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-

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,

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

Index No.
651786/2011

Assigned to:
Kapnick, J.

WALNUT PLACE'S REPLY MEMORANDUM IN SUPPORT OF ITS PETITION TO INTERVENE

Both The Bank of New York Mellon, which initiated this proceeding, and the 22 investors that already have been granted leave to intervene, state that they "take no position with respect to Walnut Place's request to intervene as respondents." Thus, Walnut Place's petition to intervene is unopposed. Because Walnut Place has at least the same standing to intervene as did the 22 investors that have already been permitted to do so, Walnut Place respectfully requests that the Court grant its petition without delay.

Although they did not oppose Walnut Place's petition, BNYM and the 22 investors each filed a "memorandum in response." Walnut Place takes issue with several of the arguments in those responses, which are addressed in turn below.

A. BNYM Should Not Be Permitted To Deprive Interested Parties Of Their Indisputable Rights Under The CPLR To Intervene As Full Parties In This Proceeding.

Both BNYM and the 22 investors that negotiated the settlement with Bank of America ask this Court to deny certificateholders (other than the self-appointed 22 and others that may agree with them) their express rights under the CPLR to intervene as parties in this proceeding. BNYM and the 22 investors argue that any other investor that wishes to participate may do so *only* by filing an "objection" under the procedure set forth in the Order to Show Cause that BNYM obtained from this Court *ex parte* on June 29. BNYM has gone so far as to submit a proposed order (Exhibit C to the Affirmation of Matthew D. Ingber, dated July 11, 2011) "directing that any petitions to intervene *(as respondents)* be treated as objections under the Preliminary Order." (BNYM Response 3 (emphasis added).) Walnut Place strenuously objects to this proposed order for at least three reasons.

First, there can be no dispute that owners of certificates in any of the 530 trusts that are covered by the proposed settlement satisfy the criteria of CPLR 1012 and 1013 to intervene *as parties* in this proceeding. Neither BNYM nor the self-appointed 22 investors even try to argue otherwise. Indeed, it is striking that BNYM would even submit this proposed order or that the 22 self-appointed investors would support it, because all investors in the 530 trusts, including Walnut Place, have precisely the same standing that the 22 self-appointed investors have, and

their petition to intervene was granted after BNYM filed a notice of non-opposition. Moreover, BNYM's proposed order would permit investors to intervene as *petitioners*, but not as *respondents.* It would be fundamentally unfair, however, to permit those that agree with the proposed settlement to have full rights as parties but to relegate those that disagree with it to the second-class status of "objectors."

Second, BNYM is not empowered unilaterally to amend the CPLR. There is nothing in the CPLR or the Order to Show Cause that BNYM obtained from this Court on June 29 that forces a party to file an "objection" rather than to intervene as a party under CPLR 1012 and 1013. BNYM's proposed order is simply an attempt to muzzle investors that object to the proposed settlement by forcing them into an *ad hoc* procedure of "objections" that has no basis or precedent under New York law.

Third, paragraph (c) of BNYM's proposed order, which would prohibit proposed intervenors from even *requesting* any relief whatsoever from the Court until the deadline for the filing of objections has passed, would be a plain denial of due process and an abrogation of proposed intervenors' rights of access to the Courts. It is hard to understand how a trustee that owes duties to all certificateholders, not only to those that support the proposed settlement, could support intervention by certificate holders that it agrees with, while simultaneously proposing an order that would deny the fundamental right to be heard to those certificateholders that it disagrees with.

B. The So-Called "Institutional Investors" Have Serious Conflicts of Interest.

The self-appointed investors that negotiated the proposed settlement with Bank of America argue that, "shielded by the cloak of its own anonymity, Walnut Place has made the odious allegation that the 22 Institutional Investors willfully subordinated their own interests and those of their clients to 'help' Bank of America." ("Institutional Investor" Response 3.) What Walnut Place actually argued, however, is that there are serious conflicts between the interests of these "institutional investors" and the interests of the thousands of other investors (like Walnut Place) that they appointed themselves to represent. Many of these 22 "institutional" investors are

giant money managers that invest billions of dollars of their clients' money. Many of these money managers have fee arrangements that do not allow them to pass along to their clients some of the costs associated with pursuing loan-repurchase claims against Countrywide and Bank of America for breaches of representations and warranties. Moreover, many of these investors have deeply entrenched relationships with Bank of America. For example, Bank of America distributes hundreds of billions of dollars of new securities each year, and many of the 22 investors depend on preferential treatment from Bank of America for access to those offerings. These investors have every incentive to avoid the actual hard-fought litigation that is often necessary to achieve an equitable settlement.

Thus, Walnut Place and many other investors have serious concerns that these self-appointed investors will not adequately protect smaller investors that have a substantial stake in the settlement but that were not represented at the negotiating table. Indeed, the New York Attorney General recently sent letters to most of the 22 self-appointed investors expressing similar concerns. According to *The New York Times*, "letters sent by Mr. Schneiderman's office to the firms that agreed to the settlement point to concerns by the attorney general that the deal may have been struck without full participation by all investors who would be affected by its terms." *See* Exhibit 1 to the Affirmation of Owen L. Cyrulnik, dated July 13, 2011.

C. BNYM Also Has Serious Conflicts of Interest.

BNYM argues that Walnut Place was "incorrect" in asserting that it was a conflict of interest for BNYM to negotiate for itself an expanded indemnity and a guarantee of that indemnity from parties that are adverse to the interests of BNYM's beneficiaries. BNYM argues that "it is receiving an indemnity from the Master Servicer that it was entitled to under the Governing Agreements – no more and no less." (BNYM Response 6.) But that begs the question why BNYM had to negotiate a special "side letter" with Countrywide in the first place, if that side letter really is "no more and no less" than BNYM already had under the unambiguous terms of the governing agreements. Moreover, BNYM concedes that it "received a guaranty from the Master Servicer's parent company because of the magnitude and associated costs of the

Settlement." (*Id.*) BNYM does not even try to dispute that this guarantee was a substantial benefit that it negotiated for itself while in the midst of purportedly arms-length negotiations on behalf of the beneficiaries of the trusts.

BNYM's conflicts of interest are underscored by the fact that it conducted settlement negotiations behind Walnut Place's back while Walnut Place was in the midst of active litigation on two of the trusts that are part of the proposed settlement. BNYM finds this argument "puzzling" because "the Trustee, Bank of America and Countrywide *told* counsel for Walnut Place that they were negotiating a settlement." (BNYM Response 3.) BNYM is referring to a meeting in February 2011 at which Bank of America informed undersigned counsel for Walnut Place that it and Countrywide were involved in settlement discussions with a group of investors. (Cyrulnik Aff. ¶ 4.) But BNYM omits several critical facts about its conduct and the conduct of Bank of America.

First, neither BNYM nor Bank of America ever informed Walnut Place or its counsel that BNYM was participating directly in any settlement negotiations. (Cyrulnik Aff. ¶ 5.) Walnut Place did not learn that BNYM was directly involved in a proposed settlement until it was announced in the press on June 29, 2011. (Cyrulnik Aff. ¶ 5.) Moreover, neither BNYM nor Bank of America ever informed Walnut Place or its counsel that any settlement discussions were being conducted with regard to the OA10 or OA3 Trusts – the two trusts that both BNYM and Bank of America knew that Walnut Place had already demanded that BNYM litigate in this Court (and that Walnut Place is now actively litigating after BNYM failed to do so). (Cyrulnik Aff. ¶¶ 6-7.) It defies comprehension how BNYM, which owes the same duty to Walnut Place that it owes to any other certificateholders, could possibly have entered into a settlement agreement that releases claims that Walnut Place was actively litigating on behalf of the OA10 and OA3 trusts without ever discussing the proposed settlement with Walnut Place or soliciting its views.

Second, Bank of America stated expressly at the February meeting that the settlement discussions were highly confidential (that is, secret). (Cyrulnik Aff. ¶ 8.) Bank of America

refused to share any details whatsoever about the settlement discussions with counsel for Walnut Place at that initial meeting. Bank of America offered to allow Walnut Place entry to the closely guarded "information loop" about those discussions, but only if Walnut Place and its counsel agreed to a set of highly unusual conditions. (Cyrulnik Aff. ¶ 9.) In particular, Bank of America stated that Walnut Place would be told what was said in settlement discussions, but it would never be permitted actually to *participate* in those discussions. (Cyrulnik Aff. ¶ 9.) Bank of America also demanded that Walnut Place and its counsel sign a confidentiality agreement and agree to postpone *indefinitely* any planned litigation against Countrywide and Bank of America. (Cyrulnik Aff. ¶ 9.) When Walnut Place respectfully declined this proposal, it never heard again from BNYM or Bank of America about any proposed settlement until Walnut Place read in the press that the Settlement Agreement had been signed and filed with this Court for approval. (Cyrulnik Aff. ¶¶ 10-11.)

Of course, BNYM provides no credible reason why the mere fact that Walnut Place filed a lawsuit somehow prevented BNYM from keeping Walnut Place informed of the progress of settlement discussions or including Walnut Place in those discussions. Parties to litigation discuss settlement all the time. The fact that BNYM somehow believed it acceptable to "cut off" Walnut Place from settlement discussions because Walnut Place had the effrontery actually to file a lawsuit that BNYM failed to file strongly suggests that BNYM was not fairly representing the interests of all investors.

D. Because Of These Conflicts Of Interests, The Court Should Amend Its Preliminary Order To Provide A Clear Mechanism For Investors To Opt Out Of The Proposed Settlement.

Both BNYM and the 22 investors argue that no mechanism "can or should be created" to permit investors of a certain percentage of a trust to "opt out" of the proposed settlement. ("Institutional Investors" Response 4.) That argument is belied by the Settlement Agreement itself, which expressly contemplates that certain trusts will be "excluded" from the Settlement. Section 4(a) of the Settlement Agreement, which is attached as Exhibit B to BNYM's petition, expressly contemplates that one or more trusts may be excluded from the proposed settlement.

Section 4(b) of the agreement even provides that Bank of America and Countrywide may scuttle the entire settlement if the unpaid principal balance of "Excluded Trusts" exceeds a certain "confidential percentage" of the total unpaid principal balance of all 530 trusts. If no mechanism for exclusion "can or should be created," then the Settlement Agreement would not have assumed that such exclusions would take place.

BNYM argues that Walnut Place has "analogize[d] the Settlement to a class action settlement – with fairness hearings and opt-out clauses." (BNYM Response 5.) In fact, however, BNYM itself is trying to use Article 77 to cherry-pick the aspects of class action settlements that it finds useful (Court approval, global releases of the rights of all class members, "objections" rather than interventions as of right, etc.) but to cast aside the aspects that it finds inconvenient (mainly the right to opt out). As it stated in its petition, Walnut Place intends to ask the Court to provide a clear procedure for the investors in a trust to exclude that trust from the proposed settlement.

CONCLUSION

For all of these reasons, Walnut Place respectfully requests that the Court grant its petition and amend the caption to add the Walnut Place entities as intervenors-respondents in this Article 77 proceeding.

Dated: New York, New York
July 13, 2011

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