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

--X

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), and Western Asset Management Company (intervenor),

Index No. 651786/11

Assigned to:
Kapnick, J.

Petitioner,

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

-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.

--X

MEMORANDUM OF INSTITUTIONAL INVESTORS IN OPPOSITION
<u>TO THE POLICEMEN'S ANNUITY'S MOTION TO INTERVENE</u>

The Institutional Investors,[1] Intervenor-Petitioners in support of the Trustee's Petition by Order of this Court dated July 8, 2011 (Doc. #39), submit this memorandum in opposition to the motion to intervene filed by Policemen's Annuity & Benefit Fund of Chicago, *et al.* ("Policemen's Annuity").

1.
Propriety of Intervention

This Court has issued an Order establishing a schedule for interested certificateholders to object or otherwise advise the Court of their views of the Trustee's proposed settlement. Policemen's Annuity, like every other certificateholder, is entitled to appear pursuant to that schedule to be heard on the proposed settlement. Intervention by Policemen's Annuity, therefore, serves no purpose that cannot be achieved by Policemen's Annuity responding in accordance with the schedule already in place.

Moreover, the petition to intervene of Policemen's Annuity fails to demonstrate that any of the proposed intervenors actually has standing to intervene in this proceeding. The petition does not allege that *any* of the purported intervenors: (i) currently holds any security issued by the Covered Trusts; (ii) has filed a pending lawsuit that will be affected by the Settlement; (iii) has ever sought to invoke voting rights under the governing agreements, or that the Trustee refused any demand to take action (if one was ever made). Accordingly, the Policemen's Annuity intervenors have not met their burden to establish standing to intervene.

[1] The Institutional Investors are set forth in the above caption.

2.
Response to Allegations in the Policemen's Annuity Petition to Intervene

The Petition in Intervention filed by counsel for Policemen's Annuity, on behalf of a self-described "Public Pension Committee," is replete with misleading statements about the settlement. The Institutional Investors will respond in full to these arguments at the appropriate time. For now, they offer the following responses to set the record straight.[2]

a.
The Role of Public Pension Fund Investors

Policemen's Annuity inaccurately claims that "no public pension funds were included in the group of twenty-two corporate investors that negotiated the deal." *See* Petition at ¶ 3. In fact, *seven* of the 22 Institutional Investors are registered investment advisers. Collectively, they manage billions of dollars of money for pension funds, both public and private. These Institutional Investors organized themselves and urged the Trustee to act precisely because no one else—including the putative intervenors or their counsel—had successfully pursued remedies for ineligible mortgages or faulty mortgage servicing. The Institutional Investors that act as advisers to pension funds are also keenly aware that pension funds need performance over the long term, in order to support their pension obligations. That is precisely why the settlement includes both a resolution of repurchase claims *and* long-term servicing improvements and an indemnity for defective mortgage and title documentation. Over time, the servicing improvements and document cures are expected to significantly increase the value of the settlement for long term holders of the mortgage backed securities at issue here, such as pension funds.

b.

[2] The Institutional Investors reserve their right to brief these issues in greater detail at the appropriate time. They summarize, and correct, Scott + Scott's misstatements here to eliminate the possibility that the inaccuracies in the petition may confuse the holders of securities issued by the Covered Trusts.

The Scope of the Release

Policemen's Annuity alleges, but does not specify, that they have "colorable claims that will be released if the Court approves the proposed settlement." The Settlement is perfectly clear that *individual investors'* direct claims—such as those for securities fraud or faulty securities disclosures—are *not* released by the settlement. *See* Settlement Agreement at ¶ 10. The only claims released are those that belong to the Trusts and are controlled by the Trustee. *Id.* at ¶ 9.[3]

c.
This is Not a Class Action

Policemen's Annuity appears to suggest the Court should treat the Trustee's settlement of claims it owns as a class action settlement of claims belonging to investors. *See* Petition at ¶ 4 (suggesting the Court should consider "whether the substantive terms of the Proposed Settlement are fair, reasonable, and in the best interest of the class."). This is not a class action settlement. Instead, it is a settlement of claims that belong to the Trustee. The only question presented is whether *the Trustee* appropriately exercised its discretion, under the governing agreements, when it concluded the settlement was fair to the covered Trusts.

d.
Payment of Settlement Proceeds Through the Governing Agreements' Waterfall is a Contractual Requirement, Not a "Windfall"

Policemen's Annuity next suggests there is something improper about the fact that the Settlement Payment will flow down the "waterfall" (the provisions of the governing agreements controlling the use and distribution of trust assets) to current holders of the Covered Trusts' securities. That payment stream is required by the governing agreements, to which all

[3] Scott + Scott's argument that the Settlement purportedly releases individual investors' securities claims that are pursued in the form of a class action is equally wrong. *No individual investors' securities claims are released*, regardless of whether they are pursued individually or in a class action. All such claims are expressly carved out of the release and are preserved.

certificateholders agreed when they purchased trust certificates, and the Trustee is required to follow that agreement when it disburses funds that flow into the trusts.

e.
Repurchase Claims Belong to the Trustee, Not Individual Certificateholders

Policemen's Annuity suggests that "false representation and warranty claims belong not just to current holders of Countrywide MBS, but to former Countrywide MBS holders ...who have since sold." *See* Petition at ¶ 10. This, too, is wrong. Under the governing agreements, trust assets (such as the repurchase and servicing claims at issue here) belong exclusively to the Trustee who holds them on behalf of certificateholders in the trusts. Under the governing agreements, all available funds are to be paid to *current* holders of the Covered Trusts' securities. *See e.g.* Pooling and Servicing Agreement, CWALT 2006-OA19 at §4.02 (specifying that "Available Funds" shall be distributed to various classes of Certificates issued by the Trusts). The certificates are akin to promissory notes or bonds: if a principal payment comes in after a note is sold, the payment goes to the current holder, not to the holder who has sold. That was the agreement each holder made when it purchased trust certificates, and that is the agreement that the Trustee is bound to follow when it disburses funds that flow into the trusts from whatever source, including by settlement of trust claims

While it may be true that individual investors who bought, sold and lost money on securities issued by the Covered Trusts might have suffered losses because they relied upon representations concerning the credit qualities of the Mortgage Loans or the Trusts' rights to demand that ineligible loans be repurchased, that does not give rise to *any* right on the part of any former certificateholder to a share of trust funds that result from a liquidation of the trust's repurchase and servicing claims. The remedy of an individual investor who sold and lost money on Covered Trust securities is to pursue a claim under the securities laws, not to demand payment from a trust in which it has no current interest.

f.
Neither the Institutional Investors, nor the Trustee, Have a Conflict of Interest

Policemen's Annuity also re-hashes the arguments made by the Walnut Place parties concerning the Institutional Investors' and the Trustee's alleged conflicts of interest. These arguments, which are neither original nor true, deserve no response beyond that which has already been made to the Walnut Place plaintiffs.

Dated: New York, New York
July 12, 2011

WARNER PARTNERS, P.C.

By: [signature]
Kenneth E. Warner
Lewis S. Fischbein

950 Third Avenue, 32nd Floor
New York, New York 10022
Phone: (212) 593-8000

Attorneys for Intervenor-Petitioners

OF COUNSEL:

GIBBS & BRUNS LLP by
Kathy D. Patrick (*pro hac vice*)
Robert J. Madden (*pro hac vice*)
Scott A. Humphries (*pro hac vice*)
Kate Kaufmann Shih

1100 Louisiana, Suite 5300
Houston, Texas 77002
Phone: (713) 650-8805