

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

In the matter of the application of	)	Index No. 651786/11
	)	
	)	
THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),	)	
	)	Assigned to:
Petitioner,	)	Kapnick, J.
	)	
-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 § 7701, seeking judicial instructions and approval of a proposed settlement	)	
	)	

**MEMORANDUM OF LAW IN SUPPORT OF PETITION TO INTERVENE**

Proposed intervenors The Policemen’s Annuity & Benefit Fund of Chicago, the Westmoreland County Employee Retirement System, City of Grand Rapids General Retirement System and City of Grand Rapids Police and Fire Retirement System (collectively, the “Public Pension Fund Committee”), by their attorneys Scott+Scott LLP, submit this memorandum of law in support of their motion to intervene under CPLR §§ 401, 1012, 1013 and 7701 in the above-captioned proceeding.

**INTRODUCTION**

On June 29, 2011, The Bank of New York Mellon (“BNY Mellon” or “Trustee”) petitioned this Court pursuant to CPLR § 7701 for judicial instructions and approval of a proposed settlement

(the “Proposed Settlement”) related to 530 mortgage-securitization trusts (the “Covered Trusts”). The Covered Trusts are identified as Exhibit A to the Trustee’s verified petition. Among other things, the Proposed Settlement purports to release certain claims related to mortgage-backed securities (“MBS”) issued through the Covered Trusts in exchange for a payment of \$8.5 billion. The members of the Public Pension Fund Committee are holders of certain MBS issued through the Covered Trusts and, pursuant to this Court’s June 29, 2011 Order to Show Cause, will have the opportunity to object to the Proposed Settlement on November 17, 2011. Accordingly, the Public Pension Fund Committee now seeks to intervene into the above-captioned matter to take discovery regarding the fairness of the Proposed Settlement.

### **PROCEDURAL BACKGROUND**

By its petition, BNY Mellon seeks to settle claims that Countrywide Home Loans, Inc. and Countrywide Financial Corporation (“Countrywide”) made misrepresentations in the representations and warranties in the governing agreements for the Covered Trusts concerning the underwriting standards and practices employed by Countrywide in generating the loans that were eventually sold to the Covered Trusts and packaged into MBS. These “representation and warranty” claims relate to hundreds of billions of dollars worth of Countrywide MBS that suffered massive losses because, contrary to its representations, Countrywide was not adhering to its underwriting standards.

The Proposed Settlement of these claims was negotiated in private between twenty-two corporate and hedge fund investors (the “Corporate Investors”), Countrywide, BNY Mellon and the Bank of America Corporation (“BofA”). Having carefully reviewed the Proposed Settlement, the Public Pension Fund Committee has identified eight significant issues that raise serious questions about the fairness of the Proposed Settlement:

- a. No public pension funds were included in the group of twenty-two 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.

- b. Many of the twenty-two corporate investors that negotiated the Proposed Settlement appear to have significant ongoing business dealings with Bank of America, raising conflict-of-interest concerns.
- c. 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.
- d. Under the terms of the Proposed Settlement, the settlement fund is allocated among investors in accordance with the “payment waterfall” set forth in the Pooling and Servicing Agreements, which may provide some investors with a windfall and may not appropriately compensate others for their actual loss.
- e. The Proposed Settlement does not appear to give investors the opportunity to opt out of the Proposed Settlement and does not appear to provide notice of the Proposed Settlement to former investors in Countrywide MBS.
- f. The Proposed Settlement appears to give BNY Mellon broad indemnification rights for the role that it played as Trustee for the Countrywide MBS, but does not appear to specifically carve out claims against BNY Mellon from the release.
- g. The Proposed Settlement carves out “Individual Securities Claims” from the release, but fails to address the securities claims asserted in the class action securities lawsuits that are currently pending before the Hon. Mariana Pfaelzer in the United States District Court for the Central District of California.

In light of these numerous red flags of potential collusion and prejudice to the Public Pension Fund Committee and other similarly situated public pension funds, the Public Pension Fund Committee contends that the fairness of the Proposed Settlement cannot reasonably be assessed without additional document and deposition discovery.

On the same day that BNY Mellon filed its petition, the Corporate Investors filed a petition to intervene in support of the Proposed Settlement pursuant to CPLR §§ 401, 1012 and 1013.

Also on June 29, 2011, this Court issued an Order setting a hearing date of November 17, 2011 at 2:15 p.m. for “anyone having an interest in the mortgage-securitization trusts listed on

Exhibit A to the Verified Petition” to show cause why the judgment requested by BNY Mellon should not be granted. The Court further ordered that written objections are due by August 30, 2011.

The Public Pension Fund Committee now moves to intervene under CPLR §§ 401, 1012 and 1013 to take discovery regarding the fairness of the Proposed Settlement.

### **BASES FOR INTERVENTION**

Intervention of right is permitted under CPLR § 1012(a) when “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.” Intervention by permission is allowed under CPLR § 1013 where “the person’s claim or defense and the main action have a common question of law or fact . . . [and] the intervention [will] not unduly delay the determination of the action or prejudice the rights of any party.” Under either standard, “[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action.” *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (N.Y.A.D. 1 Dept. 2010).

The Public Pension Fund Committee, as holders of MBS issued by the Covered Trusts, have a bona fide interest in this action and have interests and claims that stand to be affected by the Proposed Settlement. Accordingly, intervention under CPLR §§ 1012 and 1013 is appropriate. Indeed, the Public Pension Fund Committee’s intervention is desirable because it will introduce the perspective of public pension funds, who have a major interest in the MBS affected by this settlement, into this matter and will lead to a more fully developed factual record that will better enable the Court to evaluate the Proposed Settlement, which is a matter of significant public interest.

Under Federal Rule of Civil Procedure 24(b), on which CPLR § 1013 is patterned, courts have granted permission to intervene where the intervenors “have questions of law and fact in

common with the parties . . . will bring a different perspective to the case and will contribute relevant factual variations that may assist the court in addressing the constitutional issue raised.” *Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996); *See also ACORN (The New York Association of Community Organizations for Reform Now) v. County of Nassau*, 270 F.R.D. 123, 125-26 (E.D.N.Y. 2010) (granting permission to intervene and take supplementary discovery); *Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407-08 (S.D.N.Y. 2006) (recognizing that “[e]ven where factual distinctions exist, courts have permitted intervention where the same legal issue is presented.”).

If the Proposed Settlement is approved, the Public Pension Fund Committee may lose the ability to assert claims against Countrywide and BofA. Consequently, it has a direct interest in determining whether the Proposed Settlement is fair. Moreover, the Public Pension Fund Committee has acted swiftly to intervene at the start of this action, minimizing any chance of delay. Finally, the Public Pension Fund Committee’s intervention would enhance representation for public pension funds, whose interests are currently underrepresented.

**RELIEF REQUESTED**

WHEREFORE, the Public Pension Fund Committee respectfully requests that this Court issue an order permitting the Public Pension Fund Committee to intervene in the above-captioned proceeding.

DATED: New York, New York  
July 6, 2011



David R. Scott  
Beth A. Kaswan  
Joseph P. Guglielmo  
Donald A. Broggi  
SCOTT+SCOTT LLP  
500 Fifth Avenue, 40<sup>th</sup> Floor  
New York, NY 10110  
Tel: 212-223-6444  
Fax: 212-223-6334

*Counsel to Public Pension Fund Committee*