committee has a whole host of questions that need answering before its members can decide whether to object to the Settlement – questions such as:

(1) What is the total amount of the claims for losses in the 530 Covered Trusts that are being extinguished for the $8.5 billion payment, and does the $8.5 billion payment reflect a reasonable assessment of the litigation risks for these claims?

(2) Are the other substantive terms of the Settlement in the interests of all Countrywide MBS investors?

(3) Is the proposed plan for allocating the settlement fund fair to all investors, or does it prefer the individual interests of the Corporate Investors?

(4) Does the release extinguish claims of investors who are not being fairly compensated by the Settlement?

(5) Did BNY Mellon receive benefits under the Settlement which interfered with its ability to independently negotiate the best deal for investors?

(6) Did BNY Mellon or the Corporate Investors adequately investigate the strengths and weaknesses of all the claims that are being extinguished by the Settlement?

(7) Were the experts that the Corporate Investors retained to evaluate the Settlement disinterested and competent, and were they provided sufficient documents and other information necessary to reach informed opinions on the fairness of the Settlement's terms?

experts, may be necessary before investors can assert informed objections, and a hearing on the Settlement can be conducted:

- The indemnity agreement that BNY Mellon is getting from the Bank of America in the Settlement, which is potentially worth billions of dollars, raises questions regarding whether BNY Mellon has vigorously represented the interests of Countrywide's MBS investors while at the same time negotiating what is in effect its own release from liability.

- Information suggests that the Corporate Investors who negotiated the Settlement may be preferring their own interests to those whose claims they purport to represent, particularly the numerous public pension funds and other investors who have purchased billions of dollars worth of Countrywide MBS.

- Ambiguities in certain key terms and provisions of the Settlement Agreement itself – including inconsistent language with respect to the scope of the release and the priorities of payment in the plan of allocation.

Furthermore, the discovery proposed by the Committee fits efficiently into the existing schedule ordered by the Court. The Committee has acted expeditiously to assert its rights and, if the Court approves the Committee's request for discovery forthwith, will be able to substantially complete its overall review of documents before the August 30, 2011 deadline for written objections and finish its overall review, including through independent experts, well before the November 17, 2011 hearing. Thus, there is simply no reason to accept the Corporate Investors' suggestion that the Proposed Settlement be forced upon investors without giving them the opportunity to take discovery, and permitting them to have their own experts validate the fairness of the Settlement's terms.

I. The Proposed Settlement Needs an Independent and Informed Review

A. The Proposed Settlement Is Unprecedented in Size and Complexity

It is uncontested that the proposed Settlement is enormous. Countrywide reportedly issued hundreds of billions of dollars worth of MBS. *See* Ex. D. to the Affirmation of Matthew Ingber, dated June 28, 2011 ("Ingber Aff."). It has also been reported that the quality of between 40 and 70 percent of the mortgages underlying those MBS were misrepresented by Countrywide and

potentially need to be bought back by Countrywide and/or the Bank of America. *Id.* Under the terms of the Settlement Agreement, BNY Mellon proposes to "irrevocably and unconditionally grant[] a full, final, and complete release, waiver, and discharge" of these buyback claims, which are tens of billions of dollars, as well as other claims related to Countrywide MBS, in exchange for $8.5 billion and certain improvements to servicing. *See* Ex. B to the Ingber Aff. at 9, 32-33. The settlement payment will then be distributed through a byzantine "payment waterfall" set forth in pooling and service agreements that were so voluminous that they had to be submitted to this Court on a hard drive. *See* Ingber Aff. at ¶3. Under the plan of allocation, while the relative amounts of the losses in the 530 trusts determine the amounts of the settlement proceeds allocated to the various Covered Trusts, the payments to investors by the Trusts of the settlement proceeds do not appear to be based upon whether the investors incurred any actual losses on their MBS purchases -- *i.e.*, that recent purchasers of discounted MBS shares (including those in the group of 22) may well enjoy a windfall at the expense of defrauded investors who suffered significant losses because they purchased before Countrywide's wrongdoing came to light.

The fairness of such a large transaction clearly cannot be evaluated on its "face." The Public Pension Fund Committee needs to be provided with the documents underlying BNY Mellon's assessment, including materials provided to experts, in order to determine whether the experts and the parties to the settlement negotiations had adequately informed themselves of the strengths and weaknesses of the vast claims they are extinguishing by the Settlement, and to determine whether the Settlement is fair. For example, at least one professor at the Georgetown University Law Center has questioned the fairness of the $8.5 billion payment. *See* Adam Levitin, *The BoA MBS Settlement*, at 1 (attached at Ex. A to the Affirmation of Joseph P. Guglielmo, dated July 12, 2011 ("Guglielmo Aff.")). Indeed, undisclosed by BNY Mellon or the Corporate Investors, New York's Attorney

General has deemed additional discovery regarding the proposed Settlement to be necessary and sent the Corporate Investors letters on July 7, 2011 requesting the names of various clients -- including pension funds, government authorities and charities affiliated with the state -- that invested in securities issued by the Covered Trusts as well as the par and current market values of the clients' securities. *See* Daniel Fitzpatrick, *New York Attorney General May Challenge BofA Pact*, the Wall Street Journal, July 11, 2011 (attached as Ex. B to the Guglielmo Aff.). This is the type of information which would permit investors to determine whether the Corporate Investors structured the Settlement to benefit themselves to the detriment of other investors whose rights are being released.

Furthermore, the Court will benefit from the Committee's analysis of these materials. *See* MANUAL FOR COMPLEX LITIGATION, §21.643 (4th ed. 2004) ("Objectors can provide important information regarding the fairness, adequacy, and reasonableness of settlements. Objectors can also play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement.")

B. BNY Mellon Has Compromised Its Independence Through Its Efforts to Secure an Indemnification Agreement from Bank of America

The need for discovery is particularly high in this case because it appears that BNY Mellon, the trustee for the Covered Trusts, may have undermined its negotiating position as the fiduciary of MBS investors by simultaneously bargaining for greater indemnification protections from Bank of America, an indemnification potentially worth billions of dollars to BNY Mellon given its own exposure to investors for inadequately protecting their interests in the poorly underwritten mortgage loans. *See* Ex. B (the Settlement Agreement) to the Ingber Aff. at 39-40 and Ex C to the Settlement Agreement. As BNY Mellon admitted in its response to the petition to intervene filed by the Walnut entities, BNY Mellon negotiated for the indemnification from Bank of America, an entity which did

not otherwise have indemnification obligations to BNY Mellon, because of the "magnitude and associated costs of the Settlement." BNY Mellon's Response to Walnut Place LLC's Petition to Intervene at 6. In other words, while BNY Mellon had rights to indemnification by Countrywide Home Loans Servicing under its existing contracts, this entity would likely not be able to fully cover BNY Mellon's exposure. Thus, there is the potential that BNY Mellon leveraged its purported authority to settle claims related to the Covered Trusts in order to secure additional protection for itself in the form of indemnification from Bank of America. Such actions would be inconsistent with black letter law that a "trustee is under a duty to the beneficiary to administer the trust solely to the interest of the beneficiary, and cannot compete with the beneficiaries for the benefits of the trust corpus." *Milea v. Hugunin*, 24 Misc. 3d 1211(A), 890 N.Y.S. 2d 369, at *7 (N.Y. Sup. 2009) (citing, *inter alia*, to *In re Estate of Wallens*, 9 N.Y. 3d 117, 122 (N.Y. 2007)).

C. The Court Has Never Examined Whether the Corporate Investors Can Adequately Protect the Interests of Affected Parties and there Are Many Reasons to Doubt that They Have

The Corporate Investors, who control a fraction of the Countrywide MBS covered by the proposed Settlement, are essentially settling the derivative claims that belong to all of the entities that purchased Countrywide MBS issued through the Covered Trusts. Under such circumstances, courts generally closely scrutinize whether the entities who seek to act as representatives can adequately and fairly represent all interests involved:

> "Complex litigation often involves numerous parties with common or similar interests but separate counsel… often[] the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specific aspects of the litigation. To do so, invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side."

MANUAL FOR COMPLEX LITIGATION, *supra* at §10.22; *see also Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 1232(A), 831 N.Y.S. 2d 352, at *5 (N.Y. Sup. 2006) (recognizing that "the plaintiff in the derivative action must be qualified to serve in a fiduciary capacity as a representative of the class, whose interest is dependent upon the representative's adequate and fair prosecution.")(internal citation omitted); *Gilbert v. Kalikow*, 272 A.D. 2d 63, 707 N.Y.S. 2d 100 (N.Y.A.D. 2000) ("The derivative causes of action were properly dismissed on the ground that plaintiff has failed to demonstrate that he will fairly and adequately represent the interests of the limited partnership, in view of 'the totality of the relationship' between himself and the individual defendant, his former son-in-law and business partner")(internal citation omitted).

Here, the Corporate Investors have proclaimed themselves adequate, but have made no such showing, nor has the Court appointed them as fiduciaries to represent the various Trusts and their investors. Moreover, there is significant reason to question whether the Corporate Investors preferred their own interests to those of other investors in structuring the proposed Settlement. As set forth in the Public Pension Fund Committee's petition to intervene:

- No public pension funds were included in the group of large Corporate Investors that negotiated the proposed Settlement in private, even though their interests may not be directly aligned with those of the large corporate investors who negotiated the proposed Settlement.

- Many of the Corporate Investors that negotiated the proposed Settlement appear to have significant ongoing business dealings with Bank of America, raising conflict-of-interest concerns.

- The allocation plan appears to provide settlement payments to late MBS purchasers who may have purchased at substantial discounts and who thus may not have incurred losses.

- The proposed Settlement appears to release claims belonging to former investors – *i.e.*, investors who purchased Countrywide MBS in the initial offerings and have since sold their MBS holdings at a significant loss – without appearing to provide these investors with consideration for the release of their claims.

The Public Pension Fund Committee, which is comprised of current Countrywide MBS holders, needs discovery regarding these matters to ascertain whether the Corporate Investors can fairly represent the interests of affected individuals and whether the Corporate Investors fairly represented those interests during the negotiation of the proposed Settlement.

The Public Pension Fund Committee is not alone in recognizing that the Corporate Investors are potentially conflicted and require additional scrutiny. The New York Attorney General sent the Corporate Investors letters which appear to gather the information necessary to determine whether they have preferred their own interests to those of other investors. *See* Ex. B to the Guglielmo Aff. Tellingly, even BNY Mellon has tacitly admitted that there is cause for concern regarding the Corporate Investors' motives. BNY Mellon submitted as Exhibit C to the Ingber Aff. a news article referring to the Corporate Investors as "Double Agents" who had so many entangled relationships with BofA that "some – including BofA [itself]" were forced to "question the seriousness" of their efforts. Ex. C to the Ingber Aff. at 3. The article also describes how many investors who desired a more stringent, less conflicted, effort to resolve claims related to the Covered Trusts have joined a competing consortium of investors called the RMBS Investors Clearing House. *See id.*

The actions of the Corporate Investors in attempting to block an independent review of their handiwork casts additional doubt on whether they adequately represented the interests of affected entities. Specifically, it is entirely unclear why the Corporate Investors have opposed the Public Pension Fund Committee's petition to intervene. The Corporate Investors have not been appointed representatives of the Trusts or a class of investors, and thus would appear to stand in no position different from the Committee in obtaining access to the facts with respect to this Settlement. Accordingly, the puzzling attempt by the Corporate Investors to "hide the ball" can only be interpreted as an attempt to stop entities affected by the proposed Settlement from being able to

adequately challenge aspects of the Settlement that may prefer the Corporate Investors' interests. Obviously, such motivations conflict with the best interests of those affected by the proposed Settlement, and undermine this Court's own ability to rule on the Settlement's fairness.

D. In Light of the Size and Complexity of the Proposed Settlement and the Red Flags Indicating Potential Conflicts of Interest, the Opportunity to Object Would Be Meaningless Without Discovery

For the reasons described above, neither the proposed Settlement nor the process leading up to that Settlement are self-evidently in the interest of the class or fair. There are significant issues regarding whether the Trustee adequately informed itself as to the strength and weaknesses of all the claims that are being extinguished, or whether it vigorously represented investors to obtain the best possible price. Similarly, the allocation plan for the distribution of the settlement proceeds may well have been skewed to benefit the Corporate Investors. Unless this Court provides an opportunity to undertake such an examination, the right to file a formal objection will not be meaningful and the written objections filed on August 30, 2011 may not substantially aid the Court in assessing whether the proposed Settlement is fair and should be approved.

E. The Public Pension Fund Committee Is the Appropriate Entity to Undertake the Necessary Discovery

The Public Pension Fund Committee consists of four public pension funds that have an interest in this action. Each member of the Committee has purchased Countrywide MBS affected by the proposed settlement and, notably, each member of the Committee continues to hold Countrywide MBS, as set forth in each fund's certification. *See* Exs. C-F to the Guglielmo Aff. Accordingly, the Public Pension Fund Committee has standing to intervene, is an appropriate representative of the numerous public pension funds that purchased Countrywide MBS and is an appropriate entity to conduct the discovery necessary to evaluate the proposed Settlement.

II. The Schedule Proposed By the Public Pension Fund Committee Is the Most Efficient Possible and Respects the Preexisting Schedule for this Action

The Committee has proposed the most efficient schedule for coordinating discovery with the Court's scheduling order. As set forth in the proposed order it submitted with its petition to intervene, the Committee proposes to commence discovery immediately. This will allow the Committee to complete a substantial amount of discovery in time to inform its written objection to the proposed Settlement (if any), which is due on August 30, 2011 under the scheduling order entered by the Court. The Committee will be able to complete its analysis well ahead of the November 17, 2011 hearing and will be able to update the Court on any subsequent findings well in advance of that hearing. In this way, the Committee's proposed schedule allows for additional scrutiny of the proposed Settlement without slowing down the process.

By contrast, BNY Mellon argued in response to Walnut's petition to intervene that the Court should not permit discovery by any investor until after August 30, 2011. That does not make any sense. To the extent that BNY Mellon is concerned about treating all potential objectors equally, it can negotiate a discovery protocol allowing for discovery materials to be placed into a depository which other investors may access -- a process which counsel for the Public Pension Fund Committee has already broached with BNY Mellon's counsel. Discovery will be helpful in determining whether there are any grounds for objecting to the proposed Settlement and will allow the Committee (and other investors) to set forth more particularized objections, which will aid the Court in its own evaluation of whether to approve the Settlement. Furthermore, in light of the complexity of the proposed Settlement, it will clearly take a significant amount of time to properly explore all of the issues. If the Court delays discovery until after August 30, 2011, a mere two and one-half months before the November 17, 2011 hearing, it is highly likely that there will not be enough time to conduct discovery, obtain evaluations by independent experts and present any findings to the Court

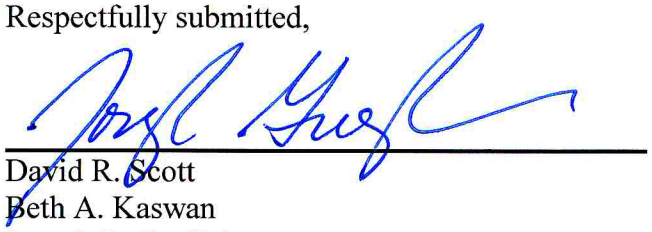
ahead of the hearing. That would be inefficient and would force the Court to choose between pushing off the hearing or conducting a less than fully informed hearing.

III. Conclusion

For the foregoing reasons and the reasons set forth in the Committee's petition to intervene and accompanying papers, the Court should grant the Committee's petition to intervene and enter its proposed order granting the specified discovery forthwith.

DATED: New York, New York
July 13, 2011

Respectfully submitted,



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