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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, 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 Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank N.V. (intervenor), ING Capital LLC (intervenor), ING 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),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE INSTITUTIONAL INVESTORS' RESPONSE TO THE OBJECTORS' MOTION TO COMPEL SETTLEMENT AND COMMON INTEREST COMMUNICATIONS

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I.
Introduction

As the Court has explained, the issue in this proceeding is whether the decision of The Bank of New York Mellon ("BNYM" or the "Trustee") to enter into the Settlement was "*within their reasonable discretion.*"[1] The Objectors have argued that they must have discovery into settlement negotiations to answer this question. In response, the Trustee and the Institutional Investors agreed that the Objectors could review every document containing every settlement communication between the Trustee (the entity whose exercise of discretion is at issue) and Countrywide ("CW") and Bank of America ("BofA") (the parties with whom the Trustee settled), including every such communication in which the Institutional Investors were participants. BNYM and the Institutional Investors agreed to this discovery notwithstanding the fact that the Objectors have no legal right to it (as discussed *infra*).

The result of the Objectors' review of these settlement communications is summed up in this passage from their brief:

> [T]he Inside Institutional Investors and their counsel were active and influential participants in the negotiation of the proposed settlement. Counsel for the Inside Institutional Investors insisted on settlement terms, put forth ultimatums, rejected settlement terms from BofA as "not acceptable" and characterized their clients' demands as a "package" not a "menu." Just a few days before the settlement agreement was submitted to this Court, the Inside Institutional Investors were still demanding substantive edits to the settlement agreement and BofA was agreeing to those demands.[2]

In other words, the Objectors found no evidence of collusion or a lack of arm's length negotiations. To the contrary, what the Objectors "discovered" is that: (i) the Institutional

[1] Transcript of April 24, 2012 Hearing at 101:20-22 ("the scope of discovery and the case going on is going to be, were the trustee's actions taken within their reasonable discretion.").

[2] Objectors' Supplemental Memorandum of Law in Support of the Motion to Compel Settlement and Common Interest Communications (Doc. 337) (filed July 28, 2012) at 2 ("Objectors' Supplemental Memorandum").

Investors played a significant role in the settlement negotiations (a fact that has never been in dispute[3]); and (ii) these negotiations were vigorous, arms-length, and non-collusive.

Now, having been allowed the opportunity to review more settlement negotiation materials than the law provides, and having found nothing in these documents to support their opposition to the Settlement, the Objectors demand more. Specifically, they demand production of: (i) settlement communications, to which the Trustee was not a party (those solely between the Institutional Investors and CW/BofA); and (ii) privileged common interest communications between the Institutional Investors and the Trustee, made in the course of their common and cooperative pursuit of the Settlement. As explained below, the Objectors are entitled to neither.

II.
The Objectors Are Not Entitled to Additional Discovery of Settlement Communications

The Objectors' demand for discovery of the "binary" settlement communications between the Institutional Investors and CW/BofA, to which the Trustee was not a party, is meritless. The issue before the Court is whether the Trustee's decision to enter into the Settlement was "within their reasonable discretion."[4] Even if settlement communications are relevant to the inquiry in the first instance, the Objectors have already been provided with all of the Trustee's settlement communications with CW/BofA. Settlement communications between the Institutional Investors and CW/BofA – *in which the Trustee had no involvement* – are irrelevant to this question.

[3] *See* Trustee's Verified Petition (Doc. 1) (filed June 29, 2011) at 4 ("Since November 2010, the Institutional Investors, with the participation of the Trustee, have engaged in extensive, arm's length negotiations with Countrywide and Bank of America in an attempt to reach a settlement for the benefit of the Trusts.").

[4] Transcript of April 24, 2012 Hearing at 101:20-22.

Moreover, "case law has consistently applied the principle that objectors are not entitled to discovery concerning settlement negotiations between the parties in the absence of evidence indicating that there was collusion between plaintiffs and defendants in the negotiation process."[5] This common sense rule has been consistently followed by courts for the last 25 years. It was developed in the class action context, where the standard of review (whether the settlement itself is "fair, reasonable, and adequate"[6]) is broader than the more narrow question posed in this Article 77 proceeding. Moreover, this rule has been uniformly followed by courts in the class action settlement approval context notwithstanding the fact that such courts are called upon to make findings (as in this case) that the settlement agreement was the product of "arm's length negotiations."[7] The same rule, requiring a threshold showing of evidence of collusion

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[5] *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 24, 28 (D.D.C. 2001). *Accord Lobatz v. U.S. West Cellular of Calif.*, 222 F.3d 1142, 1148 (9th Cir. 2000); *Thornton v. Syracuse Sav. Bank.*, 961 F.2d 1042, 1046 (2d Cir. 1992); *Mars Steel Corp. v. Continental Ill, Nat'l Bank and Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987); *In re Wachovia Corp. "Pick-a-Payment" Mortgage Marketing and Sales Practice Litigation*, 2011 WL 1496342, at *3 (N.D. Cal. 2011); *Klein v. O'Neal, Inc.*, 2010 WL 234806, at * 4 (N.D. Tex. 2010); *Smith v. Sprint Comm. Co. L.P.*, 2003 WL 715748, at *1-2 (N.D. Ill. 2003); *White v. Nat'l Football League*, 822 F.Supp. 1389, 1429 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992); *Bowling v. Pfizer, Inc.*. 143 F.R.D. 141, 146 (S.D. Ohio 1992); *Cho v. Seagate Tech. Holdings, Inc.*, 99 Cal. Rptr.3d 436, 448 (Cal. Ct. App. 2009); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 438 (Tex. App. – Texarkana 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996). *See also* MCLAUGHLIN ON CLASS ACTIONS § 6:10 (7th ed. 2010) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion between plaintiffs and defendants in the negotiating process.").

[6] Fed. R. Civ. P. 23(e).

[7] *See, e.g.*, *Michels v. Phoenix Home Life Mut'l Ins. Co.*, 1997 WL 1161145, at *25 (N.Y. Sup. Ct. N.Y. Cnty. 1997) (finding that "the terms of the proposed settlement were the result of months of *arm's length negotiations* conducted by experienced plaintiffs' counsel") (emphasis added); *Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852, at *16-17 (S.D.N.Y. 2010) (finding that settlement agreement "resulted from *arm's length negotiations*") (emphasis added); *Levinson v. About.Com. Inc.*, 2010 WL 41594990, at *3 (S.D.N.Y. 2010) (finding that [t]he settlement was the product of mediation, discussion and *arm's length negotiations* between experienced qualified counsel"); *Beane v. The Bank of New York Mellon*, 2009 WL 874046, at

before discovery into settlement communications will be permitted, has also been applied by bankruptcy courts considering the approval of settlement agreements over the objections of interested stakeholders.[8]

This rule is premised on the understanding that: (i) "settlement negotiations involve sensitive matters,"[9] and their disclosure has an "obviously chilling effect on the desire to settle cases . . . [and] carries a great risk of exposing legal strategy and attorney client privileged communications;"[10] (ii) discovery into such negotiations can lead to unnecessary delay;[11] and (iii) the merits of a settlement agreement can be evaluated "on its face, and [therefore the court] need not analyze the negotiations that led up to it."[12]

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*4 (S.D.N.Y. 2009) ("[t]he Settlement was the product of negotiations, that once started, were conducted *at arm's length* between experienced counsel") (emphasis added).

[8] *In re Lee Way Holding Co*, 120 B.R. 881, 907-09 (Bankr. S.D. Ohio 1990) (denying discovery of settlement communications to party objecting to settlement entered into by debtor in bankruptcy because the objector "has not shown the existence of any facts which support an inference of collusion").

[9] *Lobatz*, 222 F.3d at 1148.

[10] *Id.*; *see also Thornton*, 961 F.2d at 1046 ("Discovery with respect to a settlement agreement of an ongoing litigation, however, is permissible only where the moving party lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive. This is necessary to prevent parties from learning their opponent's strategy."). This risk is evident here where disclosure of settlement negotiations would be deeply prejudicial to the Institutional Investors' efforts to pursue or obtain settlements of similar claims against other banks. The prospect of such severe prejudice, when weighed against the abundance of other evidence available to the Objectors, and the lack of relevance of the information, counsels strongly against permitting this discovery.

[11] *See Smith*, 2003 WL 715748, at *1-2 (If "a disagreement about the merits of the settlement agreement [could be] the basis for a ruling permitting discovery of settlement negotiations . . . discovery would be available in virtually every proposed class settlement to which there is an objection.").

[12] *Klein*, 2010 WL 234806, at * 4.

The Objectors completely ignore this well established rule. They make no mention of it in their brief (despite the fact that it has been raised in numerous filings), and they make no attempt to demonstrate that they have met its requirement by "adducing from other sources evidence that the settlement may be collusive."[13] This should end the inquiry.

Rather than acknowledge the appropriate standard, and attempt to meet it, the Objectors instead rely solely on cases that speak only to the broad outlines of relevance in discovery generally. However, mere relevance (even if it were established) is not the standard where settlement communications are involved, and even if it were, the Objectors' justifications for why discovery into the Institutional Investors' "binary" communications with CW/BofA is necessary are meritless.

For example, the Objectors claim that the payment of attorney's fees to the Institutional Investors' contingent fee counsel, and the "side letter" between BofA and the Trustee, "likely are the result of a bargained-for-exchange during settlement negotiations, but neither the Respondents nor the Court know what was exchanged or compromised in return."[14] However, the Settlement Agreement and the related Institutional Investor Agreement (both of which the Objectors have had since the commencement of the case) set out in detail all agreements among and consideration exchanged between the parties.[15] Thus, the Objectors' claim that they are in the dark about "what was exchanged or compromised in return" is nonsense.

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[13] *Lobatz*, 222 F.3d at 1148.

[14] Objectors' Supplemental Memo at 8.

[15] Indeed, the Settlement Agreement expressly provides as much. *See* Settlement Agreement (Doc. 3) at ¶ 31 ("Entire Agreement. The Settlement Agreement and the Institutional Investor Agreement constitutes the entire agreement of the Parties here with respect to the subject matter hereof . . . .").

Moreover, neither of these assertions in any way suggests collusion, nor do they raise questions that justify the extraordinary production of settlement communications Objectors have requested, in the absence of evidence of collusion. There is nothing unusual or collusive about the payment of attorney's fees to contingent fee counsel who have obtained a favorable settlement.[16] As for the so-called "side letter" between the Trustee and BofA, the Trustee has, on numerous occasions, explained in detail why there is nothing untoward, or nefarious about this letter (which merely re-affirms pre-existing indemnity obligations).[17] Moreover, even if the side-letter did raise questions, the Objectors already have all of the settlement communications necessary to answer them: the communications between the Trustee and CW/BofA, the parties to the letter. Thus, additional discovery from the Institutional Investors, who are not parties to the letter, will shed no additional light on this issue and will amount to nothing more than an unwarranted fishing expedition.

The Objectors are not entitled to discovery of the Institutional Investors' "binary" settlement communications with CW/BofA. They have not offered evidence of collusion, which is a threshold requirement for obtaining discovery of settlement communications. Nor have they offered any explanation or justification for why this Court should make new law by ordering

[16] The only thing unusual about the amount to be paid to the Institutional Investors' counsel in this case is that it is only 1% of the total amount of the Settlement. In other comparable large settlements, contingent fee counsel have been paid fees that dwarf, both in size and percentage, the fees at issue here. For example: (i) in the Texas Tobacco case, contingent fee counsel received approximately $3.2 billion, (20.1% of the $16 billion recovery), *see http://www.afn.org/~afn54735/tob981211.html*; (ii) in the *Tyco* securities litigation, contingent fee counsel received approximately $460 million (14.5% of the $3.2 billion recovery), *see http://www.tycoclasssettlement.com/faq.php3*; and (iii) in the *Enron* securities case, contingent fee counsel received approximately $680 million (9.5% of the $7.24 billion recovery), *see, http://www.bloomberg.com/apps/news?pid=20601087&sid=aakdO2wIq9xU&refer=worldwide*.

[17] *See, e.g.,* BNYM's Memorandum of Law in Opposition to Motion to Compel Discovery (Doc. 263) at 20-22.

such discovery absent evidence of collusion. Moreover, they have been provided access to all of the Trustee's settlement communications with CW/BofA, which (by the Objectors' own description) demonstrate vigorous, arms-length, non-collusive negotiations. Finally, the Objectors are aware of all of the agreements between, and consideration exchanged among, the parties to the Settlement because they have all documents containing all such agreements and exchanges. On this record, the Objectors have more than enough information regarding the Settlement and the process by which it was negotiated to answer any legitimate questions, and their demand for more should be denied.

III.
The Objectors Are Not Entitled to Discovery of Common Interest Communications

The Objectors' demand for the production of communications between the Institutional Investors and the Trustee is also meritless. These communications – between a trustee and trust beneficiaries, made in the course of a joint and collaborative effort to negotiate a satisfactory settlement of trust claims – are plainly shielded from discovery by the common interest privilege, and numerous courts have so held.

The common interest privilege applies to communications that are: (i) "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship;" (ii) "primarily of a legal rather than a commercial nature;" and (iii) made in a context "where an interlocking relationship or limited common purpose necessitates disclosure to certain parties," although a "total identity of interest among the participants is not required."[18] All of these requirements are met here.

[18] *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 541-42 (N.Y. Sup. Ct. N.Y. Cnty. 2008) (Kapnick, J.).

On November 18, 2010, at the request of the Trustee, counsel for the Institutional Investors met with representatives and counsel for the Trustee and CW/BofA in New York to discuss the issues raised by the Notice of Non-Performance. During that meeting, CW/BofA indicated a willingness to engage in negotiations, between themselves on the one hand and the Trustee and the Institutional Investors on the other, to attempt to reach a settlement of the trust claims at issue in this proceeding.[19] Prior to this time, the Institutional Investors had taken numerous actions to attempt to bring about the prosecution of these claims.[20] From and after this date, the Trustee and the Institutional Investors, through their counsel, agreed to enter into a joint and collaborative effort to employ a common legal strategy to obtain a common result: the negotiation of a favorable settlement of the trust claims that was acceptable to the Trustee.[21]

In the course of this common and collaborative effort, counsel for the Trustee and the Institutional Investors: (i) shared research, analysis, and other work product concerning relevant legal issues; (ii) shared work product analysis of relevant facts bearing on, among other things, the merits of the claims that were the subject of the negotiations; and (iii) engaged in numerous meetings and telephone calls, and exchanged numerous e-mails, in which joint legal strategies were discussed and agreed on.[22] These communications were made for purpose of: (i) furthering the Institutional Investors' and BNYM's common legal strategy and common interest in obtaining a favorable settlement, and (ii) facilitating the rendition of legal advice by counsel for

[19] *See* Madden Aff. (Ex. A) at ¶ 2; Kravitt Aff. (Ex. B) at ¶ 2.

[20] *See* Madden Aff. (Ex. A) at ¶ 3.

[21] *See* Madden Aff. (Ex. A) at ¶¶ 4-5; Kravitt Aff. (Ex. B) at ¶ 3.

[22] *See* Madden Aff. (Ex. A) at ¶¶ 4-8; Kravitt Aff. (Ex. B) at ¶ 3.

the Trustee and counsel for the Institutional Investors to their respective clients.[23] It was the understanding, agreement, and expectation of the parties and their counsel that these communications would be kept confidential and not disclosed to third parties.[24]

On these facts, all of the elements of the common interest privilege are met. The communications between the Trustee and the Institutional Investors were legal in nature, they were carried out to facilitate the rendition of legal advice, and they were made in furtherance of a common purpose and common legal strategy.[25] Thus, they are shielded from discovery by the common interest privilege.

The Objectors do not dispute that the communications at issue were legal in nature and carried out to facilitate the rendition of legal advice. Instead, they rest their demand for production of these communications on the assertion that there was no "sufficient common legal interest" between the Trustee and the Institutional Investors.[26] This assertion is frivolous. A joint and collaborative attempt to negotiate a settlement of trust claims – by a trustee who seeks to protect the interest of trust beneficiaries, and trust beneficiaries who have a significant financial stake in the resolution of the claims – is plainly the type of "interlocking relationship or limited common purpose" that this Court has held is sufficient to give rise to a common interest privilege.[27]

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[23] *Id*.

[24] *Id*.

[25] *GUS Consulting*, 20 Misc. 3d at 541-42.

[26] *See* Objectors' Supplemental Memo at 12.

[27] *GUS Consulting*, 20 Misc. 3d at 542.

Indeed, courts in other states have addressed this very issue, and held that a common interest privilege exists for communications shared between counsel for a trustee and counsel for trust beneficiaries, when they are jointly engaged in the common goal of pursuing trust claims.[28] As one court noted, "[i]t is difficult to see how the Noteholders and the Trustee's interest in prosecuting claims of this nature could be more closely aligned."[29]

Not surprisingly, the Objectors' have not cited a single case in which a court has agreed with their assertion that trustees and trust beneficiaries do not share a common interest in pursuing trust claims. Instead, they rely on out of context statements from cases in which the facts presented have no relation to those present here. For example, the Objectors cite this Court's decision in *Amp Services Ltd v. Walanpatrias Foundation*, among others, for the proposition that "merely having a shared interest in the outcome of the underlying litigation is not sufficient to create a common interest."[30] What the Objectors fail to mention is that the Court's holding in that case was premised on the factual finding that the parties' "interests are not the same or even similar," and on the fact that there was no evidence of an agreement or understanding to pursue a common purpose.[31] The remaining cases cited by the Objectors for this proposition are likewise factually inapposite.[32]

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[28] *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2037353, at *1-2 (Del. Ch. 2005) ("It is clear that the Trustee and the Noteholders share a common interest."); *Barnett Banks Trust Co., N.A. v. Compson*, 629 So.2d 849, 851 (Fla. 2d Dist. Ct. App. 1993) ("In this case, the trustee and the aligned beneficiaries share the common interest of regaining the trust assets from [the defendant].").

[29] *U.S. Bank*, 2005 WL 2037353, at *2.

[30] 2008 WL 5150654 (N.Y. Sup. Ct. N.Y. Cnty. 2008).

[31] *Id.*

[32] In *Mt. McKinley Ins. Co. v. Corning, Inc.*, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. 2009), the court found no common interest because the parties were adversaries in litigation who had no

The Objectors are also incorrect, on both the facts and the law, when they assert that no common interest can exist between the Institutional Investors and the Trustee because (according to the Objectors), they could become adversaries if the Trustee's exercise of discretion is not approved by this Court. On the facts, the Objectors provide no explanation for why the Institutional Investors and the Trustee would become adversaries if the Settlement is not consummated, rather than remain united in their common interest in pursuing the trust claims. On the law, the Objectors are simply wrong. As this Court has recognized, the common interest privilege can apply despite an "adversarial tension" between parties so long as the other requirements of the privilege are met.[33]

Finally, the Objectors' assertion that they are entitled to invade the common interest privilege because they claim to share an interest in the pursuit of trust claims is meritless. The common interest privilege creates a protected zone in which parties can – *by agreement* – share privileged communications in pursuit of a common legal goal and strategy. It does not create a right *in favor of third parties* to invade that privileged zone – without the agreement, and indeed over the objection, of the parties – simply because the third party has (or claims to have) the same interest. Not surprisingly, the Objectors have not cited a single case that stands for the

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reasonable expectation of confidentiality. In *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473 (S.D.N.Y. 2003), the court found no common interest because the communications at issue were commercial in nature and not related to legal strategy. In *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Center Props. LLC*, 2002 WL1334821, at *3 (S.D.N.Y. 2002), the court found no common interest because one of the parties to the communication was not a party to the litigation at issue and would be unaffected by the outcome of the case. And in *Shamis v. Ambassador Factors Corp.*, 34 F.Supp. 2d 879, 893 (S.D.N.Y. 1999), the court found no common interest because there was no evidence of an agreement to pursue a common legal strategy and no evidence of coordination between the parties on legal strategy.

[33] *Amp Services Ltd*, 2008 WL 5150654; *Accord Mt. McKinley Ins. Co*, 2009 WL 6978591 (common interest privilege can exist "despite an adversarial relationship" on issues for which the parties' interests are aligned).

outlandish proposition that privileged and confidential common interest communications are fair game for any third party that can prove that it shares the same interest.

IV.
Conclusion

For all the foregoing reasons, the Institutional Investors respectfully request that the Court deny the Objectors' motion to compel the production of: (i) the Institutional Investors' "binary" settlement communications with CW/BofA; and (ii) the Institutional Investors' common interest communications with the Trustee.

Dated: New York, New York
July 27, 2012

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Investment Management LLC, New York Life Investment Management LLC, as investment manager, Nationwide Mutual Insurance Company and its affiliated companies, 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, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company