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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)	Oral argument requested Index No. 651786/2011 Hon. Saliann Scarpulla **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO REARGUE PURSUANT TO CPLR §2221(d)**

PRELIMINARY STATEMENT

While the Petitioners characterize the proposed Settlement (the "Settlement")[1] as having been "approved" by this Court's as-yet-unentered decision and order dated January 31, 2014 (the "Decision"), in fact the Decision (1) found that the Trustee "acted unreasonably or beyond the bounds of reasonable judgment" when it settled loan modification claims without investigating their worth, and (2) held that the release in favor of Bank of America and its related entities was not approved "to the extent that it releases the loan modification claims." Decision at 53.

Because a condition to the Settlement is that the Article 77 Court approve the Settlement, and in doing so accept and enter the form of the PFOJ attached to the Settlement Agreement – unless all the Parties by written agreement "deem" the Court's Decision to constitute the Final Order and Judgment – Bank of America and the other settlement parties (as BNYM's counsel has admitted) are free to withdraw from the Settlement and treat it as a nullity. *See* February 19, 2014 Hearing Transcript ("Tr.") at 31-32. Moreover, a court presented with a proposed settlement has no power to modify or delete any of its terms. Here, the Court did not direct Bank of New York Mellon ("BNYM") and Bank of America to disclose, before entry of judgment,

[1] The Settlement Agreement is attached as Ex. 1 to the Affirmation of Beth A. Kaswan ("Kaswan Aff.").

whether they would agree to the settlement that the Court was prepared to approve. Accordingly, only if Bank of America agrees to pay the same $8.5 billion in exchange for a release of fewer claims -- and only if all the parties to the Settlement agree in writing to accept the Decision as final approval by the Article 77 Court (*which the parties have yet to do*) -- will the Settlement that this Court "approved" actually come into existence.

Thus, the Decision, if it becomes final, will have the effect of merely providing an advisory opinion about what settlement terms the Court would find acceptable, should BNYM and Bank of America ultimately reach an agreement. Although entry of an advisory opinion may not be what Judge Kapnick intended, Tr. at 13, as a matter of law entry of a "judgment" here would leave certificateholders in limbo and fail to constitute a final order under CPLR 411 (because it fails to determine the rights of the parties). This Court should therefore grant leave to reargue and reconsider the Decision.[2]

ARGUMENT

A. Judge Kapnick's Decision Does Not Have the Effect of Approving Any "Part" of the Settlement

Based on the Court's comments at the February 19, 2014 hearing, apparently Judge Kapnick intended to approve portions of the Settlement. That, however, is not the effect of her Decision, either under the law (because a Court presented with a settlement for approval does not have the legal power to modify it), under the facts of this case (because the language included in the Settlement Agreement requires that the release as drafted be judicially approved by the Article 77 Court for the Settlement to be effective). *See* Ex. 1 to the Kaswan Aff., §2(a)(v). Where (as here) the release of fewer claims than provided for in the proposed Settlement has been judicially approved, Bank of America is not required to pay the full $8.5 billion, nor indeed

[2] Chicago Police also incorporates herein by reference the grounds for leave to reargue appearing in the Motion to Reargue, and Memorandum in Support, filed by American International Group, Inc. ("AIG"), Doc. Nos. 1060, 1061.

to pay any of it, and is free to "walk away" from the Settlement. Nor does the Settlement Agreement allocate any portion of the $8.5 billion payment to the release of the loan modification claims (which is not surprising given the Decision's finding that no consideration was paid for the release of those claims) – so that there is no mechanism to sever and preserve the "approved" versus the "rejected" portions of the settlement. As the Trustee's counsel admitted, the parties to the settlement are free to treat it as a nullity. Tr. at 31-32.

In *State of New York v. Philip Morris*, 686 N.Y.S.2d 564 (N.Y. Sup. 1998), the Court was presented with a wide-ranging "Master Settlement Agreement" to settle the claims of New York State and various counties against the tobacco industry. Although various amici sought to add additional provisions to the agreement, the Court explained that it simply lacked the power to adjust the settlement's terms (and that attempting to change it by judicial decree would permit the parties to withdraw from any such modified settlement):

> The *amici curiae* seem to misconceive the court's role in applying the standard of review. They imply that the court can change the terms of the settlement. Many of the anti-smoking and public health goals that they lament the settlement has not achieved, as laudable as they are, cannot be inserted by the court. After all, ***this is a consent settlement and decree that the parties are presenting, and any change in their terms would permit one or another of the parties to withdraw***, to say nothing about what this would do to the approvals already achieved in every other state participating in this settlement. ***Quite the contrary, the court is confronted with a take-it-or-leave-it proposition. <u>I must decide to approve or reject what the parties have placed before the court</u>.***

Id. at 565-66 (emphasis added).

In *Michels v. Phoenix Home Life Mut. Ins.*, No. 95/5318, 1997 WL 1161145 (N.Y. Sup. 1997), the court, citing a number of both state and federal cases, similarly held that it lacked the power to adjust the settlement terms at the behest of objecting class members, *i.e.*, that it could not "rewrite" the settlement, and that it was not free to "delete, modify or substitute" the various provisions at issue. *Id.* at *20.

Judicial approval by the Court of the Settlement under Article 77, and particularly the judicial approval of the release that Bank of America negotiated, is a condition to its obligation to pay the $8.5 billion and otherwise be bound by the Settlement. Accordingly, unless and until the parties actually formally accept the changes suggested in the Decision before this Court enters a final judgment (or negotiate a new agreement which does not require judicial approval), the unintended consequence of the Court's entry of judgment will be that there is ***no*** Settlement.

B. This Court Should Not Enter a Judgment Which Does Not Determine the Rights of the Parties

In response to Chicago Police's argument that the Settlement has not been consummated and may well be rendered a nullity, counsel for the Institutional Investors contended that, under the Settlement Agreement, BNYM and Bank of America may wait until ***after*** final judgment is entered by this Court to decide whether they will sign a written agreement to treat the Decision as the final approval of the Article 77 Court under §2(a) of the Settlement Agreement. Tr. at 25-27. In other words, BNYM and Institutional Investors would like this Court to enter a judgment that does nothing more than advise the parties what settlement terms it would find acceptable should the parties agree to enter an agreement in the future.

However, such an advisory opinion is not, and cannot be, a final judgment under CPLR 411, because such a "judgment" would fail to determine the rights of BNYM or of the intervening objectors. *See generally Davis Alarms, Inc. v. Aftar*, 15 Misc. 3d 1142(A), at *3 (N.Y. City Civ. Ct. Queens Cty. 2007); *Barretta Realty Skyline v. Bank of Am.*, 27 Misc. 3d 142(A) (N.Y. App. Term 2010). This Court should therefore modify the Decision to provide that it does not constitute a judgment, and should similarly refuse to enter any "judgment" given that neither the Court nor the certificateholders can know whether the effect of this Court's Decision will or will not result in an actual Settlement (and hence cannot know, for example, whether the

Decision should be appealed or whether they should seek to enforce rights under the various governing agreements because the Settlement is a nullity).

CONCLUSION

For the reasons stated herein and in the motion filed by AIG, this Court should grant leave to reargue.

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Respectfully submitted,

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