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

Kapnick, J.

INSTITUTIONAL INVESTORS' REPLY IN SUPPORT OF SETTLEMENT

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PRELIMINARY STATEMENT

Three numbers: $8.5 billion in cash, over $2 billion in servicing improvements, and a settlement 93% of investors support. After nearly nine weeks of evidence, the Objectors offer nothing to refute these critical numbers. Having argued (wrongly) that the standard of review requires the Trustee to demonstrate substantive fairness, the Objectors offered no evidence that the settlement is not substantively fair and reasonable. Not one of their clients has been willing to take the stand, much less testify the settlement is in any way unfair or unreasonable. In contrast, the Institutional Investors' witnesses worked for months to help the Trustee achieve the settlement, then came forward and testified for days about why it is fair and should be approved. Not one of the Objectors' experts has come forward with any alternative settlement valuation. Not one testified a different settlement was achievable. Not one testified the Trustee would, with certainty, but without protracted delay and unacceptable risk, recover more through litigation.

Petitioners' Opening Brief, and our Joint Reply, set out the abundant evidence supporting the entry of the Proposed Final Order and Judgment. The Objectors' lack of any proof that the settlement is substantively unfair requires that their objections be overruled. The Objectors' effort to wrest control of the Trusts' settlement decision from the Trustee should also be rejected: it strikes at the heart of the Governing Agreements. If successful, it would doom any subsequent effort by trustees to resolve RMBS Trust claims through anything short of years of potentially ruinous, court-clogging litigation. Petitioners have met their burden of proof. The Proposed Final Order and Judgment should be entered and the objections overruled in their entirety.

1. The Objectors Offered No Investor Testimony Disputing Substantive Fairness.

After two years of Objector-created delaying tactics, and nine weeks of evidence, the record speaks volumes, but not in the way the Objectors suggest. Where are their investors? Where is the sworn testimony of their clients that the $8.5 billion cash settlement is unfair? Where is the sworn testimony of even *one* investor who prefers loan by loan servicing litigation to the landmark, industry-reforming servicing improvements the Trustee obtained in this settlement? These are not rhetorical questions. A party's failure to produce evidence within its possession should be construed against its position. "[A] strong kind of inference … may be drawn from the failure [of a party] to call a witness under its control who has knowledge of the facts." *Seligson, Morris & Neuberger v. Fairbanks Whitney Corp.*, 11 A.D.2d 625, 257 N.Y.S.2d 706, 711 (1st Dep't. 1965). The inference is so strong that a court, if it wishes, may "give the strongest weight to the evidence already in the case in favor of the other side and which has not been, but might have been, effectively contradicted or explained by the absent witnesses." *Id.* It is "well established" that this inference may be drawn where "the witness is under the plaintiff's control and is in a position to give substantial, not merely cumulative, evidence," *Chandler v. Flynn*, 111 A.D.2d 300, 489 N.Y.S.2d 289, 301 (2d Dep't. 1985), because "when a party fails to call a witness who would normally be expected to give unique and supportive testimony [concerning its case], the omission can be more telling than the expected testimony itself." *In re Judicial Settlement of Second Intermediate Account*, 2 Misc. 3d 1002(A), 784 N.Y.S.2d 921 (N.Y. Surr. 2004).

The Objecting investors are surely knowledgeable about the settlement: they authorized the filing of their objections. If the Objectors' investor witnesses *actually believed* the settlement was unfair—as distinct from believing they might profit from their objection for other reasons—they surely would have so testified: they did not. *If* they testified the settlement was unfair, their

testimony would not have been cumulative, because *no* investor has testified the settlement is unfair. But the Objectors' investor witnesses did not testify. They remained steadfastly silent.

Objectors' counsel, in fact, went to extraordinary lengths to *prevent* the Trustee and the Institutional Investors from obtaining *any* discovery (other than holdings information) from their clients. They refused: (a) to answer substantive interrogatories about their objections (the answers to which must be sworn), and (b) to produce witnesses for deposition (where testimony must be given under oath). During the hearing, they failed to call *any* of their clients to testify. The silence of these investors does not merely "speak volumes": it requires the Court to give the strongest weight to Petitioner's evidence, because the Objectors offered no testimony from their own investors to contradict Petitioner's case. *Seligson, Morris, supra.*

The Institutional Investors and other investors did not stand silent. The Institutional Investors came forward to testify that the settlement should be approved. They do not stand alone. 93% of certificateholders did not object to the settlement. Monarch, an independent investor, came forward to refute the Objectors' claim that it opposed the settlement: Monarch supports it. Feb. 4, 2013 Letter to Court, Dkt. 752. Fir Tree, another independent investor, also came forward to urge approval. May 2, 2013 letter to Court, Dkt. 582. After a massive, world-wide notice program in which all certificateholders were informed that if they did not appear to object, they "shall be deemed to have waived the right to object (including any right of appeal) and shall be forever barred from raising such objection before the Court or in any other action or proceeding, unless the Court orders otherwise," PTX 617.7, only 44 objections were filed. Now, only four groups remain: AIG's dwindling "Steering Committee,"[1] Triaxx, the Knights of Columbus group, and the Policemen's Fund. This ever-shrinking pool of objectors—stridently demanding the right to thwart the will of a 93% majority—cannot be allowed to displace the

[1] AIG's brief was joined by Triaxx, the Debt Recovery entities, CIFG, the Sterling Bank entities, FHLB Pittsburgh, and American Fidelity Assurance Co. The Federal Home Loan Banks of Boston, Chicago, and Indianapolis, former members of the Steering Committee, did not join this brief and later withdrew their objection.

Trustee's decision that the settlement is in the best interest of *all* certificateholders. As the Court held in *In re IBJ Schroeder*, Index No. 101580/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug 16, 2000), when presented with a securitization trustee's decision to settle trust claims over beneficiary objections in an Article 77 proceeding, "[t]he Court will not invalidate the proposed settlement merely because certain beneficiaries believe a greater recovery might be obtained if the [] action is submitted to an expensive and unpredictable litigation."

The Objectors' silence is compounded by their inaction. None of them came forward—up to and including today—to assume the burden of amassing the 25% Voting Rights and providing the very substantial indemnities necessary to instruct the Trustee to pursue the Trusts' claims through litigation. Their inaction undermines their assertion that litigation would be a more profitable alternative for the Trusts. Nor have these Objectors shown that a recovery greater than this $10 billion settlement could be achieved from Countrywide, or that a successor liability claim could be pursued successfully against Bank of America, when every attempt thus far (including by Objector AIG) has failed. Even if these were the only facts (and they are not), the Proposed Final Order and Judgment should be entered.

2. The Objectors' Experts Did Not Testify the Settlement was Unfair.

With their clients unwilling to testify, the Objectors were left to offer testimony from paid experts. None of their experts testified the settlement is unfair or unreasonable.

a. The Settlement Consideration is Fair.

The settlement amount is central to the Objectors' attack, but they offered no evidence that either the cash payment or the servicing improvements were substantively unfair to the Trusts. Dr. Cowan stated plainly that he "was not testifying to what a reasonable settlement would have been, because … I said in my report that I was not doing that." Tr. (Cowan) 4254:22-26. In fact, he conducted "no analysis" to determine whether the Trustee's expert,

Brian Lin, was right or wrong in his estimation of the size of the Trusts' potential repurchase claim, Tr. (Cowan) 4266:8-11, though he acknowledged that the funnel method employed by the Institutional Investors (and Mr. Lin) is a "reasonable analysis" and an "acceptable methodology." Tr. (Cowan) 4266:17-26. Dr. Cowan had no familiarity with the GSE data, Tr. (Cowan) 4257:3-6; he also had no opinion as to the correct breach and success rates. Tr. (Cowan) 4204:21-23. Dr. Cowan prefers to assess claim size through loan file sampling, Tr. (Cowan) 4098:3-25, but did not identify any court that had permitted an RMBS Trust (as distinct from a monoline pursuing fraud claims) to prove its claims through sampling. Tr. (Cowan) 4106:2-19.[2] Dr. Cowan also admitted loan file review is subjective, so much so that—even within his own firm—an *internal* dispute resolution procedure is necessary to resolve disagreements about loan defects. Tr. (Cowan) 4270:4-10. Dr. Cowan was also constrained to admit sampling is indeterminate: people can look at the same loan files, in the same sample, but come to widely different conclusions about the percentage of defective loans in the sample. Tr. (Cowan) 4275:3-16. Finally, though the Objectors sought to elicit testimony that the Trusts' "damages" for defective loans could be measured by the risk of price declines in investors' securities, this theory was contradicted by the sole remedy provisions of the PSAs. Tr. (Cowan) 4176:2-77:18. It also collided with Dr. Cowan's admission that if a defective loan in a trust is paid in full, "the trust got everything it was supposed to get." Tr. (Cowan) 4280:13-81:13. Finally, unlike the Trustee, Dr. Cowan did not consider *any* litigation risks, because this is "not the role of a financial analyst." Tr. (Cowan) 4254:7-12. Dr. Cowan's approach to claim valuation affords the Court no basis on which to reject the settlement: it employs indeterminate loan file reviews, rests on a sampling strategy no court has approved for an RMBS trust, offers no valuation of the Trusts'

[2] To date, not a single court has endorsed sampling as a means of enforcing an RMBS trust's repurchase claim. *See, e.g.*, *Bear Stearns Mortgage Funding Trust 2007-AR2 v. EMC Mortgage LLC*, No. 6861-CS, Nov. 8, 2012 Hearing Tr. (Del. Ch. Ct. Nov. 8, 2012) ("[I]t's really nifty for a plaintiff to accuse someone of breaching their obligations over a thousand loan contracts and not wish to try all of them. It's not going to happen here.") (Ch. Strine).

claims, and no opinion the settlement is substantively unfair. In sum, Dr. Cowan provided no evidence that, given the litigation risks, the Trustee would obtain a better result if it litigated.

Professor Coates likewise offered no opinion that the settlement is substantively unfair or that a better result could be achieved in litigation. Professor Coates outlined a number of alternative theories he claims the Trustee could have pursued, but was quick to say, "I don't believe I've given an opinion that there's a, quote, *legitimate case to be made on any* of the categories that I've identified for purposes of my opinion." Tr. (Coates) 5062:17-21 (emphasis added). On the critical issue of successor liability, Professor Coates admitted he testified that a "reasonable person" could conclude the Trusts' chances of prevailing on a successor liability claim against Bank of America were "less than 50%." Tr. (Coates) 4910:6-14, 4914:7-13, 4916:7-13. He also admitted to having assessed the range of likely success on this claim as between 45% and 65%, centered on 55%. Tr. (Coates) 5115:5-13; 5116:19-21. Though Professor Coates testified he had done "all the work that [he] would deem necessary" to reach his 55% probability of success, Tr. (Coates) 4890:18- 4892:17, when confronted with the stark fact that he would have the Trustee flip a coin on this pivotal issue, he recanted that testimony, claiming that "new facts," Tr. (Coates) 5119:12-13, in Justice Bransten's summary judgment decision in *MBIA* led him to raise the probability of success. *Id.* 5119:3-6; 5116: 22-23. On cross-examination, however, Professor Coates admitted that he could not recall "*any* facts that were discussed in Justice Bransten's opinion," *Id.* 5119:22-5120:6 (emphasis added), that he had *not* made part of his initial report in this case, *id.*, the very report that led him to testify the probability of success on successor liability was no more than 45% to 65%, centered on 55%.[3]

[3] Like Objectors' other experts, Professor Frankel did not testify the settlement was substantively unfair. Tr. (Frankel) 4720:20-4721:4. She acknowledged the expertise of BNYMellon's expert, Robert Landau, Tr. (Frankel) 4682:13-17, and she testified her own work experience at a corporate trustee was limited to part time employment she undertook for two years early in her academic career to learn about the corporate trust business. Tr. (Frankel) 4738:24-39:10. This does not establish the settlement is substantively unfair.

b. Countrywide's Valuation and Potential Bankruptcy.

On the crucial issue of Countrywide's valuation, the Objectors offered no witness to refute Bruce Bingham's opinion that Countrywide was not worth more than $4.8 billion, even *assuming* (unrealistically) that the Trusts were the *only* claimants against its assets. Tr. (Bingham) 4553:20-4554:13. The Trustee obtained nearly twice that in cash. The Trustee also substituted a solvent obligor—Bank of America—for Countrywide, eliminating the continuing risk of a Countrywide bankruptcy. Tr. (Smith) 367:7-25, 373:5-20; Tr. (Laughlin) 717:10-178:8. The risk of a Countrywide bankruptcy led the class fiduciaries in a Countrywide RMBS securities class action to urge approval of their far smaller settlement with Countrywide:

> The [$500 million] Settlement amount is even more remarkable in light of testimony in the *Bank of New York Mellon* proceeding (concerning the proposed $8.5 billion settlement of representations and warranties-based claims against Countrywide) indicating that a bankruptcy of Countrywide has been, and potentially remains, a serious risk due to the billions of dollars of potential legal claims against Countrywide. Because the Court already has dismissed Bank of America as a potential defendant, any sizeable verdict in Plaintiffs' favor at the conclusion of the trial…would be an empty victory if Countrywide were to declare bankruptcy….In light of a potential Countrywide bankruptcy that would render any future judgment in the Class' favor meaningless, **the $500 million Settlement is a remarkable success and a great benefit to the Class**."[4]

The same facts support entry of the Proposed Final Order and Judgment. Though Professor Coates was untroubled by the fact that virtually every claim of successor liability against Bank of America has been dismissed and *no one* has ever prevailed, the Court cannot ignore this risk. BNYMellon's recovery of $8.5 billion for the Trusts was an extraordinary achievement. Disapproval of this settlement would injure certificateholders, because it would consign the Trusts to pursue their claims in a very different environment: one in which Bank of America has defeated, *27 times*, claims that it is liable as Countrywide's successor. This fact, alone, demonstrates the settlement is fair and reasonable.

[4] Counsel for this class initially objected to the BNYMellon settlement, but then withdrew it. *See* Dkt. No. 577.

c. Servicing Improvements.

The Objectors offered no expert to contest the industry-reforming, above-market value of the $2 billion in servicing improvements the Trustee obtained. They offered no expert evidence the Trustee could have achieved anything like these billions in improvements through loan-by-loan litigation of past servicing claims. Their lack of proof is unsurprising, given that proving a servicing violation requires the Trustee to prove gross negligence or willful bad faith. *See* R-13.99 (§ 6.03); *see also Assured Guaranty Muni. Corp. v. Flagstar Bank*, 892 F.Supp.2d 596, 606 (S.D.N.Y. 2012); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2013 WL 1845588, at *12-*13 (Sup. Ct. N.Y. Cnty. 2013). The Objectors' expert, Adam Levitin, has written that servicing claims are nearly impossible to prove: "When default levels at all servicers surpass historical levels, it becomes *near impossible to ascribe* the relative percentage of losses to servicer behavior or the innate character of the underlying mortgages in a pool." Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale L. J. on Reg. 1, 68 (2011) (emphasis added). Though they complain the Trustee did not consider the value of the Trusts' servicing claims, the Trustee did consider them. Tr. (Kravitt) 1450:3-1451:22; 1437:18-23; 2101:17-20; 2103:22-24. Though they complain the Trustee did not consider their discredited[5] loan modification/ repurchase theory, the Trustee considered this theory, too. Tr. (Kravitt) 2138:16-2140:13. There is simply no evidence the servicing *improvements* are substantively unfair to the Trusts.

d. *Ad Hominem* Attacks Do Not Demonstrate the Settlement is Substantively Unfair.

With no evidence that the settlement is substantively unfair, the Objectors resort to *ad hominem* attacks on the Institutional Investors and their counsel. Opp. Br. at 2-3. Petitioners' Joint Reply refutes these points. The Court rejected the Objectors' attacks, with good reason.

[5] The chief advocate of this theory, the Federal Home Loan Banks, abandoned it and withdrew their objection.

The Institutional Investors have not sought to advantage themselves at the expense of other certificateholders: the settlement provides them the same benefit as similarly situated investors. They and their counsel are fiduciaries for their clients and shareholders. This duty, in law and the real world, is far more significant than the Objectors' speculative innuendos about alleged business relationships with Bank of America. Tr. (Fischel) 3497:12-98:6. Objectors' attacks are unfounded and offensive, Tr. (Smith) 313:4-15, and deserve no further consideration.[6]

CONCLUSION

This settlement, like any settlement, reflects a compromise. But courts favor settlements because they substitute certainty for uncertainty, recovery for loss, and peace for litigation. This settlement achieves all that and far more. Reached after months of hard-fought negotiations, it is the largest, most heavily scrutinized settlement in the history of private litigation. It has been tested by a trial that lasted nearly nine weeks. At stake in this settlement are concrete realities: $8.5 billion dollars in cash, more than $2 billion of servicing improvements, and the best interests of tens of thousands of certificateholders. BNYMellon did what no other Trustee has been able to do: it obtained more than ten billion dollars of relief for these RMBS Trusts and their certificateholders.[7] All of that will be for naught if the Court permits this small minority of Objectors to disrupt the agreement they made when they bought these securities: the Trustee—not a small minority of certificateholders—would control the Trusts' claims. Thousands of other

[6] The Objectors' claims of a "conflicted, back-room, closed-door process," Opp. Brief at 2, are equally specious. Existence of settlement negotiations was widely publicized, *see* PTX 181, 201, 260, the Institutional Investor group nearly tripled in size from eight to twenty-two as additional investors joined over time, *see* Tr. (Smith) 338:2-6 (investors simply "called and asked" as any certificateholder was free to do); *see also id.* 387:4-10; Tr. (Waterstredt) 825:17-20 (the Institutional Investor group grew as investors "reached out to us"), and both AIG and the Knights' counsel, Talcott Franklin, were invited to participate in negotiations but declined, *see* Tr. (Laughlin) 704:1-16; Tr. (Laughlin) 703:16-705:18; Stipulated Testimony of Christopher Garvey at 2.

[7] Until recently, Deutsche Bank was the only Trustee that had even attempted to pursue RMBS Trust claims. Its lawsuit concerning repurchase obligations in Washington Mutual was filed five years ago, but remains unresolved. *See Deutsche Bank Nat'l Trust Co. v. FDIC*, No. 09-1656 (D.D.C.), Dkt. No.1, Ex. A. Similarly, claims by the RMBS Trustees in the Lehman bankruptcy have been pending for five years, likewise with no resolution in sight. *See In re Lehman Bros. Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y.), Dkt. No. 24254, at 4, 6.

RMBS Trusts are also at stake here: their claims may never be resolved through settlement if the Court rejects this Trustee's reasonable settlement judgment.

Against these compelling realities, the Objectors offer a pretend world: one in which there is an ostensibly perfect, riskless, and larger result to be had through litigation. Sustaining their objections would cost certificateholders a $10 billion *certain* recovery and doom the trusts to years of litigation, which likely would end only in a judgment against a then-bankrupt Countrywide. That is why this case is—and always has been—about three numbers: $8.5 billion in cash, more than $2 billion in servicing improvements, and a settlement supported by more than 93% of Certificateholders. These numbers establish the settlement is substantively fair. They stand unrefuted. The Proposed Final Order and Judgment should be entered.

Dated: New York, New York
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