

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

OCT 07 2013

**GARY T. HOLTZER**

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:  
In the Matter of  
The Rehabilitation of  
FINANCIAL GUARANTY INSURANCE COMPANY

Index No. 401265/2012

:  
: **NOTICE OF APPEAL**

: Hon. Doris Ling-Cohan  
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PLEASE TAKE NOTICE THAT Objectors Monarch Alternative Capital LP, Stonehill Capital Management LLC, Bayview Fund Management LLC, each in its capacity as investment advisor to certain funds, CQS ABS Master Fund Limited, and CQS ABS Alpha Master Fund Limited (the "Objectors"), hereby appeal to the Appellate Division of the New York State Supreme Court in and for the First Judicial Department from an order entered in the above-captioned action in the Office of the Clerk, New York County on August 2, 2013, declining to sign an Order to Show Cause brought by the Objectors to intervene in the above-captioned proceeding and to conduct limited and expedited discovery therein; and this appeal is taken from each and every part of that order as well as from the whole order.

Dated: October 4, 2013  
New York, New York

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**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: FIRST DEPARTMENT**

----- X  
In the Matter of : Index No. \_\_\_\_\_  
: :  
the Rehabilitation of : :  
: : **PRE-ARGUMENT**  
FINANCIAL GUARANTY INSURANCE : **STATEMENT**  
COMPANY : :  
: :  
----- X

1. Title of the Action: The title of the action is as set forth in the above caption.
2. Names of the Parties: The full names of the appellants are Monarch Alternative Capital LP, Stonehill Capital Management LLC, Bayview Fund Management LLC, each in its capacity as investment advisor to certain funds, CQS ABS Master Fund Limited, and CQS ABS Alpha Master Fund Limited (the "Objectors"). The full name of the appellee is Benjamin M. Lawsky, Superintendent of Financial Services of the State of New York, as court-appointed Rehabilitator (the "Rehabilitator") of Financial Guaranty Insurance Company ("FGIC").
3. Attorneys for Appellants: The name, address, and telephone number of counsel for the Objectors-appellants are:  
  
Willkie Farr & Gallagher LLP  
Mary Eaton  
787 Seventh Avenue  
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Telephone: (212) 728-8000
4. Attorneys for Respondent: The name, address, and telephone number of counsel for the Petitioner-appellee are:  
  
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5. Court from Which Appeal is Taken: The appeal is taken from the Order of the Supreme Court of the State of New York, County of New York (Hon. Doris Ling-Cohan, J.S.C.), dated July 31, 2013. Notice of Entry of the Order was served on September 6, 2013.

6. Nature and Object of the Proceeding: The action below was a proceeding under Article 74 for the rehabilitation of FGIC.

7. Result Reached in the Court Below: The court below declined to sign the Objectors' order to show cause seeking to intervene in the FGIC rehabilitation proceeding and to conduct limited and expedited discovery therein.

8. Grounds for Reversal: The Objectors-appellants seek reversal of the Order on the grounds that, *inter alia*, the lower court misapplied the governing legal principles, abused its discretion, and erroneously denied the Objectors' request to intervene and to take limited discovery.

9. Other Actions Pending: There is a related action, *In re Residential Capital, LLC, et al.*, No. 12-12020 (MG), pending in the United States Bankruptcy Court for the Southern District of New York.

10. Additional Appeals: Objectors-appellants have one other appeal pending in this action of an order of Hon. Doris Ling-Cohan, Supreme Court of the State of New York, County of New York, dated August 16, 2013. In addition, Federal Home Loan Mortgage Corporation has also appealed the Order of the Supreme Court of the State of New York, County of New York (Hon. Doris Ling-Cohan, J.S.C.), dated August 16, 2013, as well as two Orders of the Supreme Court of the State of New York, County of New York (Hon. Doris Ling-Cohan, J.S.C.), both dated August 19, 2013.

Dated: October 4, 2013  
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

In the Matter of  
The Rehabilitation of  
FINANCIAL GUARANTY INSURANCE COMPANY

INDEX NO. 401265/12  
MOTION SEQ. NO. 022

The following papers, numbered \_\_\_ were considered on this order to show cause:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	<u>1, 2, 3</u>
Answering Affidavits — Exhibits	_____
Replying Affidavits	_____

**FILED**

Cross-Motion: [ ] Yes [X] No

AUG 02 2013

COUNTY CLERK'S OFFICE

NEW YORK

The court declines to sign this Order to Show Cause (OSC), brought by investors Monarch Alternative Capital LP, Stonehill Capital Management LLC, Bayview Fund Management LLC, CQS ABS Master Fund Limited, and CQS ABS Alpha Master Fund Limited (jointly "the Investors"), to: (1) intervene in this Rehabilitation proceeding pursuant to CPLR 1012(a)(2) or (3), or CPLR 1013; and (2) conduct limited and expedited discovery pursuant to CPLR 408.

Procedural History

This is a rehabilitation proceeding, brought under New York Insurance Law (NYIL) Article 74, in which a rehabilitator of Financial Guaranty Insurance Company (FGIC) was appointed without objection, by order dated June 28, 2012. Pursuant to such appointment, the rehabilitator proposed the Plan of Rehabilitation, and thereafter the First Amended Plan of Rehabilitation. Numerous objections to the proposed plan were filed with the court by interested parties. After much negotiation between the rehabilitator and the interested parties, all objections were settled or withdrawn prior to the hearing date scheduled for oral arguments on approval of the proposed plan. Thus, this court approved, without objection, the First Amended Plan of Rehabilitation for FGIC by order dated June 11, 2013.

FGIC currently seeks this Court's approval of a tentative settlement agreement (mot. seq. no. 016), negotiated in the Bankruptcy case of Residential Capital (Bankruptcy case), and entered into on May 23, 2013. Approval is also being sought in the Bankruptcy case, as approval by both courts is necessary. Three objections to such settlement agreement were received by the court on July 16, 2013. By this OSC, the Investors, having previously filed their objections, now move to intervene in this special proceeding, and seek limited discovery.

Intervention in Special Proceedings

The Court notes that it is undisputed that this Rehabilitation proceeding is a special proceeding governed



by Article 4 of the CPLR. As such, the court declines to sign the Investors' OSC to intervene in this proceeding, as CPLR 1012 and 1013 specifically govern intervention in *actions*, rather than special proceedings. In fact, both statutes specifically use the words "[u]pon timely motion, any person...[is] permitted to intervene in any action..." See CPLR 1012(a) and 1013. Thus, by the language employed, limiting intervention to an "action", such statutes are inapplicable here.

The Court notes that nowhere in NYIL Article 74, which governs this special proceeding, does it permit intervention. This is in contrast to Article 78 (which is also a special proceeding governed by CPLR Article 4), which does specifically provide for intervention: "[t]he court...may allow other interested persons to intervene." CPLR 7802(d). The absence of such corresponding language in the NYIL Article 74 rehabilitation statute indicates that the Legislature did not intend for intervention in such rehabilitation proceedings. Similarly, CPLR Article 52, a special proceeding, also specifically permits intervention in CPLR 5225, 5227, and 5239, unlike a rehabilitation proceeding. See *Breezevale Ltd. v Dickinson*, 262 AD2d 248 (1<sup>st</sup> Dep't 1999).

Moreover, the Investors filed objections with the court on July 16, 2013 (which they now seek to be deemed their proposed pleadings pursuant to CPLR 1014). The Investors need not seek intervention in this proceeding in order to voice their objections, as such objections were filed, received and shall be considered. As such, this OSC to intervene is deemed moot.

#### Discovery in Special Proceedings

Further, as to the request for limited discovery pursuant to CPLR 408, the Investors concede that there is no automatic right to discovery in special proceedings. Moreover, in seeking discovery, the Investors have failed to detail the discovery sought, or provide copies of any document demands, and, thus, this court is unable to determine whether such requested discovery is necessary and material, and narrowly tailored to clarify any allegedly disputed facts. See *New York University v Farkas*, 121 Misc.2d 643, 647 (Civ. Ct. N.Y. Cty 1983). Moreover, the Court notes that, according to movant, it is already engaging in ongoing discovery in the Bankruptcy case, and movant has not explained why discovery, if permitted here, would not be duplicative and merely serve to delay this summary proceeding.

#### Standard to be Applied in Approving the Settlement Agreement

The Investors claim that the proposed settlement agreement "is not fair and equitable to the Investors", and, thus should not be approved by this Court. However, such claim ignores the standard which must govern the decision-making of this Court on whether to approve the tentative settlement agreement. The Rehabilitator is tasked with ensuring that the best interests of FGIC's policyholders as a whole are served. See *Corcoran v Frank B. Hall & Co., Inc.*, 149 AD2d 165 (1<sup>st</sup> Dep't 1989). Thus, the standard to be applied in determining this Court's approval of the settlement is whether the Rehabilitator acted arbitrary and capriciously, and abused his discretion in determining that the settlement agreement is in

the best interests of FGIC's policyholders as a whole. *Id.* Such standard is different than that which the Bankruptcy court will employ and the Investors' specific concerns can be raised there.

Dated: 7/31/13

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST  
JAOSC\Matter of FGIC - decline to sign, intervention and discovery.wpd

NON-FINAL DISPOSITION

**FILED**  
AUG 02 2013  
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NEW YORK