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***Via E-Filing and Facsimile***

The Honorable Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, New York 10007

**Re: *In re the Application of The Bank of New York Mellon***
**(Index No. 651786/2011)**

Dear Justice Kapnick:

At the conclusion of closing arguments, Respondents requested a brief sur-rebuttal of several minutes. Recognizing the late hour, the Court invited the parties to request a conference call to address any remaining issues. By this letter, AIG respectfully requests a brief conference call of not more than 20 minutes to address matters raised by Petitioners in closing arguments and related submissions. We believe a short call will allow us to highlight for the Court certain misstatements made by Petitioners that Respondents were unable to address during argument. Summaries of specific points we believe the Court should be made aware of are discussed below. We also inlcude an appendix of sample misstatements in BNY Mellon's final written submission but which were not stated openly in Court.

Standard of Review. Petitioners advanced the untenable proposition that so long as Trustee witnesses held the *subjective* belief that the Trustee acted reasonably, then this Court *must* approve the proposed settlement. Such is the basis for the incorrect notion that the Court must conclude that each Trustee witness lied before your Honor could disapprove the settlement. *See, e.g.*, Tr. (Patrick) 5896:8-11. This is not the standard of review (*see* Doc. No. 953 at 32-33 and n.6), and application of Petitioners' fictional standard would set a dangerous precedent, reducing the role of the Court to a rubber stamp and eviscerating the purpose of these proceedings. The practical effect of Petitioners' position would not only be to set the bar so low that the Court (and all courts) would be required to approve any Trustee action no matter how objectively unreasonable, but also that Respondents had no meaningful opportunity to be heard because their positions must—as a matter of law—fall on deaf ears. While the Trustee may have lashed itself to this unreasonable settlement, it cannot bind this Court to it by taking away the Court's independent and learned judgment.

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Burden of Proof. Similarly, Petitioners concluded their argument by trying to shift to Respondents the burden of proving that the Trustee acted in bad faith. Tr. (Gonzalez) 6012:3-5. However, Petitioners bear the burden of proving entitlement to each and every finding they have placed before the Court. Doc. No. 953 at 32-33 and n.6. Efforts to lower the bar and shift the burden demonstrate the weakness of Petitioners' case and of the settlement itself.

Impermissible and Misleading Written Submissions. In addition to their closing arguments, the Petitioners submitted pages upon pages of written arguments in their slide decks which they never covered during closing argument. The lengthy and often misleading materials are an inappropriate form of briefing in violation of the Court's post-trial briefing limits. By way of example only, AIG refers the Court to a number of Petitioners' counterfactual statements of alleged evidence contradicting Respondents' arguments that cannot be left unrebutted. Contrary to Petitioners' statements, the record evidence demonstrates that:[1]

- a certificateholder other than the Institutional Investor group could have availed itself of the benefits of an Event of Default but for the Trustee's *ultra vires* Forebearance Agreement;

- the Trustee's bargained-for institutional indemnity in exchange for foregoing notice of the Forebearance Agreement to certificateholders was never disclosed;

- the Institutional Investors' correction of one flawed aspect of the GSE repurchase proxy demonstrates that that one error alone undervalued the settlement range by more than $10 billion; and

- the Trustee's consideration of the causation issue resulted in multiple meritless discounts.

The trial record speaks for itself. Your Honor has heard weeks of evidence, including powerful admissions from the Petitioners' own witnesses. AIG respectfully requests that the Court view Petitioners' slide decks as the incomplete and unsound arguments they are.

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[1] All references to Rebuttal Summation of The Bank of New York Mellon, pp. 7-19 (submission by Mr. Gonzalez). *See also* Appendix A.

Claims of Concessions and Waiver. In a final effort to distract the Court from the powerful *evidence* adduced through Petitioners' own people and paper, Petitioners now characterize any argument to which Respondents did not directly respond in closing arguments as somehow conceded or waived. *E.g.*, Tr. (Houpt) 5955:21-22. But Respondents elected to use their time to emphasize certain points they thought would be most helpful to the Court. Nothing about that decisionmaking (and the reality of having limited pages for briefing and limited time for argument) erases eight weeks of trial and the facts elucidated on the record.

As is apparent from the foregoing, Petitoners have resorted to manipulation of the standard of review, shifting of the burden, and distortion of and distraction from the trial record. These last ditch efforts show the Trustee's on-going commitment to pressing this unreasonable settlement against a wall of contrary evidence and Petitioners' inability to meet *their* burden of proof.

Sincerely,

Michael A. Rollin

Appendix A

| AIG Statement | Petitioners' Alleged "Contradictory Evidence" | AIG's Response |
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| "[W]e believe under [§10.08] when there is an event of default, another group of certificate holders can come in and force the trustee to decide whether it's going to sue the master servicer. Another group can choose to do that, and nothing would prevent that from happening. The language of the provision is tortured, but every time you look at it, it comes up with the same conclusion." Tr. (Reilly) 5690:25-5691:4. | Section 10.08 is clear: only the Holders that sent the Notice of Non-Performance can direct the Trustee to sue:<br><br>Section 10.08 of the PSAs provides that: "No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless *such Holder* previously shall have given to the Trustee a written notice of an Event of Default…." PTX 071. There is nothing "tortured" about the language "such Holder."<br><br>The Objectors could have sent their own Notice of Non-Performance, but chose not to. *See* PTX 410 (letter from Walnut Place purporting to give "notice of an Event of Default" on May 25, 2011). | Petitioners' argument would mislead the Court into believing that the "written notice of an Event of Default" referred to in section 10.08 is the same notice as the notice required under section 7.01. It is not. "Written notice of an Event of Default" under 10.08 may not be given unless and until the applicable cure period expires. In this case, that cure period was *initiated* by the Institutional Investors' 7.01 notice.<br><br>Further support for the reading that 10.08 notice cannot be the same as 7.01 notice is the fact that under section 7.01 there are multiple ways an Event of Default may occur, several of which do not require notice at all. *See e.g.,* 7.01 (iii-vi). Therefore 10.08 contemplates an entirely separate notice, independent of any notice that may or may not have been given under 7.01, precisely because 7.01 does not require giving notice.<br><br>Furthermore, Petitioners' current reading of section 10.08 in this respect is at odds with its reading of 10.08 during the period of time in which the Trustee was seeking to exclude "wildmen" from the settlement negotiations. R-1449. The wildmen email, in which Mr. Kravitt stated that "another group" of holders might exercise their rights following an Event of Default, confirms that 10.08 allows "another group" of holders to exercise their rights and that the Forbearance Agreement deprived those holders of such rights. *Id.* |
| "We learned through that [settlement communications produced in discovery], that there was an indemnity and forbearance agreement never before disclosed." Tr. (Reilly) 5694:24-26. | The existence of the Forbearance Agreement and a list of the trusts covered by it was disclosed in a widely-reported press release on December 15, 2011. PTX 181.<br><br>Extensions of the Forebearance Agreement were similarly publicized. *See, e.g.*, PTX 201, 260 | The press releases do not disclose either the existence of the indemnity or the fact that notice was traded in exchange for indemnity, *see* R-53, and there is no evidence of the extent to which the press releases were carried by the media.<br><br>The Court's Order is not a final ruling on the merits and predates the evidence introduced by Respondents that the December 10, 2010 indemnity expands the Trustee's indemnity rights under the PSAs. *See* Doc. 953 at 16-18. |

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| | This Court has ruled as a matter of law that there is no colorable claim that the "never disclosed" confirmation of indemnity expanded the Trustee's indemnity beyond what was already provided for (and disclosed) in the PSAs. Order. Doc. No. 825, at n.3. | Moreover, the issue is not whether the indemnity was expanded, but whether the Trustee received something of value and therefore engaged in self-dealing. The record is replete with evidence that the Trustee negotiated for the indemnity and considered it valuable. *See* R-62; R-1447; Tr. (McCarthy) 5009:14-16. |
| "[T]he very first problem with the breach rate with trying to use the GSE experience as a proxy for the covered trusts is there was a two-year limit. The GSEs acted as though the representations and warranties expired after two years." Tr. (Rollin) 5779:20-24. | Mr. Scrivener clearly testified that his experience showed that the GSEs did not stop looking for breaches once a loan performed for two years. Tr. (Scrivener) 1171:4-11 (quotations omitted).<br><br>And in any case, Mr. Scrivevner's GSE data adjusted for further development of GSE repurchase requests for loans performing for 24 payments or more. *See* PTX 36.4; Tr (Scrivener) 1273:5-20 (describing adjustments of 150% for the 25-36 payments bucket at 400% for the 36+ payment bucket). | Mr. Robertson admitted that the 36% breach and 40% success rates assumed a two-year limit on the representations and warranties. R-4143 (Robertson Depo.) 225:14-231:13. By contrast, the loans in the Covered Trusts have life-of-loan representations. *Id.;* Tr. (Lin) 3994:19-26. The failure to account for this difference could have cost the Trusts over $10 billion in settlement proceeds. *See* R-4143 (Robertson Depo.) 225:14-231:13; PTX 604 (column 2).<br><br>Petitioners' argument about the "development factor" as a response to the two-year limit issue, is misleading. The "development factor" was used to "get the ultimate repurchase rate to consider . . . what's going to be bought back in the future[,]" Tr. (Scrivener) 1158:26-1159:3, not to account for the assumption that the representations expired after two years. To the extent the "development factor" covers some loans where more than 24 payments have been made it is merely incidental and the Trustee never verified Bank of America's assumptions, even after the completion of the GSE repurchase experience in January 2013. Tr. (Burnaman) 2840:8-2844:21. There is no evidence that the Trustee accounted for the fact that the representations and warrantees remained in force for the life of the loans. |
| "And so what we have in this methodology is [causation] meritless defense nevertheless being accounted for in the very Lin funnel in the success rate. And even if there is some merit to the defense, it is accounted for in the success rate so you can't take | Lin's methodology did not discount for causation.<br><br>When asked if the causation haircout "could" already be reflected in the success rate used in his report, Mr. Lin clearly testified, "No, it's not. And you could tell from the report, it's not included in the percent and the 14 percent is | Although Petitioners now retreat from reliance on the discredited causation defense in closing argument, they nevertheless have and continue to use causation in a meritless effort to to persuade the Court that the settlement is reasonable in two ways:<br><br>• Petitioners argue that causation is a litigation risk that justifies a settlement amount lower than the lowest end of the settlement range. *See, e.g.*, Doc. No. 1 at 23 ¶¶ 68-77 ("The existence and viability of |

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| another discount off of it afterwards and use it as a justification that – for a number that is even lower." Tr. (Rollin) 5796:3-9. | what I use." Tr. (Lin) 4000:20-24.<br><br>The GSE experience did not include a causation element because the GSEs were not even subject to "material and adverse effect" requirements.<br><br>Objectors then asked Mr. Lin, "When the GSE put loans back to Bank of America, did they – could it be that they had material and adverse breaches?" Mr. Lin answered, "My understanding in the GSE reps they do not have to prove that materiality." Tr. (Lin) 4003:7-14.<br><br>Mr. Burnaman similarly testified: [M]aterial and adverse effect does not have to be proved in the GSE case. Their reps don't have the material and adverse qualifier. So I think generally you might be saying that the GSE experience in fact included the lack of a qualifier. Tr. (Burnaman) 2883:2-13.<br><br>The Trustee took no discount for causation. And the Trustee reviewed the "deemed" Material and Adverse representations and warranties, and found that they are rarely implicated in putting back loans.<br><br>Q. Did you study this language and see how many loans it might apply to? | [the causation] defense is viewed by the Trustee as a compelling reason to discount the financial experts' settlement range, and provides an additionally, equally compelling reason to enter into the Settlement.").<br><br>• BofA's starting negotiating position of $4.0 billion[1] is predicated on several legal defenses, including causation. Without the defenses that the Trustee now says it rejected, BofA's own exposure estimate is $9.45 billion. PTX 036.006. The Trustee's expert analysis without the discounts the Trustee now claims it did not consider included a reasonable settlement amount of $21.2 billion. Tr. (Burnaman) 2755:10-2756:3. Thus, the Trustee asks the Court to endorse a settlement amount that is nearly $1.0 billion *lower* than *BofA's* low-ball, GSE based number and more than *$12 billion* lower than the Trustee's *reasonable* high-end estimate.<br><br>Further, the evidence does not support Petitioners' position that Mr. Lin did not include causation discounts in his analysis. In fact, he took two causation discounts.<br><br>• Mr. Lin limited the universe of potential repurchase exposure to loans that were in default despite knowing that the PSAs do not make default a requirement of the repurchase obligation. Tr. (Lin) 4018:11-20. This threshold narrowing is exactly BofA's rejected causation defense. R-832.<br><br>• The causation discount is also reflected in the breach and success rates because the GSEs only put loans back to BofA where there was a material and adverse effect. *See* R-201-018 ("Freddie Mac reviews intensively for repurchase claims only those loans that go into foreclosure or experience payment problemsduring the first two years |

[1] Petitioners' misleadingly argued in closing that BofA's starting negotiating position was $1.0 billion. That number was based on a settlement portfolio of 225 trusts. BofA's first position on 530 trusts was $4.0 billion.

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| | A. Two things. First of all, I told you we ddin't take a discount for causation. But secondly, we studied every agreement, and we even compared the – we were told the ten most common breach of warrantee that were alleged for the private label portfolio. And we compared those to the – to a study of the automatic material and adverse warrants and they didn't overlap very much at all. Tr. (Kravitt) 1795:24-1796:2. | during origination."); Tr (Lin) 4003:12-22 (agreeing that the GSEs may have only put back loans with material and adverse breaches, an issue he did not analyze).<br><br>Finally, the Trustee's claimed analysis of the deemed material and adverse clause is wholly inadequate and ignores the evidence that many breaches would be deemed to be material and adverse.<br><br>• As is clear from the quoted testimony of Mr. Kravitt, the Trustee relied on BofA to tell it which representations are most commonly violated. Even then, the Trustee limited its inquiry to what BofA claimed were the 10 most commonly breached representations. It cannot be reasonable for the Trustee to fail to investigate and recover on all possible theories.<br><br>• The Trustee objectively failed to recover for deemed material and adverse breaches because such breaches, contrary to the Trustee's belief, exist. *See, e.g.*, R-13-056 (identifying breaches of representations 44-54 as deemed material and adverse) *and* R-13-141 (showing that representations 46-47 and 49-54 are against predatory lending practices); R-15-002-3 ("[E]vidence [of fraudulent representations in the applicable loan pools] includes . . . multi-billion dollar predatory lending settlements reached by Countrywide with various states attorneys general…."); R-4183 (Patrick Dep. 46:19-47:13) (noting that the Institutional Investors asked the Trustee to investigate ineligible predatory loans in the pools).<br><br>Thus, the causation discount pervades the Trustee's flawed approach to the settlement amount and reflects multiple, inappropriate discounts to the direct economic detriment of the Trustee's own beneficiaries. |