

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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In the matter of the application of : Civil Action No. 11-cv-5988-UA
THE BANK OF NEW YORK MELLON (as :
Trustee under various Pooling and Servicing :
Agreements and Indenture Trustee under various :
Indentures), et al., :
Petitioners, : **MEMORANDUM OF LAW**
- against - : **IN SUPPORT OF MOTION**
WALNUT PLACE LLC, et al., : **TO INTERVENE**
Intervenor-Respondents. :
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Ambac Assurance Corporation (“Ambac”) and The Segregated Account of Ambac Assurance Corporation (the “Segregated Account”) hereby move, pursuant to Rule 24(a)(2) and (b)(1)(B) of the Federal Rules of Civil Procedure, to intervene as a respondent in this proceeding.

FACTUAL BACKGROUND

Ambac is a financial guaranty insurer incorporated in Wisconsin, with its principal place of business in New York, NY. Ambac’s business has involved the provision of insurance policies that guarantee the payment of financial obligations on various instruments, including bonds and structured finance products. The Segregated Account is a segregated account that was established on March 24, 2010, pursuant to Wis. Stat. § 611.24, with the approval of the Office of the Commissioner of Insurance of the State of Wisconsin. The Segregated Account is a separate Wisconsin insurer with the legal capacity and authority to sue in its own name and right. Pursuant to the court-ordered Plan of Operation for the Segregated Account, Ambac allocated to the Segregated Account the policies and claims related to the securitization trusts identified below.

The Article 77 proceeding that has now been removed to this Court arises out of actions taken by Countrywide Home Loans, Inc., and its affiliates (collectively, “Countrywide”). To raise money with which to make mortgage loans, Countrywide sold millions of loans to securitization trusts that Countrywide sponsored. To raise money to pay Countrywide for the mortgage loans, those trusts in turn sold securities called certificates or notes, which were backed by those mortgage loans, to investors all over the world. In order to enhance the marketability of those notes, Countrywide entered into agreements with Ambac pursuant to which Ambac issued financial guaranty insurance policies that guaranteed the payment of principal and interest to note investors should there be a shortfall in payments made by borrowers on the mortgage loans that were sold to the securitization trusts. To assure Ambac that the loans in the securitization trusts were of good quality, Countrywide made numerous representations and warranties about those loans to Ambac.

Based on Countrywide’s representations and warranties, Ambac insured certain tranches of securities issued by, among others, the following Countrywide residential mortgage securitization trusts putatively covered by the settlement that is the subject matter of this proceeding: CWL 2004-13, CWL 2004-AB1, CWL 2005-1, CWL 2005-3, CWL 2005-16, CWL 2005-17, CWALT 2005-81, CWL 2006-11, CWL 2006-13, and CWALT 2006-OA19 (collectively, the “Ambac Insured Trusts”).

It is now clear that Countrywide’s representations and warranties were false and misleading, as reflected by, among other things, recent forensic analysis and the poor performance of the securitized collateral. Pursuant to the parties’ agreements, Ambac has demanded that Countrywide cure the breaches or repurchase certain of the breaching loans, as required by the agreements between Countrywide and Ambac. Countrywide has thus far refused to repurchase the overwhelming majority of the breaching loans put-back by Ambac.

The Article 77 proceeding originally filed on June 28, 2011, in New York Supreme Court, New York County, was removed to this Court on August 26, 2011.

ARGUMENT

Intervention as of right under Rule 24(a)(2) is granted “when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.” *MasterCard Int’l Inc. v. Visa Int’l Svc. Ass’n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006).

First, this motion is timely. Before this action was removed to this Court, Justice Barbara Kapnick ordered any Potentially Interested Person to file a written notice of intention to appear and object on or before August 30, 2011. *In re The Bank of New York Mellon*, Index No. 651786/2011 (Sup. Ct. New York County) (August 5, 2011 Order).¹

Second, Ambac and the Segregated Account may have an interest in the property that is the subject of this action. Indeed, although Bank of New York Mellon (the “Trustee”) did not name any adverse parties when it filed this proceeding, its petition identified Ambac as a “Potentially Interested Person.” (Affirmation of Matthew D. Ingber ¶ 4(f), June 29, 2011). On information and belief, Ambac was so identified because it is the financial guaranty insurer for the Ambac Insured Trusts that are identified above. Also, Ambac and the Segregated Account have commenced suit against Countrywide in New York Supreme Court for its contractual and extra-contractual representations about the loan collateral deposited into several trusts, including some

¹ Under 28 U.S.C.A. § 1450, “injunctions, orders and other proceedings” had in the state court prior to removal “remain in full force and effect until dissolved or modified by the district court.” *See also* Wright & Miller, *Federal Practice & Procedure* § 3738 (4th ed.) (“[I]t is well-settled that state court rulings do remain binding on the parties unless and until formally set aside by the federal district court.”).

of the Ambac Insured Trusts identified above, that are at issue in this proceeding. *See Ambac Assurance Corp., et al. v. Countrywide Home Loans, Inc., et al.*, Index No. 651612/2010 (N.Y. Supreme Court) (Bransten, J.) (asserting claims related to several covered trusts in proposed amended complaint).

Third, Ambac and the Segregated Account seek to intervene to prevent these proceedings from impairing their interests. Ambac and the Segregated Account do not believe that they can or should be bound by the judgment sought in this action or that their legal rights or remedies as the note insurer (which are independent of the rights of an investor) can lawfully be settled, liquidated, or otherwise affected by the investor settlement proposed by the Trustee, and object to the proposed settlement to the extent that it purports to do so. Ambac and the Segregated Account also object to any effort to bind or liquidate Ambac's rights through this proceeding.

Fourth, the interests of Ambac and the Segregated Account are not adequately represented in this proceeding. This is because the Trustee's interests are not convergent with the interests of financial guaranty insurers such as Ambac and the Segregated Account. There is simply no reason to expect that the Trustee will seek to advance Ambac's and the Segregated Account's interests in this proceeding.

Accordingly, all four criteria for intervention as of right under Rule 24(a) are satisfied. In the alternative, for the reasons set forth above, this Motion to Intervene is authorized under Rule 24(b)(1)(B). *See In re Bank of New York Deriv. Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003) (observing that courts consider substantially the same factors for permissive intervention under Rule 24(b) as for intervention as of right under Rule 24(a)). Moreover, Ambac's intervention creates no delay or prejudice given that Justice Kapnick contemplated that Potentially Interested Persons (such as Ambac) would intervene and/or file notices of appearance to object to the settlement by August 30, 2011. *See Fed. R. Civ. P. 24(b)(3)* (“[T]he court must consider

whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights[.]”).

In short, Ambac and the Segregated Account do not currently have sufficient information to evaluate fully the settlement and its purported impact, if any, on their rights and remedies. By filing this Motion to Intervene, Ambac and the Segregated Account seek to preserve any and all rights that they may have with respect to this proceeding, including the right to take discovery, to file an objection, and/or to take any other actions they deem appropriate or necessary. This basis for intervention is consistent with the rulings of Justice Kapnick prior to the removal of this action.² Finally, Ambac and the Segregated Account expressly reserve their rights not only in this proceeding, but also their right to proceed in separate lawsuits unaffected by this purported settlement, including but not limited to the lawsuit referred to above.


² In her August 5, 2011 Order, Justice Kapnick ordered that any Potentially Interested Person “need not provide a detailed statement of their objection, but may just state the grounds for their objection, one of which may be that such Potentially Interested Person does not have enough information to evaluate the Settlement. The filing of a written notice by a Potentially Interested Person as described above shall preserve all rights of such Potentially Interested Person to seek discovery and to supplement its objection to the Settlement as need be.” *Id.* Moreover, in light of this order by Justice Kapnick, Ambac and the Segregated Account are not required to comply with Rule 24(c), which calls for an intervenor to submit a proposed pleading in support of a motion to intervene. *See Belgian American Mercantile Corp. v. DeGroeve-Marcotte & Fils*, 433 F. Supp. 1098, 1101 (S.D.N.Y. 1977) (declining to “require formal adherence” to Rule 24 in a claim arising out of state law issues and instead permitting intervention in the absence of a formal pleading where the proposed intervenor “gave adequate notice to the plaintiff” of its opposition and “clearly stated the ground on which that opposition was based”); *see also Nelson v. Greenspoon*, 103 F.R.D. 118, 121 (S.D.N.Y. 1984) (permitting intervention in the absence of compliance with “formalities” required by Rule 24(c) because to do otherwise would “exalt form over substance”).

RELIEF REQUESTED

For the reasons stated, Ambac and the Segregated Account respectfully request that the Court grant their motion to intervene.

Dated: New York, New York
August 30, 2011

AMBAC ASSURANCE CORPORATION
and THE SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

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