SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK Justice

PART 39

Index Number : 651786/2011
BANK OF NEW YORK MELLON
vs.
FOR AN ORDER PURSUANT TO
SEQUENCE NUMBER : 026
LEAVE TO INTERVENE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/6/12

BARBARA R. KAPNICK J.S.C.

, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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IN THE MATTER OF THE APPLICATION OF THE BANK OF NEW YORK MELLON, et. al.

Petitioners,

FOR AN ORDER PURSUANT TO CPLR 7701, SEEKING JUDICIAL INSTRUCTIONS AND APPROVAL OF A PROPOSED SETTLEMENT.

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DECISION/ORDER
Index No. 651786/11
Motion Seq. Nos. 026 and 027

BARBARA R. KAPNICK, J.:

Before this Court are two Orders to Show Cause - the first (motion seq. no. 026) brought by the Delaware Department of Justice ("DEAG"), and the second (motion seq. no. 027) brought by the Attorney General of the State of New York (the "NYAG" and together, the "AGs") seeking an Order of this Court granting their motions to intervene in this pending Article 77 proceeding (the "Proceeding").

Petitioner Bank of New York Mellon ("BNYM") commenced the instant proceeding pursuant to Article 77 of the CPLR seeking the Court's instructions and approval of a proposed $8.5 billion settlement agreement (the "Settlement Agreement"), entered into by BNYM solely in its capacity as Trustee, on behalf of 530 residential mortgage-securitization trusts (the "Trusts"). The Settlement Agreement, as proposed, would settle potential claims arising from the Pooling and Servicing Agreements (the "PSAs"), indentures and related Sale and Servicing Agreements ("SSAs" and

together, the "Governing Agreements") governing the Trusts, against Bank of America and Countrywide.[1] These potential claims, which primarily concern alleged breaches of representations and warranties in the Governing Agreements and violations of prudent servicing obligations, would be settled in exchange for a payment into the Trusts in the amount of $8.5 billion. In addition to this monetary relief, the Settlement Agreement also proposes the implementation of various mortgage loan servicing improvements and remedies (the "Servicing Improvements"). Petition, ¶¶ 1, 42-47.

Both AGs previously moved, under motion sequence nos. 012 and 015, to intervene in this Proceeding. Those motions were disposed of as moot by Orders of this Court dated October 26, 2011, after the case was removed to the United States District Court for the Southern District of New York by the Walnut Place entities (who were previously granted leave to intervene in this Proceeding) on August 26, 2011.

Petitioners' motion to remand the case to this Court was denied by District Court Judge William H. Pauley III in *Bank of New York Mellon v. Walnut Place LLC*, 819 FSupp2d 354 (SDNY Oct 19,

[1] Countrywide originated the underlying loans and Bank of America acquired Countrywide in July 2008. According to the Petition, Countrywide is currently maintained as a separate subsidiary of Bank of America and appears to have limited assets. (Petition at p. 4, fn 2.)

2011).

While the action was pending in the Southern District, the NYAG and DEAG again moved to intervene. In a November 18, 2011 Memorandum & Order, Judge Pauley granted their motions to intervene, holding that "[i]t is undisputed that the State AGs have *parens patriae* standing to assert their 'quasi-sovereign interest' in 'securing an honest marketplace in which to transact business'" (*citing Abrams v. General Motors Corp.*, 547 FSupp 703, 705 [SDNY 1982]). Further, Judge Pauley found that "[b]ecause 'the Settlement Agreement at issue here implicates...the vitality of the national securities markets,' this action concerns far more than the financial interests of a few sophisticated investors. And the intervention of the State AGs in this action will protect the interests of absent investors." *Bank of New York Mellon v. Walnut Place LLC*, 2011 WL 5843488 at *1-*2 (SDNY Nov 18, 2011).

Subsequently, Judge Pauley's decision denying petitioners' motion to remand the case to this Court was reversed by the Second Circuit Court of Appeals, *sub nom BlackRock Financial Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F3d 169 (2d Cir. Feb 27, 2012), which instructed the District Court to vacate its decision and order and remand the matter to this Court. The Second Circuit did not, however, specifically vacate Judge Pauley's

November 18, 2011 Memorandum & Order granting the AGs' motions to intervene.

The NYAG now renews his motion to intervene in this Proceeding pursuant to CPLR 401, 1012(a) and 1013.[2] This renewed motion is asserted on a narrower basis than the original motion in that the (Proposed) Amended Verified Pleading in Intervention, dated April 10, 2012, deletes the affirmative counterclaims that were included in the previous Pleading in Intervention and relies solely on the

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[2] CPLR 401 provides in relevant part that "[a]fter a [special] proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court."

* * * *

CPLR 1012 provides, in pertinent part:

> (a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
>
> 1. when a statute of the state confers an absolute right to intervene; or
> 2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment.
>
> * * * *

CPLR 1013 provides:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

NYAG's objection to the proposed Settlement.

The NYAG argues in the first instance that he seeks to intervene to protect the interests of the public and absent investors and beneficiaries as to the proposed Settlement, since there is a risk that unrepresented New York investors may be bound by the judgment to be rendered in this Proceeding.

He next argues that he has "both common law *parens patriae* and statutory interests in protecting the economic health and well-being of all investors who reside or transact business within the State of New York." Moreover, the NYAG claims he has an interest in "upholding the integrity, efficacy, and strength of the financial markets in New York State, as well as an interest in upholding the rule of law generally." (Memo of Eric T. Schneiderman in Support of his initial motion to intervene, dated 8/4/11 at 4-5).

In addition, the NYAG argues that he is entitled to intervene because a judgment in this Proceeding may interfere with his ability to assert potential claims against BNYM, BofA or Countrywide in the future.[3] In particular, the NYAG points to the

[3] BNYM and the Institutional Investors dispute that the Final Judgment in this Proceeding would bar or have a preclusive effect as to most of the AGs' potential future claims.

specific language of Petitioner's [Proposed] Final Order and Judgment which seeks to permanently bar and enjoin "[t]he Trustee, all Trust Beneficiaries, the Covered Trusts," and others, "from knowingly assisting in any way any third party in instituting, commencing, or prosecuting any suit against any or all of the Bank of America Parties and/or the Countrywide Parties asserting any of the Trust Released Claims." (Proposed) Final Order and Judgment, ¶ o.

The DEAG also seeks to intervene in this Proceeding on grounds almost identical to those of the NYAG. First, the DEAG argues that his intervention is necessary to protect the public interest and unrepresented beneficiaries, some of who may be Delaware investors who will be bound by the judgment.

He next argues that he has standing to intervene pursuant to his common law *parens patriae* authority. In support of this claim, the DEAG alleges his quasi-sovereign interest in (1) protecting the integrity of the marketplace; (2) protecting the investing public in Delaware from misleading statements or omissions in the purchase and sale of securities; and (3) seeking relief on behalf of individual or institutional investors who have been the victim of violations of the Delaware Securities Act. The DEAG cites to Judge Pauley's November 18, 2011 decision finding that the State AGs have

parens patriae standing to intervene in order to protect their asserted quasi-sovereign interests. *Bank of New York Mellon v. Walnut Place LLC, supra* at *1-*2.

The DEAG also makes the argument that his intervention should be permitted because certain claims that he might assert against BNYM, Countrywide or BofA, including securities fraud, consumer fraud and deceptive trade practices claims, may be impaired by a judgment in this Proceeding. Finally, the DEAG claims that even if he is not entitled to intervene as a matter of right, he should be permitted to intervene because the claims he might assert on behalf of the relevant Delaware interests share "common questions of law or fact" with this Proceeding (citing CPLR 1013).

Both BNYM and the Institutional Investors argue in opposition that the AGs lack *parens patriae* standing to intervene in this Proceeding in order to attempt to block the settlement of private claims seeking monetary relief on behalf of a discrete group of sophisticated private investors. Further, they argue that a suit seeking nothing more than pecuniary relief on behalf of private investors does not invoke a quasi-sovereign interest, and that allowing the AGs to intervene here would radically expand the AGs'

power to intervene in private litigation.[4]

BNYM asserts that if the DEAG is allowed to intervene here, simply because he believes that the amount of a private settlement may fail to adequately compensate private investors who are Delaware citizens or that the Settlement may impact Delaware borrowers, then he could intervene in virtually any private litigation settlement that involves Delaware entities, investors or citizens. It is also BNYM's position that this is not a case in which the DEAG would protect a single block of investors against a Trustee, because the investors themselves are a diverse and divergent group, disagreeing on the issue of whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement. Thus, BNYM contends, the diversity of views of the participating investors ensures that all viewpoints will be represented regardless of whether the DEAG is permitted to intervene.

Moreover, BNYM and the Institutional Investors argue that the NYAG and DEAG should not be allowed to intervene because they are not seeking - and indeed, cannot seek in an Article 77 proceeding - any injunctive relief or "structural reforms" that would address

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[4] In fact, this Proceeding provides not only for a monetary payment into the Trusts, but also for equitable relief, i.e. improvement to mortgage loan servicing procedures.

the quasi-sovereign interests that they claim to be seeking to protect here.

Finally, BNYM and the Institutional Investors argue that Judge Pauley's November 18, 2011 decision granting the AGs' motions to intervene is "null and void" in light of the subsequent order of the Second Circuit remanding the matter to this Court.

Discussion

The Court will first consider this last argument regarding Judge Pauley's November 18, 2011 decision granting the AGs' motions to intervene.

As discussed *supra*, while the Second Circuit Court of Appeals instructed the District Court to vacate its decision and order denying remand of the matter to this Court, it did not specifically or explicitly vacate Judge Pauley's November 18, 2011 decision. However, "a district court order putatively deciding any aspect of a claim remanded to the state court is but an advisory opinion." *In re C and M Properties, L.L.C.*, 563 F3d 1156, 1162 (10th Cir 2009). Thus, while Judge Pauley's decision is certainly not binding on this Court, this Court is free to consider his decision as an "advisory opinion."

As to the AGs' claims of having standing to intervene pursuant to their *parens patriae* authority, the United States Supreme Court has held that a State will have standing under the common law *parens patriae* doctrine where it can articulate a "quasi-sovereign" interest in the litigation. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 US 592, 601 (1982); *see also, Abrams v. General Motors*, 547 FSupp at 705-707. Quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace," and "must be sufficiently concrete to create an actual controversy between the State and the defendant." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 US at 602.

Courts have found that a "State's goal of securing an honest marketplace in which to transact business" and of "eliminating fraudulent and deceptive business practices in the marketplace" is a legitimate "quasi-sovereign" interest. *Abrams v. General Motors Corp.*, 547 FSupp at 705 (State's "quasi-sovereign" interest in securing an honest marketplace was involved where the NYAG sought to require GM to disclose automobile defects to prospective purchasers); *see also, People v. H & R Block*, 16 Misc3d 1124(A) at *7 (Sup Ct, NY Co 2007)(State's "quasi-sovereign" interest in securing an "honest marketplace for all consumers" was implicated where the NYAG brought suit related to fraudulent and deceptive practices in the marketing of an Express IRA).

By contrast, where "the Attorney General seeks only monetary relief that would inure to the benefit" of particular individuals, his "continued prosecution of these causes of action,... vindicates no public purpose." *People v. Grasso*, 54 AD3d 180, 194-96 (1st Dep't 2008)("Grasso III"); *see also, People v. Seneci*, 817 F2d 1015, 1017 (2d Cir. 1987)("Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests").

Here, the NYAG has articulated his interest in "secur[ing] an honest marketplace" and "upholding the integrity, efficacy, and strength of the financial markets in New York State." Similarly, the DEAG has articulated his interest in, *inter alia*, "protecting the integrity of the marketplace." It is clear that the AGs are not seeking "only monetary relief that would inure to the benefit" of private parties. *Grasso III*, 54 AD3d at 194-95. Accordingly, the AGs have identified legitimate quasi-sovereign interests at play in this Proceeding.

Nevertheless, BNYM and the Institutional Investors argue that the NYAG and the DEAG cannot be allowed to intervene because they are not seeking any form of injunctive relief or "market reforming

relief" related to their quasi-sovereign interests. While it is true that in most of the cases relied upon by both sides, *supra*, the State was seeking injunctive relief, those cases were plenary actions brought by the State, which is the usual way this issue arises, not in an Article 77 proceeding such as this, which is admittedly a very unique proceeding, and which is also arguably "the largest private litigation settlement in history." There appears to be no precedent to the scenario here, where AGs are seeking to rely on their *parens patriae* authority to intervene in a special proceeding, as opposed to pursuing affirmative relief in a plenary action.

The Court is not persuaded by the arguments made in opposition to the AGs' motions that their intervention would somehow be the source of undue delay or burden in this Proceeding since there has been no indication of that so far. Nor would that alone be a reason to deny the AGs standing in this Proceeding, since the Court will control the discovery process and is already working with the parties to move discovery forward.

Accordingly, the motions of the DEAG (motion seq. no. 026) and the NYAG (motion seq. no. 027) are granted and the AGs are permitted to intervene in this Proceeding.

This constitutes the decision and order of this Court.

Date: June 6 , 2012

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.