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June 1, 2017

Hon. Saliann Scarpulla
Supreme Court of the State of New York
New York County
Commercial Division
60 Centre Street
New York, NY 10007

VIA NYSCEF

Re: *In re Bank of N.Y. Mellon*, No. 150973/2016: Settlement of Judgment

Dear Justice Scarpulla:

We represent Tilden Park Capital Management LP and Prosiris Capital Management, L.P. ("Tilden Park" and "Prosiris"). We write regarding the draft "counter-proposed judgment" that the institutional holders submitted on May 30. Dkt. #256-258. Because that "judgment" does not even pretend to faithfully implement the Court's decision in this case – and, in fact, is not a judgment at all, but an improper request for a stay – the Court should strike it and order Tilden Park's and Prosiris' proposed judgment entered immediately.

In its April 4 decision, the Court "direct[ed] the Trustee to distribute the Allocable Shares for the fourteen trusts using the pay first, write up second method" requested by Tilden Park and Prosiris. Dkt. #193 (opinion) at 17. The Court also directed the parties to "[s]ettle judgments." *Id.* at 18. Prosiris and Tilden Park thus offered a judgment for settlement that reflects the Court's decision and which, the Trustee has stated, it "can implement . . . if . . . entered as-is." Dkt. #254-55; Ex. A (May 23, 2017 email from the Trustee's counsel attaching draft judgments). The institutional investors' "counter-proposed judgment," by contrast, asks the Court not to implement its April 4 decision, but to hold settlement funds "in escrow until [the institutional investors'] pending Motion for Leave to Reargue and appeals are fully resolved." Dkt. #256 at 2-3. The institutional investors have not filed a motion to stay the judgment.

The institutional investors' "judgment" contrary to the Court's order is not proper. A judgment offered for signature implementing a court's decision must "reflect[ ] the decision properly." *Funk v. Barry*, 89 N.Y.2d 364, 367 (1996). It is "improper" to offer a draft judgment that is "not in conformity with the court's opinion." *Lowenkron v. Berkeley Co-op. Towers Sec. 11 Corp.*, 25 A.D.2d 656, 656 (2d Dep't 1966); *see McDermott v. City of Albany*, 309 A.D.2d 1004, 1006 (3d Dep't 2003) ("introduc[ing] . . . new theor[ies]" on a motion for settlement "is improper"). A judgment that does not conform to a court's opinion should be stricken. *See, e.g.*,

Lowenkron, 25 A.D.2d at 656-57. Because the institutional investors' submission is totally contrary to the Court's opinion, the Court should strike it in its entirety.

The "counter-proposed judgment" is also improper because it is a motion for stay in disguise. The institutional investors, as Tilden Park and Prosiris have already noted, filed a meritless motion for reargument designed merely to delay a judgment without having to post a bond. Dkt. #250 at 8-9; *see* Dkt. #231 (motion). This "judgment" now attempts to reach the same result without filing a motion that would give Tilden Park, Prosiris, or other affected certificateholders a chance to respond. But that, too, is not allowed under the law. A judgment may not be used "to grant to defendants affirmative relief though [they] made no cross motion therefor." *Lowenkron*, 25 A.D.2d at 656-57; *Registered Country Homebuilders, Inc. v. Stebbins*, 16 A.D.2d 835, 835-36 (2d Dep't 1962) (using settlement of an order as "an indirect manner of attempting to obtain other relief is disapproved"). The institutional investors' failure to move for a stay is grounds, by itself, to deny the relief they seek.

Of course, as Tilden Park and Prosiris have also noted, the institutional investors *could not* get a stay if they moved for one. Dkt. #250 at 8-9. Among other things, the Court should consider the merits on appeal if the institutional investors sought a stay, *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990) – and it is hardly likely that the Appellate Division will reverse this Court for faithfully enforcing the plain text of a contract between sophisticated commercial parties. Further, a stay would deeply prejudice Tilden Park, Prosiris, and all other certificateholders in the "senior support" classes because the delay would cause *millions of dollars* each month to transfer, at their expense, to the most senior bonds – the very bonds held by the institutional investors. Dkt. #250 at 8; Dkt. #124 (Smith Aff.) ¶49; *Da Silva*, 76 N.Y.2d at 443 n.4 (courts should consider "the relative hardships that would result from granting (or denying) a stay"). Because the institutional investors' appeal and motion for reargument are both "meritless" and "taken primarily for the purpose of delay," any request they make for a stay "will not be granted." *Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep't 1987).

The Court should not indulge the institutional investors' attempts at delay. We therefore respectfully request that the Court strike their proposed "counter-proposed judgment" and sign Tilden Park's and Prosiris' proposed judgment without delay. We further request that the Court make clear that any motion to stay the judgment will be denied.

Respectfully submitted,

/s/ Steven F. Molo
Steven F. Molo

CC: All counsel of record via NYSCEF

Exhibit A

From: Ware, Michael O.
To: Dave Burnett (Quinn Emanuel); Jordan Goldstein (Quinn Emanuel); Joshua Margolin (Quinn Emanuel); John Lundin (Schlam Stone); Bob Scheef (McKool); Gayle Klein (McKool); Madden, Robert (EXTERNAL CONTACT); Sheeren, David (EXTERNAL CONTACT); Patrick, Kathy (EXTERNAL CONTACT); Ken Warner (Warner Partners); Ellis, Justin; Molo, Steven; Isaac Gradman (Perry Johnson); Mike Ledley (Wollmuth Maher)
Cc: Kravitt, Jason H. P.; Ingber, Matthew D.; Houpt, Christopher J.
Subject: Countrywide A77.2 - forms of judgment [MB-AME.FID222315]
Date: Tuesday, May 23, 2017 4:49:56 PM
Attachments: 17-05-23 draft j - cwabs 2006-12.DOCX
17-05-23 draft j - 14 trusts.DOCX
17-05-23 cwabs changes from 3 trust judgment.pdf
17-05-23 fourteen-trust changes cwabs 2006-12.pdf

To all counsel in the Article 77 on the distribution of the Countrywide settlement

Here are forms of judgment for CWABS 2006-12 and for the Fourteen Trusts. The key paragraph in each was worked up last year with the relevant counsel; everything else should be largely familiar from last year's partial judgments.

Also attached are two blacklines that should facilitate review. The first shows changes in the CWABS 2006-12 document from the three-trust judgment entered in November 2016; the second shows differences in the Fourteen Trust document from the CWABS 2006-12 draft.

It's customary for the prevailing party to serve notice of settlement ("the undersigned will present for settlement and signature" etc.), but anybody can do it. Historically these have been made returnable before the court, but I heard somebody say recently that they're now supposed to go to Room 130; check with your managing clerk or attorney. Be mindful of the June 5 deadline under Rule 202.48

If you see some small error (say in how your clients are named), I suggest contacting the relevant prevailing party or replying-to-all.

These documents are, I believe, faithful to the order – and I know that the Trustee can implement them if they are entered as-is. If you contemplate tinkering with the machinery, either on settlement or counter-settlement, I invite you to contact me first so that the Trustee may confirm that the language you contemplate would lead to a judgment the Trustee is able to implement.

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