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: Kapnick, J.

CONSOLIDATED REPLY IN OPPOSITION TO THE PROPOSED SETTLEMENT

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INTRODUCTION

The settlement proponents attempt to conjure up dim projections of a bleak future in which their prepackaged settlement is not approved in whole. Certificateholders will get nothing. Bank of America and Countrywide will get away with the massive damage they have caused to the secondary mortgage market. BNYM and all other big banks will shut down their trust business rather than comply with their duties to investors.

This all ignores one fundamental reality: Bank of America wants and needs to resolve its putback and servicing liabilities at least as much as certificateholders do. As is well-documented, the Inside Institutional Investors only have sufficient voting rights in just over 1/3 of the trusts covered by the settlement. The proposed settlement came to cover the remaining 2/3 of Countrywide trusts *at the request of Bank of America*, not through strong-armed negotiations by the Inside Institutional Investors (and certainly not by the passive Trustee). Bank of America is not the reluctant defendant who was dragged to the settlement table and had every last penny extracted from its pockets. Rather, Bank of America seized the opportunity to put this massive liability for its Countrywide acquisition and its own servicing problems behind it in one fell swoop, and found willing partners in the Trustee and the investor group. A defendant who is willing to increase the size of the settlement it is agreeing to by over 150% is not one who is going to walk away merely because it is told that its sweetheart deal is inadequate.

BNYM has not requested an instruction in this matter. It has already taken all of the actions it now asks this Court to bless. If it had wanted instruction, the Trustee could (and, Intervenors assert, should) have presented the issues it faced *before* it agreed to settle with Bank of America. This Court should not approve this settlement or the broad findings of the PFOJ

unless and until the parties return to the bargaining table. The parties remain motivated to put these claims to rest. Such a direction from the Court would not unravel the deal. Instead, this will finally create the unity of interest that should have existed from the outset, with *all* interested investors seeking to achieve the best possible resolution of the claims in the proposed settlement.

ARGUMENT

I. The Trustee Acted in Its Own Interests at the Expense of the Certificateholders

Having lost its argument that it does not owe certificateholders any duty to avoid conflicts of interest,[1] the Trustee now argues that conflicts do not matter. The Trustee's new argument that "bad faith, not conflict of interest, is the standard" does not withstand serious scrutiny.[2] Even BNYM's own expert realizes that "allegations of conflict are particularly important to address because they affect how much deference should be accorded the Trustee in its decision to enter into the Settlement."[3]

Equally unconvincing is the Trustee's continued reliance on case law concerning indenture trustees to argue that it is not subject to the fiduciary duty of loyalty.[4] First, this position is contrary to New York law. *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 11 (1st Dep't 1995). As discussed in the Joint Opposition and unrefuted by BNYM in its response, BNYM's own trust law expert recognizes that BNYM is a trustee who owes fiduciary duties—so many duties, in fact, that it would take "many years" to list them all.[5] Second, even if BNYM carries limited duties in the ordinary course of affairs when it is merely distributing funds

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[1] *Knights of Columbus v. Bank of New York Mellon*, Index No. 651442/2011, slip op. at 15 n.6 (N.Y. Sup. Ct. Apr. 30, 2013).
[2] Doc. No. 793 at 8.
[3] Doc. No. 541 (Fischel Report) ¶ 27.
[4] Doc. No. 793 at 6-7.
[5] Ex. 132 (Langbein Dep.) at 103:23-104:3; Doc. No. 588 (Joint Opp'n) at 28-30.

according to the terms of the PSAs, here its actions and decisions went far beyond the plain terms of the agreements.[6] The Trustee decided to negotiate and settle the claims of its beneficiaries, conduct that is quintessentially fiduciary, and is subject to the duty of loyalty. Nor is BNYM correct when it argues that the PSAs excuse it from its fiduciary duties.[7] Nothing in the PSAs says that the Trustee is relieved of a fiduciary duty of loyalty when it undertakes to settle billions of dollars in claims beneficially owned by the certificateholders. This Court has affirmed that the Trustee has a nonwaivable duty to avoid conflicts.

The Court should also reject BNYM's attempt to shuffle under the rug its relationship with Bank of America.[8] BNYM can hardly claim, and is notably silent on this issue in its Response, that "private-label mortgage securitizations" are the only relationship that it had with Bank of America at the time the settlement was negotiated. Moreover, as Professor Levitin elaborates in his report, there are many reasons that BNYM had the incentive to protect Bank of America's interests at the expense of the interests of the certificateholders.[9] These motivations were undeniably present in 2010 and 2011 when the Trustee assumed the responsibility for settling the claims covering $100 billion dollars worth of MBS losses and then returned to the passive role to which it was more accustomed.

Finally, BNYM unpersuasively attempts to downplay the evidence that its entry into the forbearance agreement to purportedly avoid an Event of Default, avoid the prudent person standard, and avoid giving mandatory notice to certificateholders was a conflicted and self-interested action at the expense of the certificateholders. BNYM contends that an Event of

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[6] Ex. 133 (Frankel Report) at 8-12.
[7] Doc. No. 793 at 7-8.
[8] *Id.* at 10-12.
[9] Ex. 134 (Levitin Report) ¶¶ 52-56.

Default makes no difference, because regardless it must act reasonably and in good faith.[10] The premise that nothing changes upon an Event of Default is rebutted by the plain language of the PSAs, which state that upon an Event of Default the prudent person standard applies to the Trustee's conduct.[11] [REDACTED]

[REDACTED],[12] as well as fundamental trust law that unequivocally recognizes that fiduciary duties are heightened after a default. *See Beck*, 218 A.D.2d at 12.

As to whether the forbearance agreement (and the related lack of notice in exchange for an indemnity to BNYM) was at the expense of the certificateholders, BNYM ignores that its purported stopping of an Event of Default is its justification for not providing certificateholders with the notice of an Event of Default that is *mandatory* under § 7.03(b) of the PSAs. An Event of Default, which happens after the 60-day cure period runs without a cure where such cure period is applicable,[13] is the gateway to the certificateholders' right to sue under § 10.08 (once the other procedural requirements of that section are satisfied). Receiving notice from the Trustee of when an Event of Default has occurred allows certificateholders the opportunity to evaluate whether they want to try to invoke the rights of § 10.08. There is no provision in the PSAs that allows the Trustee unilaterally to discard this opportunity.

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[10] Doc. No. 793 at 13.
[11] Ex. 32 to Joint Opp'n § 8.01.
[12] Ex. 36 to Joint Opp'n (Kravitt Dep.) at 201:8-23.
[13] Section 7.01(ii) of the PSA provides that the 60 day cure period does not apply to defaults relating to "initial delivery of the Mortgage File for Delay Delivery Mortgage Loans nor the failure to substitute or repurchase in lieu thereof." Ex. 32 to Joint Opp'n.

II. The Trustee's Conduct Throughout the Negotiations Was Unreasonable

A. The Reasonableness of the Settlement Is Squarely Before the Court

The Trustee concedes in its response brief that whether it acted reasonably is a proper question for the fact finder.[14] However, the Trustee continues to argue that the reasonableness of the settlement that the Trustee entered into and which is the very subject matter of this dispute is not a proper question for the Court.[15]

The Trustee's position makes no sense. This proceeding concerns a proposed settlement signed by the Trustee. One cannot evaluate the reasonableness of the Trustee while ignoring the proposed settlement. Therefore, the reasonableness of the settlement agreement is one of several determinations the fact finder must make.[16]

B. The Court Should Not Defer to a Passive Trustee that Unreasonably Refused to be the Voice of its Certificateholders in the Settlement Negotiations

The settlement proponents are desperate for a deferential standard of review that keeps the Court at arms-length when reviewing the Trustee's conduct. This makes sense from the settlement proponents' perspective because any meaningful inquiry into the Trustee's conduct reveals that the Trustee failed to satisfy its duty of care—a duty it admits it has.[17] BNYM's latest rendition of its attempt to constrict judicial scrutiny is its invocation of the business judgment rule. BNYM argues that the business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment[.]"[18] However, as even BNYM recognizes, the business judgment rule has been developed in the context of

[14] *See* Doc. No. 793 at 4.
[15] *Id.*
[16] *See also* Doc. No. 588 at 11-12.
[17] Doc. No. 793 at 55 ("The Trustee has a duty of care.").
[18] *Id.* at 43 (quotations omitted).

corporate directors.[19] BNYM's attempt to shoehorn its own RMBS trusteeship into the limited protections afforded under the business judgment rule fails.

First, the business judgment analogy is inapt because the rule is premised, "at least in part," on the "recognition that courts are ill equipped . . . to evaluate what are and must be essentially business judgments," and the reasoning that the "responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility." *Auerbach v. Bennet*, 47 N.Y.2d 619, 630-31 (1979). As to the present matter—the settlement of legal claims—it is *the court system* that is equipped to evaluate and resolve the disputed factual and legal issues. In stark contrast, an RMBS trustee—unlike directors in the corporate context—is not peculiarly qualified to determine whether and on what terms to litigate and settle. RMBS Trustees perform administrative functions and are uniquely qualified to administer only a limited set of tasks.[20] Once a trustee goes beyond that narrow set of administrative tasks (as it did here), it is well beyond its area of expertise. The Court should not defer to the Trustee's judgment because the Trustee has no particular expertise that merits deference.

Second, the business judgment rule applies "only if [the directors] possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment." *Auerbach*, 47 N.Y.2d at 631. Here, for the reasons set forth in this brief and prior briefing, the Trustee was both conflicted and stands in dual relation with Bank of America, precluding an unprejudicial exercise of judgment.[21] Even if the Trustee is owed some deference

[19] *Id.* at 44.
[20] Ex. 134 (Levitin Report) ¶¶ 47-51.
[21] As evidence that it is willing to sue its clients, the Trustee points to *J.P. Mortgage Acquisition Trust v. WMC Mortgage, LLC*, Index No. 654464/2012, in which it sued another securitization sponsor. *See* Ex.

(and under these circumstances it is not), any such deference dissipates here, where the Trustee acted unreasonably and failed to devote the appropriate level of care concerning the claims at issue. For example, it is undisputed that BNYM never [REDACTED] shows an utter lack of care in handling the claims. In a last-ditch effort to argue that it did investigate the claims, BNYM cites to Mr. Bailey's testimony, [REDACTED][22] That testimony does not show—as BNYM contends—that the Trustee investigated [REDACTED]. Instead, it proves the very point the objectors have made: that the Trustee *did not* investigate the claims and instead went straight to settlement negotiations (it was only *after* negotiations had ensued, months after, that the Trustee decided to hire advisors).

BNYM defends its haste to negotiate by arguing that the negotiations "took place against the backdrop of threatened litigation."[23] However, even if the Trustee believed it could enter into settlement discussions right away because it could "fall back" on litigation, it should have done so with care. It did not. The Trustee did not investigate or value the claims at issue *before* settlement negotiations, it did not draft a complaint to exert leverage over BofA, and it did not

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72 to Joint Opp'n. However, nothing about BNYM's willingness to sue WMC refutes the fact that it remains unwilling to sue Bank of America. What the WMC case proves is that when willing to do so, BNYM knows how to use its power to obtain and review loan files, hire litigation counsel, and file a lawsuit against a recalcitrant loan seller. Its failure to do so here demonstrates the favored position BofA holds, particularly because BNYM has a full indemnity for all settlement activities and therefore a blank check to investigate and prosecute the claims. BNYM's conflicted position and dual relation vitiates any deference that might be afforded to it *if* the business judgment rule applied here, which it does not.

[22] Doc. No. 793 at 45.

[23] *Id.* at 48.

hire experts to actually develop or support the Trusts' claims. The Trustee allowed the Inside Institutional Investors to negotiate and extinguish Trust claims before it even knew, and in fact without ever determining: 1) how much those claims were worth, 2) the likelihood of success on those claims, and 3) the various sources of potential recovery for the Covered Trusts. Either the Trustee was ill-prepared to evaluate the Inside Institutional Investors' negotiations, or it came to the table unwilling to maximize recovery for the Covered Trusts. Either way, it violated its duty of care.

Further, BNYM's description of its own role in the negotiations is telling. It uses terms like "involved," and states the Trustee [REDACTED]" "participated," "[REDACTED][24] BNYM never contends that it itself engaged in hard-fought or arms-length negotiations, because it did not. Instead, its counsel writes that he wanted only to be able to say that the Trustee "watched" and to say that the negotiations were "clearly hard fought" and "arms length."[25]

BNYM cannot seriously contend it was anything more than a passive Trustee, so it now challenges objectors to articulate why that matters.[26] It matters because—as both the Inside Institutional Investors and the Trustee itself point out—certificateholders speak through the Trustee. The Trustee is their voice.[27] BNYM failed to speak up on behalf of certificateholders when it mattered most.

Contrary to PSA §§ 10.01 and 10.08, BNYM allowed a small group of self-interested certificateholders to commandeer the settlement negotiations. It is undisputed that the Inside

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[24] *Id.* at 52-53.
[25] Ex. 83 to Joint Opp'n.
[26] Doc. No. 793 at 51.
[27] *See id.* at 56; Doc. No. 763 at 4-9.

Institutional Investors, not the Trustee, negotiated key terms like the Settlement Amount. BNYM had a duty of care to each individual trust and had to be a voice for all investors (particularly those not represented by the Inside Institutional Investors) but it was not. It allowed the Inside Institutional Investors to speak for all of the Covered Trusts. Nothing in the PSAs allowed the Trustee to delegate its powers in this regard.

The Trustee then failed to perform any individualized analysis to determine whether the result was adequate with respect to each individual trust. In its latest brief, BNYM attempts to defend its failure to perform a trust-by-trust analysis by relying on the trust-by-trust allocation provision in paragraph 3(c) of the Settlement Agreement. Allocation—as this Court is aware—occurs *after* the settlement is approved and payment is made. It has nothing to do with the Trustee's pre-settlement analysis of whether or not the full amount is fair and adequate with respect to each Trust. If anything, the allocation method merely highlights the fact that the Trustee *could* employ someone to evaluate the losses and expected losses to *each* Covered Trust, but failed to do so when purporting to calculate the total repurchase liability. Furthermore, BNYM's claim that no one has challenged the allocation method is wrong. As discussed in Prof. Levitin's expert report, basing the allocation methodology on losses ignores the differences in collateral and risk levels that the certificateholders in the various trusts assumed when they made their investments.[28]

BNYM's lack of care was evident at every turn. Among other things, it failed to participate in settlement negotiations in a meaningful way; failed to provide notice of the settlement activities to investors; failed to hire experts in a way that added value to the Covered Trusts' claims (and instead attempted to devalue the claims with opinions that plainly favored

[28] Ex. 134 (Levitin Report) at ¶¶ 76-87; Doc. No. 588 (Joint Opp'n) at 47, n. 190.

BofA's legal positions); failed to demand loan files; and in instances where there was some uncertainty about a particular course of action, failed to seek judicial instruction, though it now touts its ability to rely on such instruction and guidance.[29]

III. The Settlement Is not Simply an Up Or Down Decision for the Court

The Court is not required to either approve or disapprove the settlement in total. The settlement proponents themselves recognized that the Court can modify the proposed settlement agreement and the proposed final order and judgment. Section 2(a) of the settlement agreement provides that "if the Settlement Court modifies Subparagraphs 3(d)(i), (ii), or (iii) [of the settlement agreement] . . . that modification shall not be considered to be a material change to the form of [the PFOJ]." This provision is wholly inconsistent with BNYM's view that the Court cannot modify any portion of the settlement agreement. Furthermore, as the Trustee has stated several times, the PFOJ is only a proposal—the Court need not enter all, or any, of that order.[30] Therefore, the Court may modify both the settlement agreement itself as well as the PFOJ.

The Trustee chose to proceed by seeking judicial approval of the settlement and its conduct—including the elaborate wish list contained in the PFOJ—rather than simply exercising its judgment and living with the consequence. In doing so, the Trustee submitted itself to this Court's jurisdiction. It cannot now simply pretend that it is not subject to this Court's supervision and direction. The cases cited by BNYM, none of which are Article 77 cases, fail to establish BNYM's broader proposition that this Court in this unparalleled proceeding cannot

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[29] BNYM's failure to demand loan files is particularly egregious because the indemnity agreement with Bank of America gave BNYM a blank check to investigate the claims. BNYM's complaint about the cost of loan file review thus has no merit. BNYM's complaints regarding the time it would take to conduct a review are similarly meritless. *See* Ex. 120 to Consolidated Resp. (Cowan Report) at 4-5; Ex. 135 (Cowan Rebuttal Report) at 18-19; Ex. 136 (Cowan Dep.) at 186:19-187:21.
[30] Ex. 12 to Joint Opp'n (Feb. 7, 2013 Hearing Tr.) at 65:14-25.

give any direction to the Trustee as to what an acceptable settlement would entail.[31] This remarkable position also ignores that permissible uses of Article 77 are "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust." *In re Greene*, 451 N.Y.S.2d 741, 743 (1st Dep't 1982). In this Article 77 proceeding, the Court may order the parties to conduct mediation or direct the Trustee to engage in an appropriate process that would merit the Court's approval.

IV. BNYM Has Not Met And Cannot Meet Its Burden of Establishing the Findings Requested in the PFOJ

As BNYM concedes, the Trustee has the burden to prove each of the factual findings that it has requested from the Court, just as a plaintiff would have had to prove all facts in a complaint.[32] The Trustee has not met its burden to prove each of the requested findings in the PFOJ. Several of the PFOJ findings requested by BNYM should be rejected based on the evidence in the record, the evidence presented at trial, and the evidence set forth in the Joint Memorandum of Law in Opposition to the Proposed Settlement (Doc. No. 588) and the Consolidated Response to Statements in Support of the Proposed Settlement (Doc. No. 771). Instead, the fact finder should find, among other things, that:

- **The Settlement Agreement is not the result of factual and legal investigation by the Trustee (¶ h).**

[31] Contrary to BNYM's assertions, the cases cited actually *support* this Court providing guidance. *See, e.g.*, *City Bank Farmers' Trust Co. v. Smith*, 263 N.Y. 292, 295 (1934) (Courts can control a Trustee's actions by instructions or advice for the Trustee's "protection and the discharge of his trust."); *In re Shiel's Will*, 120 N.Y.S.2d 632, 636 (Sur. Ct. Westchester Cnty. 1953) (Court can control actions of a Trustee when there is evidence of "an abuse of discretion, bad faith, arbitrary action or fraud."); *In re Lykes' Estate*, 305 A.2d 684, 686-87 (N.H. 1973) (If "specific questions of doubt or of conflicting claims should arise later…further instruction will be given.") (quotations omitted).

[32] Doc. No. 793 at 22 (agreeing that the Trustee has to prove all the proposed findings in the PFOJ and analogizing itself to a plaintiff).

- **The Trustee did not appropriately evaluate the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled. The Trustee did not appropriately consider the claims made and positions presented by the Institutional Investors, Bank of America, and Countrywide relating to the Trust Released Claims in considering whether to enter into the Settlement Agreement (¶ i).**

- **The Trustee's deliberations did not appropriately focus on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries (¶ j).**

- **The Trustee did not act in good in good faith, within its discretion, or within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts (¶ k).**

- **The settlement negotiations were not arms' length (¶ j).**

- **The Court cannot approve the actions of the Trustee in entering into the Settlement Agreement in all respects (¶ l).**

Paragraph (l) of the PFOJ is perhaps the most overreaching of BNYM's proposed findings. BNYM has not, and cannot, meet its burden to show that all of its actions, both known and currently unknown, should be approved in all respects. Furthermore, approval of the Trustee's conduct in this case creates dangerous precedent for how future trustees will treat their beneficiaries. Approval of BNYM's actions would entail approval of a Trustee's attempts to obtain an expansive release for all of its own conduct; a Trustee's decision to forbear on an event of default to the detriment of certificateholders and without any support in the governing documents; a Trustee's negotiation of an indemnity for its own benefit at the expense of notice that would benefit certificateholders; a Trustee's failure to provide any recovery for the servicing and document exception claims while simultaneously agreeing to release certificateholders' claims on those very issues; a Trustee's failure to maximize its leverage against the liable parties; and a Trustee's attempts to circumvent the PSAs' strict standards for amending the PSAs. For

these reasons, the Court should reject this finding and reject BNYM's request for a release of all claims related to its settlement conduct.

- **BNYM is not entitled to the release it seeks (¶ p).**

BNYM engages in linguistic gymnastics to avoid the conclusion that the Trustee fought to protect itself from future claims related to its settlement conduct. The PFOJ seeks this release from multiple angles. First, it includes findings of fact and conclusions of law that would establish res judicata on all issues that could be raised in claims against the Trustee for settlement-related conduct. Second, it includes a specific paragraph that releases any claim "arising from or in connection with the Trustee's entry into the Settlement, including but not limited to the Trustee's participation in negotiations regarding the Settlement, the Trustee's analysis of the Settlement, the filing by the Trustee of any petition in connection with the Settlement, the provision of notices concerning the Settlement to Potentially Interested Persons, and any further actions by the Trustee in support of the Settlement[.]" BNYM's contention that its requested finding is not in effect seeking a release of claims against it asks this Court to ignore the reality of what it is attempting to do here.

As demonstrated above and in the filed objections, BNYM has failed to meet its burden to prove it is entitled to the PFOJ findings. Consequently, the Court should not enter the broad release included in the PFOJ for the Trustee's settlement-related conduct.

V. The Court Cannot Have Any Confidence that the Proposed Settlement Fairly Resolves the Certificateholders' Claims

BNYM argues that "if the Court finds that the Trustee entered into the right settlement for the wrong reasons, the Settlement should still be approved."[33] Based on the record established by BNYM and its so-called experts, however, the Court can have no confidence that this settlement is the right settlement. In fact, all evidence available to the Court today makes clear that this is the wrong settlement entered into for the wrong reasons.

The reasons demonstrating this settlement's inadequacy are detailed in the prior briefing: the settlement amount is based on unreasonable assumptions that inure entirely to the benefit of BofA; the legal "haircuts" that BNYM took to further depress the settlement amount were unreasonable at the time and are now completely unjustified in light of recent case law; and the so-called servicing "improvements" and document cures either provide no benefit to which the trusts are not already entitled, or even limit the obligations of BofA as spelled out in the PSAs.[34]

The settlement proponents also continue to attack the objecting investors for not developing an alternate settlement amount. This attack brazenly disregards that the settlement proponents steadfastly denied the objectors the information they would have needed to conduct such an analysis. In any event, the objecting investors have presented evidence that demonstrates the inadequacy of the settlement amount.[35]

And make no mistake—the claims being released in this settlement are the investors' claims, not the Trustee's.[36] It is a fundamental principle of trust law that while the legal title of trust property, including causes of action, belongs to the trustee, equitable title for the trust

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[33] Doc. No. 793 at 5.
[34] Doc. No. 588 at 49-70.
[35] *See id.*; *see also* Doc. No. 771 (Consolidated Resp.) at 8-16.
[36] *Cf.* Doc. No. 763 at 4.

property belongs to the investors.[37] *See, e.g.*, Restatement (Third) of Trusts § 42 cmt. a (recognizing "the basic concept that the beneficiaries hold the beneficial interests (or 'equitable title') in the trust property, while the trustee (ordinarily) holds 'bare' legal title to the property"). The Trustee is given legal title to the trust property only to serve the interests of the certificateholders.[38] Indeed, the very existence of this Article 77 proceeding underscores the point. If the Trustee truly owned the claims, it could settle and release those claims at whatever price it wanted without asking the Court for approval. Instead, because the Trustee is obligated to the certificateholders and could be held liable for failing to act in their interests when it negotiated the settlement and release of their claims, the Trustee comes to Court in an attempt to preemptively bar such a suit.

The Trustee's vigorous defense of its settlement in this Article 77 proceeding is a continuation of the Trustee's failure to act in the best interests of its certificateholders. In light of the evidence unearthed in discovery in this matter and considering the new court rulings and settlements that have been announced since June 28, 2011, BNYM should be withdrawing its petition to approve this proposed settlement and should use the substantial resources available to it to negotiate a truly fair, adequate, and reasonable deal on behalf of *all* investors in the Covered Trusts. If, during that open and collaborative process, BNYM needs the guidance and direction of the Court, it can and should seek such guidance before it embarks on any step that does not

[37] BNYM's own trust expert concedes that the certificateholders are the beneficial owners. Ex. 132 (Langbein Dep.) at 163:12-164:1 ("when a fiduciary owns something for the benefit of somebody else, there are, unless other provisions allocate the responsibility elsewhere, the default is that you have duties of prudence and loyalty to the beneficial owners because your ownership here is merely legal ownership, not equitable ownership. The equitable title, so to speak, is in the hands of your beneficiaries.").
[38] Ex. 137 (Frankel Rebuttal Report) at 3.

take into consideration the interests of all certificateholders. The undersigned parties stand ready to actively participate in that process.

CONCLUSION

For the reasons set forth above, as well as those set forth in the Joint Opposition and Consolidated Response briefs, the undersigned parties request that this Court not approve the settlement as it currently stands.

DATED: May 20, 2013

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