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

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures), AEGON USA Investment Management, LLC (intervenor), Bayerische Landesbank (intervenor), BlackRock Financial Management, Inc. (intervenor), Cascade Investment, LLC (intervenor), the Federal Home Loan Bank of Atlanta (intervenor), the Federal Home Loan Mortgage Corporation (Freddie Mac) (intervenor), the Federal National Mortgage Association (Fannie Mae) (intervenor), Goldman Sachs Asset Management L.P. (intervenor), Voya Investment Management LLC (f/k/a ING Investment LLC) (intervenor), Invesco Advisers, Inc. (intervenor), Kore Advisors, L.P. (intervenor), Landesbank Baden-Wurttemberg (intervenor), Metropolitan Life Insurance Company (intervenor), Pacific Investment Management Company LLC (intervenor), Sealink Funding Limited (intervenor), Teachers Insurance and Annuity Association of America (intervenor), The Prudential Insurance Company of America (intervenor), the TCW Group, Inc. (intervenor),Thrivent Financial for Lutherans (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

-against-

FEDERAL HOME LOAN BANK OF BOSTON (intervenor), TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD. (intervenors), QVT FUND V LP, QVT FUND IV LP, QUINTESSENCE FUND L.P., QVT FINANCIAL LP (intervenors), BREVAN HOWARD CREDIT CATALYSTS MASTER FUND LIMITED AND BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED (intervenor), THE NATIONAL CREDIT UNION ADMINISTRATION BOARD,

Respondents,

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

Index No. 652382/2014

STATEMENT OF PROPOSED-INTERVENOR W&L INVESTMENTS, LLC CONCERNING THE SCOPE OF DISCOVERY

Proposed-intervenor W&L Investments, LLC ("W&L") respectfully submits this Statement Concerning the Scope of Discovery ("Statement"), in accordance with the Court's statements of October 29, 2014. Doc. 102 at 7.

PRELIMINARY STATEMENT

W&L is a Certificateholder in Chase 2007-A3 and Chase 2007-S6 (the "W&L Trusts"), for which the Bank of New York Mellon Trust Company ("BNY Mellon") serves as Trustee. At this time, W&L is concerned with certain aspects of the proposed Settlement, including the proposed method by which the Settlement payment will be distributed to Certificateholders. Accordingly, W&L seeks discovery bearing on the reasonableness of the proposed Settlement, the process by which it was reached, and BNY Mellon's acceptance of it. BNY Mellon and the other Trustees have placed those matters squarely before the Court, and discovery is necessary for W&L to fully and adequately present its position at the end of this proceeding.

Discovery Concerning the Trustees' Acceptance of the Proposed Settlement

It is not apparent from the face of the documents provided by the Trustees whether and to what extent any of the Trustees, including BNY Mellon, or their experts considered or evaluated the distribution methodology, whether it is fair and reasonable, or whether it comports with the Governing Agreements. Therefore, discovery concerning the Trustees' investigation, evaluation, consideration, and acceptance of the proposed Settlement (and in particular, the portions of the Settlement that concern distribution) is necessary.

Discovery Concerning the Process by Which the Settlement Was Reached

What *is* apparent, is that the proposed Settlement (including the distribution methodology) was negotiated and agreed upon by a group of Certificateholders (hereinafter referred to as the "Institutional Investors") with holdings in only a subset of the Accepting

Trusts.[1] To determine whether the integrity of the Settlement was compromised by any potentially self-interested conduct, Certificateholders must be afforded an opportunity to conduct discovery into the Settlement negotiations.

Discovery Concerning the Fairness and Reasonableness of the Settlement

Discovery is also necessary to determine the reasonableness of the proposed Settlement itself. As it stands, the distribution methodology turns the proclaimed purpose of the proposed Settlement—to compensate Certificateholders for breaches of representations and warranties and improper servicing—on its head. Under the proposed Settlement, it appears the very Certificates that took the most substantial losses from breaches of representations and warranties and improper servicing will receive little-to-none of the payment that is intended to compensate for those very harms. By contrast, Certificates that suffered little-to-no harm will receive a windfall.

LEGAL STANDARD

Disclosure in an Article 77 special proceeding is expressly "governed by [A]rticle 31." N.Y. C.P.L.R. § 408 (McKinney 2014). Pursuant to Article 31, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." N.Y. C.P.L.R. § 3101(a) (McKinney 2014). The scope of disclosure under the rule is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy…." *Allen v. Crowell-Collier Publ'g Co.,* 21 N.Y.2d 403, 406 (1968).[2]

In *In re Bank of New York Mellon,* 42 Misc. 3d 1237(A) (Sup. Ct. 2014) ("*BNYM"*), Justice Kapnick applied the CPLR's broad disclosure provisions to the Article 77 proceeding

[1] Unless otherwise stated, capitalized terms shall have the meaning set forth in the Petition. *See* Doc. 1.

[2] Not only is broad discovery permitted by statute, New York courts have specifically recognized that settlement materials are discoverable if "material and necessary" to a party's case. *Masterwear Corp. v. Bernard,* 298 A.D.2d 249, 250 (1st Dep't 2002); *see also NYP Holdings, Inc. v. McClier Corp.,* 836 Index No. 601404/04, 2007 WL 519272, at *1, *4 (N.Y. Sup. Ct. Jan. 10, 2007) (holding that because the settling party had to demonstrate the reasonableness of the settlement, it had to produce, among other things, the settlement negotiations.)

before her and permitted extensive discovery, including several depositions of multiple trustee representatives, most of the trustee's disclosed advisors, all of the trustee's litigation experts, and multiple Institutional Investor representatives. That discovery allowed the parties to uncover key issues pertaining to the reasonableness of the settlement's terms, the trustee's evaluation of those terms, and the process by which the settlement was reached. The narrower discovery sought herein is similarly necessary to ascertain relevant facts.

W&L's PROPOSED DISCOVERY

W&L seeks discovery bearing on the reasonableness of the proposed Settlement, the process by which it was reached, and BNY Mellon's decision to accept it. At this time W&L intends to focus its efforts on matters related to the distribution method, including, for example:

- Whether and to what extent BNY Mellon and/or any of its experts evaluated the proposed distribution methodology and/or considered alternatives;
- Whether BNY Mellon's acceptance of the distribution methodology was reasonable;
- Whether BNY Mellon's evaluation and acceptance of the distribution methodology was in accordance with its duties under the Governing Agreements and applicable law;
- Whether BNY Mellon acted unreasonably when it refused W&L's repeated requests to participate in and be apprised of the settlement review process before BNY Mellon accepted the proposed Settlement Agreement for the W&L Trusts; and
- Whether the Institutional Investors negotiated the distribution methodology in their own self-interest at the expense of other Certificateholders, including W&L, and whether the Trustees evaluated, considered, or investigated that issue.

ARGUMENT

The requested discovery is permitted pursuant to Articles 77 and 31, and recent precedent demonstrates the importance of such discovery.

I. The Analogous Article 77 Case Before Justice Kapnick Demonstrates the Importance of Determining Whether the Trustee Appropriately Considered An Issue Bearing on the Reasonableness of the Settlement

The issue raised by W&L related to the distribution of Settlement proceeds is substantially similar to a question decided by Justice Kapnick in *BNYM*. There the trustee, BNY

Mellon, accepted and advocated for the release of loan modification claims without ever evaluating the viability or value of those claims. As a result of the trustee's failure to appropriately investigate the issue, the court disapproved the settlement to the extent it purported to release modification claims "without investigating their potential worth or strength." *In re Bank of New York Mellon,* 42 Misc. 3d at *20.

Inherent in Justice Kapnick's consideration and disposition of the loan-modification issue*,* is the need for discovery into whether, and to what extent, the Trustees evaluated certain aspects of the proposed Settlement. This is all the more true where, as here, the Trustees did not participate in the settlement negotiations but rather, were presented with a proposed Settlement negotiated by two self-interested parties. Absent adequate discovery, the Court cannot know whether and to what extent the Trustees appropriately investigated and evaluated certain key issues, including the impact of the proposed distribution method.

II. Disclosure is Necessary to Determine Whether the Settlement is Unreasonable, or Unreasonably Driven by the Interests of the Institutional Investors

The Trustees and the Institutional Investors have advocated that the Institutional Investors' negotiation of, and agreement to, the proposed Settlement is evidence of the Settlement's reasonableness. *See e.g.* Doc. 194 at 9-10. Indeed, the Trustees' lead expert, Professor Fischel, places significant reliance on the Institutional Investors' role in the negotiation of the Settlement. *Id.* at 10. Yet, there is no evidence that the Institutional Investors were adequate representatives across all Trusts, or that the Trustees evaluated or even considered whether the Institutional Investors were acting in their own self-interest.

This matter, although an Article 77 proceeding in name, is akin to a proposed settlement negotiated on behalf of a class action, which requires adequate class representation and court approval based on a determination that the terms are "fair, adequate and in the best interest of the

class." *Rosenfeld v. Bear Stearns & CO.,* 237 A.D.2d 199, 199 (1st Dep't 1997). The Advisory Committee Notes under FRCP 23(e) (analogous to CPLR § 908) explain, "court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement." 2003 Adv. Comm. Notes. Fed. R. Civ. P. 23(e). Such is the case here—and the requested discovery is necessary and targeted to aid the parties and the Court in assessing the reasonableness of the proposed Settlement and the process by which it was reached. *See generally NYP Holdings, Inc. v. McClier Corp.,* 836 Index No. 601404/04, 2007 WL 519272 (Sup. Ct. N.Y. Cnty. Jan. 10, 2007); *see also In re General Motors Corp. Engine Interchange Litig.,* 594 F. 2d 1106, 1124 (7th Cir. 1979) (finding "the conduct of the [settlement] negotiations [is] relevant to the fairness of the settlement…").

Importantly, nowhere is the potential for self-interested negotiation more manifest than in connection with how the Settlement will be distributed among the Classes of Certificates within each Trust. This is so because the Governing Agreements do not specify how to distribute a settlement payment of this sort, and an interested party having access to the negotiations has the ability to structure the distribution in a manner that serves her or his self-interest. The Court should carefully scrutinize those portions of the Settlement that have the potential to favor the group that struck the bargain, over the group that was absent from the negotiations.

CONCLUSION

For the reasons set forth herein, W&L respectfully requests sufficient time to conduct discovery into the proposed Settlement, the process by which it was reached, and the Trustee's decision to accept it.

Respectfully submitted this 9th Day of December, 2014.

/*s* Michael A. Rollin
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