

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),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial  
instruction.

Index No. 652382/2014

**THE TRUSTEES' BRIEF IN FURTHER SUPPORT OF THE  
ORDER TO SHOW CAUSE**

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Petitioners respectfully submit this memorandum of law in further support of their Order to Show Cause [Docket No. 6] filed on August 3, 2014 (the “Order to Show Cause”) seeking, in part, confirmation that the Notice Program (as hereafter defined) is the best notice practicable, is reasonably calculated to put interested parties on notice of this action, and constitutes due and sufficient notice of this special proceeding in satisfaction of federal and state due process requirements and other applicable law, including the requirements of Article 77 (“Article 77”) of the New York Civil Practice Law and Rules (“CPLR”).

### **PRELIMINARY STATEMENT**

This brief responds to this Court’s request on August 4, 2014 to explain how the Trustees’ proposed notice program satisfies the requirements of Article 77 and due process in a proceeding that is intended to bind all trust beneficiaries and other parties potentially interested in the proposed Settlement.<sup>1</sup>

Since the Settlement was first announced in November 2013, the Trustees have devoted eight and a half months to evaluating the offer. The Trustees, via a dedicated settlement website, provided investors with notice of the initial settlement offer and of various subsequent developments, and the Trustees have since disclosed to the public each of the expert reports they considered. The Trustees have also provided six notices to investors through DTC and the Trustees’ website. As described herein, the Trustees are prepared to launch the worldwide Notice Program to provide every potentially interested party with notice and an opportunity to be heard in a formal judicial proceeding, and the Trustees ask this Court to enter the Order to Show Cause as expeditiously as possible so that the Trustees may implement the Notice Program.

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Petition or the Affirmation of Robert C. Micheletto [Docket No. 7] (“Micheletto Affirmation”), or the Supplemental Affirmation of Robert C. Micheletto (“Supplemental Micheletto Affirmation”) to be filed concurrently herewith.

## **DESCRIPTION OF THE NOTICE PROGRAM**

The Potentially Interested Persons (as defined in paragraph 4 of the Micheletto Affirmation) to be targeted by the Notice Program include every party and third-party beneficiary of the Governing Agreements for each securitization and thereby include everyone with a legally cognizable stake in the issues to be determined in this Article 77 proceeding. Substantial information about the Settlement and the Trustees' consideration thereof has already been available to Potentially Interested Persons for several months through a dedicated settlement website. This website contains the initial notice of the settlement offer, additional settlement-related information, and copies of the expert reports considered by the Trustees. As described in the Order to Show Cause, the Trustees intend to take eight additional and distinct steps to provide notice of the commencement of this special proceeding, and the eventual hearing, to all Potentially Interested Persons within forty-five days of the entry of the Order to Show Cause (collectively, the "Notice Program"). These steps include a mailing to the investor addresses that appear on the Certificate Registry for each securitization, as well as to investors or their counsel who have contacted the Trustees in connection with the Settlement. Those two outlets are the only direct information that the Trustees have about the identity or location of investors. The Trustees will also send notice through The Depository Trust Company ("DTC"), the securities depository at which the vast majority of the securities are registered, which is the formal notice procedure set forth in the trusts' Governing Agreements. In addition, the Trustees will post a link, or undertake efforts to cause relevant third parties to post a link, to the notice on the regular investor reporting websites that already exist for the Accepting Trusts. The Trustees will also disseminate notice on the dedicated settlement website, through newswire services, through banner advertisements on a selection of websites that are intended to reach sophisticated

investors, and through publication in 17 newspapers worldwide, translated into the local language where necessary.

The Trustees and Garden City Group, Inc. (“GCG”) -- a leading provider of legal administrative services for class action, mass tort, and bankruptcy cases – developed the Notice Program, which they modeled after a notice program that GCG developed and this Court approved. That program was implemented to provide notice to residential mortgage-backed securities certificateholders in the Article 77 proceeding styled *In the matter of the application of The Bank of New York Mellon*, No. 651786/2011 in this Court (the “Bank of America Proceeding”). That case, like this one, sought approval of a securitization trustee’s decision to settle representation-and-warranty and servicing claims.

### **ARGUMENT**

In *Mullane v. Central Hanover Bank & Trust Co.*, the U.S. Supreme Court approved a New York proceeding similar to this one, in which a trustee sought to bind trust beneficiaries. The Court wrote that “[t]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.” 339 U.S. 306, 311 (1950). That state interest may be satisfied, the Court held, as long as the state recognizes “the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that ‘The fundamental requisite of due process of law is the opportunity to be heard.’” *Id.* at 313 (internal citations omitted).

Accordingly, the petitioner must provide “notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 309. “The means employed must

be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.” *Id.* at 314 (citations omitted). Finally, where a large number of trust beneficiaries have similar interests,

no such [personal] service is required under the circumstances . . . [N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

*Id.* at 319.

Article 77 of the CPLR does not establish any particular service requirements. Where trust beneficiaries and their addresses are known, service may be made by the usual means under Article 3. But where the beneficiaries are not known, Article 3 permits service “in such manner as the court, upon motion without notice, directs.” CPLR 308(5); *see also* CPLR 311(b).

The Notice Program easily satisfies those standards. The program provides for “mailed notice to known beneficiaries,” just as *Mullane* requires. 339 U.S. at 319; *Micheletto Aff.* ¶ 5(a). Beyond that, it provides for notice through the DTC system – which, along with the mailed notice, is the method of notice provided for in the Governing Agreements -- and on the regular investor reporting websites (*Micheletto Aff.* ¶¶ 5(b), (g)), both of which are monitored by diligent investors. The Trustees will post the Notice on their website dedicated to the Settlement (*id.* ¶ 5(f)); investors that have developed a particular interest in the Settlement over the past eight and a half months are likely to visit the website regularly (or monitor it automatically) and thereby learn of this proceeding. The Trustees’ acceptance of the Settlement already has generated news coverage, and the distribution of the Notice to wire services (*id.* ¶ 5(e)) is

intended to encourage further reporting. Finally, the worldwide publication in seventeen major newspapers and on the websites of internet news outlets (*id.* ¶¶ 5(c), (d), (h)) ensures a global distribution. The Supreme Court “has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning.” *Mullane*, 339 U.S. at 317.

As noted above, Justice Kapnick approved the Bank of America notice program (“Bank of America Notice Program”) in an Article 77 proceeding very similar to this one. *See* Exhibit A to the Supplemental Micheletto Affirmation. It was unquestionably successful—over 100 investors, insurers, and other parties initially appeared, and the adequacy of the program was never challenged. During the Bank of America Proceeding, Jose Fraga, a GCG director, testified “in my experience, this is one of the most robust notice programs I’ve been involved in.” *See* Exhibit B to the Supplemental Micheletto Affirmation at 3454:20–24. In her final order resolving the Bank of America Proceeding, Justice Kapnick expressed full support of the Bank of America Notice Program. The Court found that the notice “provided due and adequate notice of these proceedings . . . and the Notice fully satisfied the requirements of New York law, federal and state due process requirements and the requirements of other applicable law.” *See* Exhibit C to the Supplemental Micheletto Affirmation.<sup>2</sup>

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<sup>2</sup> The only material difference between the Bank of America Notice Program and the Notice Program proposed here is that the Trustees propose to run the print notice for one day, as opposed to three under the Bank of America Notice Program. The reason is that, the Bank of America settlement was announced on the same day that the Article 77 proceeding was filed. Here, in contrast, the current Settlement already has received widespread publicity. The Trustees’ settlement website has been available since November 2013, and the Trustees posted documents and notices relating to the Settlement, including the expert reports that the Trustees considered, to the website even before the Trustees decided to accept the Settlement for the Accepting Trusts. Accordingly, the reduction in the frequency, though not the geographic or linguistic scope, of the print publication is appropriate.

**CONCLUSION**

For all of the foregoing reasons, the Trustees request that the Court enter the Order to Show Cause.

Dated: New York, New York  
August 5, 2014

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