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

Assigned to Hon. Saliann Scarpulla

REPLY IN SUPPORT OF ORDER TO SHOW CAUSE WHY THIS COURT SHOULD NOT STAY ENTRY OF FINAL JUDGMENT

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Respondent American International Group, Inc. ("AIG") respectfully submits this Reply in Support of its Order to Show Cause Why This Court Should Not Stay Entry of Final Judgment, and as grounds therefor states as follows:

PRELIMINARY STATEMENT

While the Petitioners characterize the settlement as having been approved, the Court found that the Trustee did not act reasonably in all respects but, instead, "acted unreasonably or beyond the bounds of reasonable judgment" when it tried to release as much as $31 billion in modified loan claims. Doc. No. 1036 at 53 ("Order"). Consequently, the Court rejected both the release of those claims as well as the release the Trustee sought for its own settlement-related conduct. Because those releases were material, non-severable terms of the Settlement Agreement, the Settlement Agreement is ineffective. PTX 1 ¶¶ 2(a), 26 (attached as Ex. PTX 1 to Rollin Aff., filed herewith).

Nevertheless, Petitioners apparently plan to proceed as though it has been approved unless they decide otherwise at a later time, arguing that they are not required to state whether they intend to proceed with a new, partial settlement until after the exhaustion of all appeals. Doc. No. 1049 at 9. As detailed below, this argument misreads the Settlement Agreement, and demonstrates that Petitioners seek to avoid judicial review of critical analyses and decisions, including: (1) how the Trustee intends to resolve the unreleased loan modification claims, (2) whether certain trusts are in the settlement or out of the settlement, (3) for those trusts that are in the settlement, how much of the Settlement Payment they and the trusts' beneficiaries will receive, and (4) whether the amount the trusts and beneficiaries receive was properly and fairly calculated and distributed.

These tactics only amplify the need for judicial intervention: Petitioners cannot privately construct a judicial procedure under which these important determinations will be made and implemented only after there is nothing aggrieved certificateholders can do about it. Due process requires more. And now that the settlement is ineffective, the Court should retain jurisdiction and conduct such proceedings as are necessary to address the issues left open by the Order.

Tens of billions of dollars are at stake, yet the Trustee would cast aside the beneficial rights it holds in trust. Failure to resolve these key questions until after there is no ability to seek redress would be deeply prejudicial to trust beneficiaries. On the other hand, a stay sufficient to resolve these issues would not prejudice the Petitioners at all. The Trustee's own expert testified that the incomplete loss estimations and allocation analyses can be done in only eight weeks, long before the date on which the first appeal would have to be perfected. Thus, appeals can proceed on the merits of the Court's Order while this Court resolves the open questions relating to Bank of America's exclusion of trusts, the Trustee's allocation and distribution of the settlement payment, and the unresolved loan modification liability.

Not only are the Petitioners' prejudice and bond arguments objectively incorrect, any claimed prejudice is of the Trustee's own making because the Trustee agreed that Bank of America would not have to make any settlement payments until 120 days after the exhaustion of all appeals, PTX 1 ¶3 (a), and then intentionally chose to engage in lengthy court proceedings that it knew could last as long as five years. Ex. A to Rollin Aff. at 1551:23-1552:3 (Kravitt). Moreover, the Trustee knowingly failed to ensure that interest would build for the benefit of the trusts because Bank of America refused to allow it. *Id.* at 1552:22-1553:6. Thus, if the

Institutional Investors are concerned about lost interest, they, like all trust beneficiaries, have only their trustee (and their own acquiescence) to blame.

Accordingly, the Court should stay entry of final judgment while all open issues are resolved in a transparent and participatory way, which begins with a full accounting by the Trustee of (1) its experts' loss estimates, (2) its cross-trust allocation of the settlement payment, (3) its intra-trust distribution of the settlement payment, (4) Bank of America's exclusion of trusts, and (5) its resolution of the loan modification claims.

RELEVANT BACKGROUND

Bank of America and the Trustee asked the Court to approve the Settlement Agreement "in all respects," including expansive releases for both Bank of America and the Trustee. R-4 at ¶¶ n, o, p (attached as Ex. R-4 to Rollin Aff.). Complete approval was so important that they built two self-destruct mechanisms that would take effect if materially complete approval were not achieved. First, paragraph 2(a) of the Settlement Agreement states that if the PFOJ is not approved in all material respects, the Settlement Agreement would be deemed disapproved unless Bank of America and the Trustee separately agree to treat partial approval as a Final Order and Judgment. Second, the severability clause in paragraph 26 required that the Bank of America release in paragraph 9 be approved or else the entire agreement would fall.

The Court's Order triggered both self-destruct mechanisms in two ways. First, the Court's determination that the Trustee abused its discretion when it tried to release the loan modification claims constituted a material deviation from the PFOJ, requiring a new agreement among the parties if a settlement was to be implemented. PTX 1 ¶ 2(a). It also rendered the remaining portions of the Settlement Agreement non-severable because the release and waiver under paragraph 9 of the Settlement Agreement was not approved. PTX 1 ¶ 26. Second, the

Court did not approve the release the Trustee sought in subparagraph "p" of the PFOJ. This, too, is a material rejection of the PFOJ, requiring a separate agreement under paragraph 2(a) of the Settlement Agreement.

Faced with the question of whether to proceed with a revised settlement, the Trustee is now reinterpreting paragraph 2(a) when it argues that, "there is no decision to be made, by anyone, about any action to take with respect to [the loan modification] claims until it is determined whether the Settlement Agreement is finally approved and appeals are exhausted." Doc. No. 1049 at 9. But this is not true. Under the Settlement Agreement,

> Final Court Approval shall have occurred ***only after*** … the Settlement Court enters in the Article 77 Proceeding (including in a subsequent proceeding following an appeal and remand) the Final Order and Judgment (provided that if the Settlement Court enters an order that does not conform in all material respects to the form of order attached as Exhibit B hereto, ***the Parties*** may, by the written agreement of all Parties, ***deem that order to be the Final Order and Judgment*** … and … upon entry of an order in such appeal finally affirming the Final Order and Judgment without right of further appeal….

PTX 1 ¶ 2(a) (emphases added). Therefore, the parties' agreement to a new, partial settlement is a condition precedent to the chain of events that, if that settlement is ultimately approved, will result in Final Court Approval. Final Court Approval is, in turn, a condition precedent to settlement implementation. *Id*.

AIG and Chicago Police have asked the Trustee to advise us, as trust beneficiaries and parties to these proceedings, on what it intends to do with respect to the loan modification claims *it holds in trust* and whether it intends to proceed with a new agreement. *See* Ex. B. to Rollin Aff.; *see also* Doc. No. 1051. The Trustee, however, has not responded. The loan modification claims, however, are not the only parts of the settlement that remain outstanding following the Court's Order. In fact, several of the most important aspects of the settlement remain unresolved because Bank of America and the Trustee seek to prevent trust beneficiaries from having any

insight into whether their trusts will be excluded from the settlement and how much money they will receive until after the exhaustion of all appeals. PTX 1 ¶¶ 3(c)(iv), 3(d)(iv), 4(b).

There is no reasonable rationale for keeping this information from trust beneficiaries until after they cannot challenge the Trustee's and Bank of America's decision-making because the Trustee's expert could have completed these critical analyses years ago. The only reason would be to avoid any such challeneges. AIG now asks the Court to prevent that prejudice.

ARGUMENT

I. A Stay Is Warranted Because the Order is Not a Final Order Until All Rights, Contingencies, and Uncertainties are Resolved in the Trial Court

Under CPLR § 2201, this Court has the inherent power to "grant a stay of proceedings . . . upon such terms as may be just." CPLR § 2201. "It is well settled that a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." *Zonghetti v. Jeromack*, 150 A.D.2d 561, 563 (2d Dep't 1989). And thus, the Court here has broad discretion to stay entry of final judgment pending the resolution of numerous unresolved issues that must be determined before the order can be final. *Cf. Maloney v. Rincon*, 581 N.Y.S.2d 120, 122 (N.Y. City Civ. Ct. 1992) (recognizing that "a court may stay the entry of a judgment pending determination of a motion to vacate judgment").

A. The Order Does Not Satisfy the Requirements of a Final Judgment Because It Does Not Determine All Rights of the Parties

Under New York law, a final judgment must "state *the result* of the verdict or decision," C.P.L.R. § 5011 (emphasis added, alterations omitted), and a judgment entered in a special proceeding must "determin[e] the rights of the parties," C.P.L.R. § 411. Indeed, it is the "order directing judgment *and determining the rights of the parties*," that terminates the special

proceeding. *Davis Alarms, Inc. v. Aftar*, 15 Misc. 3d 1142(A), at *3 (N.Y. City Civ. Ct. Queens Cnty. 2007) (emphasis added); *see also Barretta Realty Skyline v. Bank of America*, 27 Misc. 3d 142(A) (N.Y. Sup. Ct. App. Term 2010) (citing C.P.L.R. § 411 and noting that a special proceeding should terminate in a judgment).

The Order, however, does not state its result and does not determine Respondents' rights with respect to the most important parts of the settlement:

- How will the Trustee resolve the remaining $31 billion in loan modification claims?
- Which trusts are in the settlement and which trusts are excluded from the settlement?
- For those trusts that are in, how much of the settlement payment will each trust receive, and how was that calculated?
- Within each trust, how much of the settlement will each trust beneficiary receive, and how was that decided?
- How much of the $8.5 billion will Bank of America keep by excluding trusts?
- Will Bank of America withdraw from the settlement because the balance of loans in excluded trusts exceeds the confidential, predetermined threshold?

It would be difficult to conceive a list of open questions that is more important or central to the implementation of the settlement than these. Thus, final judgment cannot enter consistent with the C.P.L.R.

B. The Order is Not Final Because It is Conditional and Discretionary

"In general, a conditional judgment, order, or decree, the finality of which depends on certain contingencies which may or may not occur, is not final for the purpose of appeal." 4 C.J.S. Appeal and Error §144 (2013).[1] Here, the Order is conditional in the following respects:

- The settling parties retain the right to determine for themselves whether to treat a partial order as the final order. PTX 1 ¶ 2(a).

[1] This of course does not mean that a non-final order can never be appealed. AIG recognizes that a trial court order, conditional or not, may be deemed interlocutory and appealable. Thus, AIG's contention is not that the Court's Order should not be appealable but rather that it should not be considered final, and that any appeal from such Order would be an appeal from an interlocutory order.

- Bank of America retains the right to exclude trusts even after this Court's approval if financial guarantee companies decline to resolve or waive certain rights against BofA. PTX 1 ¶ 3(d)(iv).

- Payment of the full settlement amount is conditioned upon resolution of potential financial guaranty claims. *Id.*

- Payment of the Settlement Payment may not be made if the Trustee's allocation expert acts in bad faith or commits manifest error. PTX 1 ¶ 3(e).

- The settlement will not take effect at all if the Trustee does not obtain certain tax rulings from federal and state tax authorities. PTX 1 ¶¶ 2(e), 2(f).

The Order also cannot be considered "final," because compliance with it is discretionary. *See generally* 4 C.J.S. Appeal and Error §144 (2013) ("An order granting alternative relief at the election of a party is not final and appealable unless the election has been made."). Compliance with the Order is discretionary in at least these respects:

- According to the Trustee, "[t]he Settlement Agreement provides for allocation *after* Final Court Approval, and it gives Bank of America the right to exclude certain trusts *after* Final Court Approval, meaning *after* appeals." Doc. No. 1049 at 9.

- Under the Settlement Agreement, "[i]n the event that one or more Covered Trusts, holding, in the aggregate, Mortgage Loans with unpaid principal balances as of the first Trustee report after the Signing Date aggregating in excess of a confidential percentage of the total unpaid principal balance of the Covered Trusts as of that date, such percentage having been provided to the Trustee by Bank of America and Countrywide prior to the execution of this Settlement Agreement, shall become Excluded Covered Trusts, *Bank of America and Countrywide shall have the option, in their sole discretion, to withdraw from the Settlement* with like effect as if Final Court Approval had become legally impossible." PTX 1 ¶ 4(b) (emphasis added).

- "[I]f the Settlement Court enters an order that does not conform in all material respects to the form of order attached as Exhibit B hereto, the Parties ***may***, by the written agreement of all Parties, deem that order to be the Final Order and Judgment…." PTX 1 ¶ 2(a) (emphasis added).

Therefore, as a matter of law, the Order is not final, and final judgment cannot yet enter.

II. A Stay Need Not Alter the Timeline for Appeal of the Order as Further Trial Court Proceedings May be Completed Before or Concurrently with an Interlocutory Appeal of the Order

Petitioners claim that the stay will delay appeals of the Order is incorrect, since they could have served notice of entry of the Order weeks ago and started the appellate process. CPLR § 5513. It is only Petitioners' insistence that the Order be regarded as a final judgment that is holding up the appellate process.[2]

In the meantime, the open exclusion, allocation, distribution, and modification issues can and should be sorted out in the trial court. According to the Trustee's expert, NERA, the loss estimation and payment allocation process can be completed in only 6-8 weeks, and would have been done in 2011 had the Trustee not instructed NERA to stop work in July or August of that year:

> Q. Now, you were told to stop working on your project, correct?
>
> A. That's correct.
>
> Q. And it still hasn't been done?
>
> A. Still has not been done.
>
> Q. And the person who told you to stop working on your project was Jason Kravitt, right?
>
> A. That's correct.
>
> Q. And that happened in July or August of 2011, right?
>
> A. That's right.
>
> Q. And that's because what he told you was that things were not moving as fast as they had hoped for; right?
>
> [Objection overruled.]

[2] It has been a consistent theme throughout these proceedings that Petitioners blame Respondents for delays. However, there is a long record of Petitioner delay to (1) unsuccessfully obtain a release for the Trustee from any liability related to its settlement-related conduct and its administration of the trusts, (2) avoid having any discovery or merits proceedings in the federal court, (3) resist discovery in the state court proceeding, and (4) keep the open exclusion, allocation, and distribution issues hidden until after the exhaustion of all appeals. There will also be substantial delay as a result of the Trustee's abuse of discretion in trying to settle the loan modification claims. AIG reserves the right to present the entire record of delay in any bond-related proceedings or at another appropriate time.

A. Right. I don't recall exactly what he said, but we were definitely told to stop working at the time.

Q. Right. And your recollection was, although not specific, that he mentioned something about things not moving along as fast as they had hoped?

[Objection overruled.]

A. That's correct.

Q. Now, the whole project—the whole task that you were given would've taken six to eight weeks to complete; correct?

A. I think so. I'm not quite sure. But, yes, around that time. It sounds right.

Q. You understand that each trust['s] allocable share of the settlement proceeds, if approved, will not be determined until you complete the work that you were given to do; correct?

A. Yes. The allocation will happen after the settlement is approved.

Q. Not only the allocation, but also the determination of the allocable share, right? How much each trust will get as a percentage of eight-and-a-half-billion dollars; right?

A. That's correct. After the settlement would be approved, the each trust would know its allocable share, yes.

Q. And until that happens, no trust or certificateholders will know how much money any trust will get; right?

[Objection overruled.]

A. They would know what the NERA allocation would be, if that's what you mean.

Q. That's what I mean.

A. Yes.

Ex. A at 4355:2-4356:6; 4357:20-4358:15 (Sabry); *see also* R-4181 at 171:24-172:6 (attached as Ex. R-4181 to Rollin Aff.) (Buechele Dep. Designations) (Trustee representative testifying that NERA had enough information to project the allocable shares).

During the brief period in which the Trustee's expert estimates and discloses the estimated losses to each trust and allocates the settlement payment amounts to them, Bank of America can disclose which trusts it will exclude and how much of the settlement payment it will

retain. Then, trust beneficiaries will know whether they are in the settlement or out of it and, if they are in, how much of the remaining settlement amount will go to their trust(s).

Once the allocable share for each trust is set, the Trustee should then have to disclose the precise method by which those shares will be distributed to the different classes of holders in each trust. While the Settlement Agreement states very generally that the payments will be treated as unscheduled principal payments, PTX 1 ¶ 3(d)(i), the Trustee has altered the contractual payment waterfall. *E.g.*, *id.*, (prohibiting distributions to REMIC residual holders); *see also* R-4181 at 86:3-87:10 (Trustee representative testifying that the Settlement Agreement alters the contractual distribution priorities). The consequences of any alterations remain unknown to trust beneficiaries. These critical features of the settlement can and should be disclosed immediately.

Finally, the Trustee must state what it intends to do about the unreleased loan modification claims. Although AIG disagrees with the Petitioners' statement that the Trustee owns those claims (the Trustee holds those claims in trust for the benefit of its beneficiaries), it agrees that the Trustee has the power to prosecute them. The Trustee should state plainly what it intends to do so trust beneficiaries can decide what course of action to pursue.

This is not complicated. An interlocutory appeal of the Order can proceed while the open issues are addressed in the trial court.

III. Failure to Stay Entry of Final Judgment Will Severely Prejudice Trust Beneficiaries Whereas Entry of the Stay Will Not Prejudice the Petitioners

As set forth above, the settlement proponents, the Petitioners and Bank of America, have attempted to avoid judicial review of the process of estimating losses, allocating and distributing payments, and excluding trusts. The way they conceived this process is as follows: four months after the exhaustion of all appeals, PTX 1 ¶ 3(a), each then-current trust beneficiary will receive

a notice of a distribution on a regular monthly distribution date, *id.* ¶ 3(d)(i). Nothing in the Settlement Agreement requires the Trustee to indicate what portion of the overall monies received in that distribution comes from the settlement, how much the trust, as a whole, received, how either the cross-trust allocation was completed or the intra-trust distribution was constructed, or what relationship the payment bears to the harm suffered by the misconduct that is being settled. Thus, even if trust beneficiaries had a procedural mechanism for objecting, they would never have enough information to know whether they should. Moreover, if trust beneficiaries wanted to object, they would have no way to do it because no distributions will happen until all potential procedural avenues for redress are eliminated.

Now that the Court has declined to approve the release the loan modification claims, the Trustee is using the same method to avoid review of its handling of those claims by arguing that it need not decide what to do about them until after the exhaustion of all appeals. Doc. No. 1049 at 9.

The Court can easily remedy this prejudice: require the requested accounting and allow affected trust beneficiaries to vet these decisions and processes in this Court before entry of a final judgment. Entering the stay for the limited purpose requested will not prejudice the Petitioners—they did not plan on allocating the settlement proceeds until after the exhaustion of all appeals anyway, and the Trustee knew that the court process could take as long as five years. Ex. A at 1551:23-1553:6 (Kravitt).

The process AIG is requesting will be done long before that happens. Indeed, going through this process now will help ensure that the case does not first go all the way to the New York Court of Appeals only to come back to this Court for resolution of the open issues and then, potentially, back through the appellate courts. Entry of a stay and requiring the requested

accounting from the Trustee will likely *shorten* the time between now and the ultimate disposition of this case.

IV. The Settlement Proponents' Claims of Improper Motives and Misstatements of the Record Reinforce the Unreasonableness of Their Position

The Petitioners continue to criticize AIG for availing itself of a judicial proceeding initiated by the Trustee. Justice Kapnick repeatedly refused to give any weight to Petitioners' claims that AIG was merely leveraging its objection to benefit its separate securities fraud claim, and Petitioners presented no such evidence at the hearing. In fact, certificateholders' securities fraud claims against Bank of America were expressly excluded from the Settlement Agreement, PTX 1 ¶ 10(c), and AIG rightfully seeks redress from Bank of America for all forms of harm it and its Countrywide subsidiary caused through the sale and securitization of defective mortgage loans and imprudent mortgage loan servicing.

In addition to overplaying AIG's reasonable willingness to engage in global settlement discussions with Bank of America, the Petitioners also include several misstatements in their opposition papers that require response in order to avoid having an incorrect record before the Court, as follows:

Petitioners' Statement	Response
"Under the Settlement Agreement, certificateholders in the trusts will receive $8.5 billion in cash." Doc. No. 1049 at 2.	The $8.5 billion is a cap. As much as $1 billion could be retained by Bank of America. PTX 1 ¶ 3(d)(iv); Ex. A at 1821:24-1822:9 (Kravitt).
"93% of certificateholders…favor the settlement." *Id.* at 3.	There is no evidence of this oft-repeated claim anywhere in the trial record. The evidence is that the settlement is supported by the investors who intervened in support and opposed by the investors who intervened in opposition. There is also no evidence as to why any objectors chose to discontinue their litigation efforts. In light of the efforts of certain objectors, including AIG, they may have decided to conserve their own resources and rely on the judicial system to protect their rights.
"Further litigation will reveal nothing new, because the Settlement states plainly that these provisions	This is circular. Further litigation will reveal the loss estimates and the methodology by which they

will be implemented after court proceedings are over." *Id.* at 8.	were reached, the cross-trust allocation, the intra-trust distributions to beneficiaries, which trusts will be covered by the settlement and which will not, and what the Trustee is going to do with respect to the unreleased loan modification claims.
"AIG never showed any interest in [the loan modification] claims at trial—it did not raise them in its briefs." *Id.* at 9.	AIG is a member of a steering committee. The committee allocated the assignments among committee members in an effort to streamline the presentation of evidence. *See, e.g.*, Doc. No. 953 (Respondents' Joint Brief in Opposition to Approval of Proposed Settlement and Entry of Proposed Final Order and Judgment) at 48.
"[T]here is no decision to be made, by anyone, about any action to take with respect to [the loan modification] claims until it is determined whether the Settlement Agreement is finally approved and appeals are exhausted." *Id.*	The Settlement Agreement expressly requires the Trustee and Bank of America to decide whether they will treat the Order as a Final Order and Judgment as a condition precedent to Final Court Approval. PTX 1 ¶ 2(a). In fact, Respondents do not even know at this time whether there is a settlement at all.

The Petitioners' are required to prosecute this settlement at any cost, PTX 1 ¶ 30 (Settlement Agreement Further Assurances Clause); PTX 3 ¶ 21 (attached as Ex. PTX 3 to Rollin Aff.) (Institutional Investor Agreement Further Assurances Clause), and their arguments should be viewed in that light.

CONCLUSION

For the foregoing reasons, Respondent AIG respectfully requests that the Court stay entry of judgment, order the Trustee to provide a full accounting of the matters addressed herein, and protect trust beneficiaries' due process rights by affording them a forum in which to inquire into and, if necessary, challenge the Trustee's handling of the issues left open by the Court's Order.

Dated: New York, New York
February 18, 2014

Respectfully submitted,

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