

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) *et al.*,

Petitioners,

For an order, pursuant to C.P.L.R. § 7701, seeking
judicial instructions and approval of a proposed
settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**MEMORANDUM OF
THE STATE ATTORNEYS GENERAL INTERVENORS
ADDRESSING THE JANUARY 16, 2013 ORDERS TO SHOW CAUSE**

Intervenor-Respondents the State Attorneys General of New York and Delaware (“Attorneys General”) submit this memorandum of law addressing three of the January 16, 2013 orders to show cause.¹

PRELIMINARY STATEMENT

The Attorneys General respectfully submit that the Court should consider the instant motions to compel in context of the following larger considerations:

- Bank of New York Mellon (the “Trustee”) has used this Article 77 proceeding to present a settlement negotiated by a minority of certificateholders to all other certificateholders in 530 RMBS trusts, after negotiations were completed.

¹ This memorandum addresses the following motions filed by the Steering Committee: the Motion to Compel Evidence Purportedly Protected Under the Common Interest Privilege (“Common Interest Motion”); the Motion to Compel Discovery of Evidence that the Trustee has Placed at Issue and that is Subject to the Fiduciary Exception (“At Issue Motion”); and the Motion to Compel Discovery from RRMS Advisors, LLC (“RRMS Motion”). The Attorneys General take no position on the other two filed motions.

- Approval of the settlement will effectively extinguish the claims of all certificateholders in the covered trusts, even though most of the certificateholders were not privy to the settlement negotiations.
- Unlike class actions, the proceeding does not allow certificateholders to opt out to pursue separate claims.
- Although the Trustee acted in concert with the negotiating certificateholders, it has a fiduciary duty to all certificateholders.
- The Trustee seeks detailed judicial findings including that a full and fair opportunity to object has been offered to interested parties, that the settlement agreement results from the Trustee’s factual and legal investigation, that the Trustee appropriately evaluated the settlement and claims resolved thereby, that negotiations were at arm’s length and appropriately focused, and that the Trustee acted reasonably and in good faith.
- Use of the Article 77 in this way is novel and untested.

Disclosure of most of the disputed material addressed herein should be compelled, not only on the grounds advanced in the Steering Committee briefs, but to assure the Court that the settlement is in fact all its proponents say it is. To be able to make the findings sought by the Trustee, the Court should ensure that all interested parties can make a fully informed decision whether to object, and, if they do object, that they can present all relevant evidence supporting their objections for the Court’s evaluation. Only then will the Court be in the best position to make the requested finding that the parties have had a “full and fair” opportunity to object. Likewise, the Court will be assured that any judgment it enters concerning the merits of the settlement and of the Trustee’s actions will be supported by a complete factual record.

Finally, the disclosure sought in the motions addressed here has been narrowly and responsibly focused on matters closely related to the findings sought by the Trustee, and can be accomplished within the present schedule. The Court can address any remaining concern for delay by tailoring the disclosure sought in its discretion.

ARGUMENT

The Appellate Division has held that in the Article 77 context, courts must “consider *all relevant factors* in determining whether [settlement] approval is warranted.”² This Court has recognized that it has wide discretion in managing an Article 77 proceeding.³

The findings of fact requested by the Trustee weigh in favor of requiring disclosure of most of the material at issue here. The Trustee has requested that this Court find:

- “A full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon.” (“Full and Fair Opportunity Finding”) (Proposed Order ¶ e.)
- “The Settlement Agreement is the result of factual and legal investigation by the Trustee...” (“Factual and Legal Investigation Finding”) (*Id.* ¶ h.)
- “The Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled. In that regard, the Trustee appropriately considered the claims made and positions presented by the Institutional Investors, Bank of America, and Countrywide relating to the Trust Released Claims in considering whether to enter into the Settlement Agreement.” (“Appropriate Evaluation Finding”) (*Id.* ¶ i.)
- “The arm’s-length negotiations that led to the Settlement Agreement and the Trustee’s deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the Settlement.” (“Negotiations & Deliberations Finding”) (*Id.* ¶ j.)
- “The Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts.” (“Good Faith Finding”) (*Id.* ¶ k.)

² *In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 322 (1st Dep’t 2000) (emphasis added).

³ (See, e.g., Apr. 4, 2011 Transcript at 11:19-20.)

The material addressed herein is important to the above findings because it bears directly on the settlement's negotiation and formation.

A. The Evidence Sought is Important to a Finding of a “Full and Fair Opportunity” to Object and Make Views Known

As a preliminary matter, the requisite “full and fair opportunity” to object to the settlement would be unduly curtailed without a complete record in the areas now in dispute. For example, the Common Interest Motion seeks evidence of what was discussed by the primary negotiator of the settlement and the representative of the absent certificateholders. Providing this information to certificateholders who did not participate in the negotiations gives them the opportunity to inform the Court as to whether, for example, their Trustee did not act in good faith, or reasonably. Likewise, the At Issue Motion seeks a number of important categories of evidence regarding the information and advice relied on by the Trustee, including what it relied on when (i) deciding to enter into the settlement; (ii) assessing the settlement amount and deciding to retain RRMS; (iii) deciding not to review loan files; and (iv) considering its own exposure in connection with the settlement. Finally, the RRMS Motion seeks the materials on which RRMS relied, namely draft reports, time records and invoices, and prior reports on RMBS, necessary in order to understand how RRMS determined that the settlement amount was reasonable. All of this material is of central relevance to a “full and fair” opportunity to object to the settlement, and to inform the Court fully of the basis for such objection at the final hearing.

B. The Evidence Sought is Important to any Substantive Finding Concerning the Trustee’s Investigation, Evaluation, Negotiation, Deliberations About the Settlement, and Good Faith in Entering Into the Settlement

Not only is the evidence sought necessary to support a finding of a full and fair opportunity to object, but it is also important to the substantive questions raised by this proceeding. Without this evidence, the Court will lack the factual record necessary to make certain of the findings requested by the Trustee. The following table sets out in summary form the motions discussed herein, the evidence sought thereby, and examples of the findings and significant questions to be answered by the materials at issue:

Motion to Compel	Evidence Sought	Proposed Substantive Finding	Questions Addressed by the Evidence
Common Interest	“[P]roduction of all documents currently being withheld under the common interest exception to the attorney client privilege by the Trustees and the Inside Institutional Investors. These documents have all been identified by the Inside Institutional Investors in a previously disclosed privilege log to the Intervenor on May 21, 2012, and comprise a total of 548 communications, most of which are emails.” (Common Interest Mot. Mem. in Supp. at 2.)	Negotiations & Deliberations Finding Appropriate Evaluation Finding Good Faith Finding Factual and Legal Investigation Finding	Were the negotiations at arm’s length? Did the Trustee act on behalf of all certificateholders? Did the Trustee adequately assess the claims of the Institutional Investors? Did the Trustee actually consider litigating put-back claims? Did the Trustee protect itself at certificateholders’ expense?
At Issue	“(1) communications with counsel [REDACTED]; (2) communications with and documents generated by counsel concerning BNYM’s evaluation of the settlement amount, including its decision to retain RRMS Advisors and to forego a review of loan files; and (3) communications with and documents generated by counsel concerning the event of default and forbearance agreement, BNYM’s assessment of its own risk and its requests for an indemnity, BNYM’s decision(s) not to provide notice to certificateholders, and BNYM’s attempts to obtain an expansive release of claims held by certificateholders.” (At Issue Mot. Mem. in Supp. at 1.)	Negotiations & Deliberations Finding Factual and Legal Investigation Finding Good Faith Finding	What did the Trustee’s decision-makers consider in deciding to enter into the Settlement? Did the Trustee act on behalf of all certificateholders? Was the Trustee justified in deciding not to review any loan files in the covered trusts? Did the Trustee protect itself at certificateholders’ expense?

Motion to Compel	Evidence Sought	Proposed Substantive Finding	Questions Addressed by the Evidence
RRMS	“(1) documents RRMS relied upon in forming the opinions in the two RRMS reports; (2) drafts of the reports prepared by RRMS; (3) time records, invoices, and bills for work performed by RRMS; and (4) prior reports prepared by RRMS concerning mortgage-backed securities.” (RRMS Mot. Mem. in Supp. at 1.)	Factual and Legal Investigation Finding Appropriate Evaluation Finding Negotiations & Deliberations Finding Good Faith Finding	Did the Trustee reasonably select RRMS? Did the Trustee know what RRMS was relying on? Did RRMS properly consider and verify the information it received from the Trustee and others? Did RRMS’s opinions change over time, and if so, why?

These and other questions should be addressed with the benefit of the material sought in the motions to compel discussed here.

C. The Disclosure Sought Is Narrowly Targeted and May be Addressed Within the Current Schedule

Intervenors have clearly defined the materials they seek in the motions to compel discussed herein. Both the Common Interest and At Issue motions seek material, most of which has been entered on a privilege log, or that has been the subject of counsel’s instruction not to answer in deposition transcripts. The material sought by the RRMS Motion is likewise clearly defined: documents relied on in the RRMS reports; drafts of the reports prepared; time records, invoices and bills for work performed; and prior RRMS reports concerning RMBS. (RRMS Mot. Mem. in Supp. at 1.)

Thus, a specific record of almost all the material sought exists, allowing for prompt production. Moreover, the Court has the discretion to confine analysis and questioning concerning the disclosure to the remaining months prior to the hearing,⁴ including, if necessary, the power to conduct *in camera* reviews and to abbreviate the disclosure produced. Accordingly, no delay should result from production of the materials sought and questioning related thereto.

⁴ *Allen v. Crowell-Collier Publ’g Co.*, 21 N.Y.2d 403, 406 (1968) (courts have wide, but not unlimited, discretion to define disclosure).

CONCLUSION

For all the foregoing reasons, and for the reasons advanced by the Steering Committee in their papers supporting the following motions to compel, the Attorneys General respectfully request that the Court grant the following motions to compel:

1. Motion to Compel Evidence Purportedly Protected Under the Common Interest Privilege;
2. Motion to Compel Discovery of Evidence that the Trustee has Placed at Issue and that is subject to the Fiduciary Exception; and
3. Motion to Compel Discovery from RRMS Advisors, LLC.

Dated: January 29, 2013
New York, New York

DELAWARE DEPARTMENT OF
JUSTICE

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