SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

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.

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT PRECLUDE USE OF DISCOVERY AND PLEADINGS FROM OTHER IRRELEVANT ACTIONS

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INTRODUCTION

This Article 77 proceeding has been pending for nearly two years. As the Court has repeatedly emphasized, this is a proceeding to approve a *settlement.* It is not, despite the Objectors' repeated efforts to make it so, a litigation of the underlying claims that have been settled. This is not a trial against Countrywide. This is not a trial against Bank of America. This is not a trial of claims against the Trustee for its pre-Settlement conduct. The only issues before the Court are the reasonableness of the Trustee's conduct in agreeing to the Settlement and—should the Court conclude that the Trustee was conflicted—the reasonableness of the Settlement itself.[1] Nothing else is relevant. The Court should reject the Objectors' latest effort to convert this Article 77 proceeding into something it is not: a *plenary* proceeding in which the Objectors evidently plan to introduce evidence not just of Countrywide's potential liability to the Covered Trusts (ignoring the Settlement) but also of the liability of every other RMBS originator, to every other RMBS trust, in any case, brought anywhere in the country, at any time.

I. BACKGROUND

The Objectors first sought to remove this case to federal court. The Second Circuit rejected that attempt. *See BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 179 (2d Cir. 2012). Once back in this Court, the Objectors sought to convert this special proceeding to a plenary action. The Court rejected that attempt. *See* Mot. Seq. 23. Most recently, the Objectors sought to turn this equitable proceeding into a jury trial. The Court rejected that attempt as well. *See* Mot. Seq. 35. The Court has instructed the Objectors repeatedly that this is not a litigation of the Covered Trusts' underlying claims against Countrywide, it is a settlement—it will be decided on its *own* merits, not on the merits of claims

[1] *See, e.g.*, Obj. of Cranberry Park, Doc. 719 at 2 ("[T]he essential issue in this proceeding is whether the Trustee by entering into the Proposed Settlement has acted within the bounds of a reasonable judgment." (internal quotations omitted)); Tr. 6/14/2012 at 19 (Reilly, D.) (question for the Court is whether "the settlement is fair, and reasonable, and the process was proper").

brought in other litigations, because each of those cases is "a different case." Tr. 5/8/2012 at 85-86 (Kapnick, J.). Yet the exhibit list provided to the settlement proponents on May 24, 2013—just days before trial—makes clear that the Objectors again seek to expand the scope of this proceeding. Like each of the Objectors' prior attempts to recast this proceeding, the Objectors' newest gambit must fail.

In their exhibit list, the Objectors have indicated that they seek to introduce into evidence in this case several irrelevant categories of documents from other cases, most of it hearsay, including, among other things:

- Potentially tens of thousands of unspecified "[p]leadings, orders, exhibits, and other papers filed in" *101 other cases related in some way to mortgage-backed securities*—most from cases that do not involve the Covered Trusts, *any* of the parties to this case, or even Countrywide or Bank of America.[2] Ingber Affirmation, Ex. 1 (Exhibit List Excerpts) (*e.g.*, R-1169, R-1170, R-1171).

- Unspecified "[p]leadings, orders, exhibits, and other papers filed in any other cases where an RMBS loan file review was conducted." *Id.* at 24.

- Unspecified "[p]leadings, orders, exhibits, and other papers filed in any other cases in which Countrywide or Bank of America is a Defendant for liabilities related to breaches of representations and warranties or servicing in RMBS."[3] *Id.*

- Unspecified "[t]ranscripts of any testimony given under oath by any witness appearing in this proceeding," whether in this case or otherwise. *Id.*

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[2] On May 28, Objectors supplemented their exhibit list to add nearly one hundred identified documents from these other cases, without narrowing their general designations and while adding additional generalized designations of irrelevant cases. Other than a small number of identified documents, Objectors only provided sweeping designations of the *entire record* from these other cases. The exhibit list makes clear that Objectors intend to offer in evidence unidentified hearsay documents concerning Bear Stearns, Morgan Stanley, Credit Suisse, EMC Mortgage, and JPMorgan, among numerous others.

[3] In addition, Objectors added on May 28 a designation for "all documents" produced under the subpoena that they served on William Frey of Greenwich Financial Services. Ingber Affirmation, Ex. 1 at 24. That subpoena is a clear end-run of the discovery process in this case and settlement proponents intend to object to the documents produced under that subpoena for a number of reasons. As relevant here, this vague proffer should be stricken to the extent that it is intended to introduce documents from *Greenwich Financial Services Distressed Mortgage Fund 3 v. Countrywide Financial Corp.*, Index No. 650474/2008 (Sup. Ct. N.Y. Cnty.).

- Irrelevant documents from other, unrelated litigations by monoline insurers, securities plaintiffs, and others against Countrywide, Bank of America, and/or the Trustee, including discovery produced in MBIA's case against Countrywide and Bank of America before Justice Bransten, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/08 (Sup. Ct. N.Y. Cnty.), and the Scott + Scott firm's direct liability case against The Bank of New York Mellon, *The Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago v. The Bank of New York Mellon*, No. 1:11-cv-05459 (WHP) (S.D.N.Y.). *See id.* (*e.g.*, R-663-70; R-1364-75).

- Voluminous deposition testimony from other litigations, including entire deposition transcripts from *MBIA* and excerpts from *Policemen's Annuity*. *See id.* (*e.g.*, R-435, 452-54, 458-60, 1340, 1347, 1359, 1376, 1383).

These materials from different litigations involving different trusts (and in many cases different issuers, trustees, and loan originators) have nothing to do with the negotiation or terms of the Settlement. They also shed no light on the reasonableness of the Trustee's decision to enter into *this Settlement* for the benefit of certificateholders in *these* Trusts.[4]

None of the documents that appeared on the Objectors' exhibit list were either seriously pursued or produced by the Objectors in discovery. The Objectors steadfastly have *refused* to produce any documents in discovery in this case *other than their holdings*. Having refused to produce these documents, the Objectors should not now be permitted to ambush the parties and the Court with extraneous documents, from extraneous lawsuits, that have nothing to do with this Settlement or the limited issues to be resolved in this summary, Article 77 hearing.

Finally, the Objectors' proposed introduction of depositions from other cases into this case is prohibited by Rules 3117(a) and (c) of the C.P.L.R.

[4] The vast majority of the proffered materials, to the extent that it is clear what material Objectors even have in mind, also lacks foundation, is inadmissible hearsay, and likely cannot be authenticated by any witness. The settlement proponents reserve the right to raise those and any other objections not covered in this motion on a document-by-document basis if the Court determines not to exclude—as we urge it should—all of these irrelevant materials as a threshold matter.

II. THE COURT SHOULD PROHIBIT THE USE OF IRRELEVANT HEARSAY DOCUMENTS FROM OTHER CASES NOT PURSUED IN DISCOVERY IN THIS CASE.

A. The proffered documents are not relevant to this proceeding.

It is both the law of the land and the law of this case that a proceeding to approve a settlement is no place to litigate the merits of the settled claims. *Cf.* Tr. 5/8/12 at 86 (Kapnick, J.) ("This is an approval of a settlement[.]"). Even in class-action settlement hearings, which—unlike this proceeding—require judicial inquiry into the *underlying* fairness of a settlement, discovery into the merits of the underlying settled claims is routinely forbidden.[5] This is because "[t]he settlement hearing is not a trial or a rehearsal of the trial," and "[i]t does not attempt to decide the merits of the controversy." *Robertson v. Nat'l Basketball Ass'n*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (internal quotations omitted). Surely, "it would be inconsistent with the salutary purposes of settlement to conduct a full trial in order to avoid one." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 834 (2d Cir. 1986). Trying the settled claims would "emasculate the very purpose for which settlements are made." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (internal quotations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

The Court has *repeatedly* recognized that this proceeding is *not* a litigation of the underlying settled claims. Tr. 5/8/2012 at 91 (Kapnick, J.) ("If I have to start reading all of those underlying files or looking at them . . . I think you will turn this into what this isn't and . . . maybe one day you will find out this was a good settlement and it won't be available to your clients or anybody else . . . . So I don't want to turn this into what it isn't."); *see also*

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[5] *See, e.g., Grinnell Corp.*, 495 F.2d at 462 (2d Cir. 1974); *In re Bausch & Lomb, Inc. Sec. Litig.*, 183 F.R.D. 78, 81 (W.D.N.Y. 1998) ("[P]art of the reason that settlements are looked upon with favor is that they allow the parties to avoid engaging in protracted, costly discovery."); *Ginsburg v. Phila. Stock Exch., Inc.*, 2007 WL 2982238, at *2 (Del. Ch. Oct. 9, 2007) ("Settling—rather than fully litigating—a dispute offers both parties the distinct advantage of avoiding costly discovery.").

BlackRock, 673 F.3d at 179 (rejecting former-Objector Walnut Place's attempt, *in this case*, to "recast the . . . proceeding (which concerns a trustee's rights, duties and obligations) into the underlying claim resolved in the Settlement Agreement"). That this settlement approval proceeding should not become a vehicle for litigating the underlying claims makes perfect sense. Otherwise, as the Court has recognized, what would be the point of settling? *See, e.g.*, Tr. 5/8/12 at 69-70 (Kapnick, J.) ("Judge Bransten's case is a different case . . . . If we were going to look through all of these underlying loan modifications—these loan files, what was the point of settling this case?"); Tr. 4/12/2013 at 118-19 (Kapnick, J.) (responding to statement by Mr. Loeser that "everybody else" reunderwrites loans: "That's not in this kind of case, that's in a different kind of case. . . . That's what they are trying to avoid doing, that will take forever. That's exactly why they settled it . . . .").

This is not the first time the Objectors have tried to import into this case the issues and the record from other cases. They have made constant references to *MBIA v. Countrywide*. Each time, the Court's answer has been clear: "[T]hat is a different case. That is a lawsuit. This is an approval of a settlement . . . ." Tr. 5/8/2012 at 86 (Kapnick, J.). MBIA *was* a "different case," a nearly five-year *litigation* of claims,[6] a result the Trustee settled precisely in order to avoid. Moreover, those claims involved different legal theories (such as fraud), different contract rights (MBIA is a monoline insurer, not a Trustee or an investor) and different trusts. Inserting that case's voluminous record (or, as the Objectors would have it, a one-sided view of that record) into this proceeding would not aid the Court's assessment of the issue before it here: the reasonableness of the Trustee's decision to enter into the Settlement of contract claims for *these* Trusts.

[6] Notably, at the time *MBIA* was settled—almost five years after it was filed—Justice Bransten had, on the most recent of successive summary judgment motions, refused to order repurchase of a single loan before trial and had denied MBIA's summary judgment motion on the key issue of successor liability.

Policemen's Annuity is also a "different case." It is a direct liability action against the Trustee for alleged failure to comply with its duties under the PSAs during the years leading up to the Settlement. The *Policemen's Annuity* complaint does not assert *any* claim that the Trustee's decision to enter into the Settlement was unreasonable. It includes *no* allegations concerning whether the Settlement should be approved. And there is incomplete overlap between the trusts at issue there and the Covered Trusts. The introduction of materials from the *Policemen's Annuity* case would add no relevant information, as illustrated by the fact that the Objectors are seeking to use deposition testimony and exhibits from *Policemen's Annuity* witnesses who, with one exception, were not deposed in this case. Those depositions could have been sought in this proceeding if the Objectors believed that those witnesses had relevant knowledge.[7] They were not, a fact that independently precludes the use of that testimony here. *See infra* Part III; C.P.L.R. 3117.

And just like the *MBIA* and *Policemen's Annuity* litigations, the scores of other collateral cases the Objectors now seek to inject into this proceeding are all "different case[s]." Tr. 5/8/12 at 86 (Kapnick, J.). They are lawsuits, not settlements. *Id.* They involve persons and entities who are not parties to this proceeding. In some cases they do not involve representations and warranties at all. To the extent that they involve securitizations, they involve trusts that are not the Covered Trusts in this proceeding. Many (indeed, most) involve different originators and different mortgage collateral. For example, the Objectors have identified as an exhibit the docket sheet in *SEC v. Mozilo*, Case No. 2:09-cv-03994 (C.D. Cal.), an SEC enforcement action against individual Countrywide executives relating to disclosures under federal securities laws. *See* Ingber Affirmation, Ex. 1 (R-1391). And the Objectors have identified as exhibits *all*

[7] The only deponent from *MBIA* or *Policemen's Annuity* that overlaps with the Article 77 deponents is Thomas Scrivener, a Bank of America employee, who was deposed on November 14, 2012 in this case and on May 15, 2013 in *Policemen's Annuity*. Lead counsel in the *Policemen's Annuity* action conducted nearly half of Mr. Scrivener's deposition in this case.

"[p]leadings, orders, exhibits, and other papers filed in" *101* different cases, including such cases as *Allstate Insurance Co. v. Goldman, Sachs & Co.* and *Mass Mutual Life Ins. Co. v. HSBC Bank USA, N.A.*, litigations having *nothing* to do with this case. *See id.* (R-1177; R-1188). The Objectors go so far as to proffer the *pleadings* in those cases, ignoring the basic principle that "the arguments of counsel [are] not evidence." *Adamko v. Steinberg*, 166 A.D.2d 547, 548 (2d Dep't 1990). This is illustrative of the Objectors' intention to "turn[] the fact-finding process into a series of mini-trials" on "extraneous" issues. *Andon v. 302-304 Mott. St. Assoc.*, 94 N.Y.2d 740, 745, 747 (2000).

These tens of thousands of documents from dozens of other litigations are irrelevant to the sole question in this proceeding—whether the Trustee's decision to enter into this $8.5 billion settlement with landmark servicing improvements was reasonable. "[I]nstead of sharpening the issues," this purported evidence can only "blunt them and add to the delay and prolixity which normally inheres in trials." *Stephen-Leedom Carpet Co. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 101 A.D.2d 574, 577 (1st Dep't 1984) (internal quotations omitted). These materials should be excluded so that the Court and the parties can focus on the issues that are relevant to resolution of this case. *See, e.g., In re Matthews*, 266 A.D.2d 290, 290 (2d Dep't 1999) (reversing grant of motion to compel in trust proceeding where the information sought was "neither material nor relevant to the determination of whether the trustees behaved improperly").

B. <u>The Objectors failed to timely identify their intention to use the proffered documents</u>.

In addition to the irrelevance of these documents from other litigations, the Objectors have created a procedural nightmare for the settlement proponents and the Court by failing to disclose their intention to use this massive and amorphous collection of documents until the eve of trial. In the face of the Court's rulings on the scope of this proceeding and its repeated admonitions that this case involves a *settlement*, the Objectors chose not to bring the issue of

discovery from the *MBIA* litigation and other irrelevant cases to a head during the discovery process.[8] Instead, they waited until ten days before trial to dump tens of thousands of irrelevant documents onto their exhibit list. Had the Objectors raised this issue earlier, the Institutional Investors and the Trustee could and would have argued that discovery from these other lawsuits should be precluded. Had the Objectors produced these documents in response to the Institutional Investors' repeated requests that they produce the materials underlying their objections, the Institutional Investors and the Trustee would have had time to argue that these documents were irrelevant and should not be considered. The Objectors did neither: instead, they stonewalled any discovery from themselves—other than holdings information—and steadfastly refused to identify the "[d]ocuments, information, witnesses, testimony, and analysis that [they] intend to present at the Hearing in support of [their] Objection to the Settlement." Ingber Affirmation, Ex. 5, Request 7.[9]

Easily one of the most egregious examples of the Objectors' attempt to end-run the discovery process in this proceeding is their attempt to import into this case the record from *Policemen's Annuity*. The *Policemen's Annuity* plaintiffs are among the Objectors here; the same counsel (Scott + Scott) represents *Policemen's Annuity* in both cases. They had a full and fair

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[8] The Objectors' timing is astonishing. In November 2011, members of the Objectors' Steering Committee sought discovery from Bank of America calling for numerous irrelevant categories of documents from the *MBIA v. Countrywide* litigation. *See* Ingber Affirmation, Ex. 2, Request 19. The Objectors dropped this request in the meet-and-confer process. Objector AIG next attempted to end-run the Court by petitioning Justice Bransten to give AIG access to discovery produced in *MBIA*. *See id.*, Ex. 3. After Justice Bransten directed AIG back to this Court, AIG again dropped the matter. Finally, Objectors AIG, Triaxx, and the FHLBs of Chicago, Boston, and Indianapolis again served a subpoena on Bank of America in September 2012 that called for the production of documents from the *MBIA* litigation and other RMBS litigations. *See id.*, Ex. 4, Requests 1, 13. Yet, again, the portions of the demands relating to other litigations were dropped in meet-and-confers.

[9] Either the documents Objectors have identified from other litigations clearly fall within this request, or they do not form the basis for any of their objections and should be excluded on relevance grounds.

opportunity to take discovery *in this proceeding*. After the close of discovery here, they took discovery in *Policemen's Annuity*, purportedly relating to *that case*. The Institutional Investors are not parties to that case and thus had no opportunity to review the documents in question or to cross-examine the witnesses whose deposition testimony is now sought to be admitted in this proceeding. The Objectors' effort to use discovery from *Policemen's Annuity* comes so late that—because the protective order in that case requires fourteen days' notice—the Objectors will not even disclose the contents of that material to the Institutional Investors until *after* this Article 77 hearing begins. The Objectors may have a right to be involved in both cases, but they do not have a right to use the pendency of those two cases to game the system and ambush the settlement proponents.

The Objectors' attempt to surprise the Court and the settlement proponents with an indeterminate number of irrelevant documents that have never been pursued or produced in discovery in this case is contrary to this Court's direction and to the spirit of the C.P.L.R., which "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 376 (1991). Accordingly, all such documents should be excluded categorically.

III. THE OBJECTORS' EFFORTS TO USE DEPOSITIONS FROM OTHER CASES ARE INAPPROPRIATE.

The Objectors have taken more than thirty depositions in this proceeding, including depositions of the witnesses most knowledgeable about the Settlement from the Trustee, the Institutional Investors, Bank of America, and their respective counsel, as well as depositions from expert witnesses. They have had months to seek relief from the Court to take additional depositions if they thought it necessary. They did not do so. Now, they surprise the Court and the

other parties with irrelevant depositions from other cases intended to prejudice and impede the fair resolution of this Article 77 proceeding.

The Objectors' exhibit list includes fourteen deposition transcripts from other cases: nine were taken in *MBIA* and five were taken recently (after the close of discovery in this case) in *Policemen's Annuity*. *See* Ingber Affirmation, Ex. 1 (*e.g.*, R-433; R-1340). In addition to being irrelevant to this proceeding for the reasons set forth above, *see supra* pp. 3-7, the deposition testimony from these other lawsuits is inadmissible because it does not meet requirements of C.P.L.R. 3117(c) and 3117(a) governing the use of depositions.

For a deposition taken in one action to be used in any other action "as if taken therein" (*i.e.*, for any purpose other than impeachment), C.P.L.R. 3117(c) requires that the two actions must be "brought between the same parties or their representatives or successors in interest" and must "involv[e] the same subject matter." Depositions from *MBIA* and *Policemen's Annuity* fail both prongs. Neither the Trustee nor any of the Institutional Investors was a party to *MBIA*; none of the Institutional Investors is a party in *Policemen's Annuity*. Even more fundamentally, these cases do not involve the same subject matter as this Article 77 proceeding. Because both the parties and subject matter in *MBIA* and *Policemen's Annuity* are different from this proceeding, the depositions in those cases cannot be used in this proceeding under C.P.L.R. 3117(c).[10]

Even if the *MBIA* and *Policemen's Annuity* depositions could be treated under Section 3117(c) "as if taken" in the Article 77 proceeding, they would still be inadmissible for any

[10] Depositions from *Policemen's Annuity* are also inadmissible under Rule 3117(c) inasmuch as the Rule provides only that "[w]hen an action has been brought" and "another action . . . is afterwards brought," "depositions taken in the former action may be used in the latter as if taken therein." This Article 77 proceeding was commenced prior to *Policemen's Annuity*. Thus, in the language of C.P.L.R. 3117(c), the Article 77 proceeding is the "former action" and *Policemen's Annuity* is the "latter action." Therefore, under the plain language of the Rule, depositions in *Policemen's Annuity* cannot qualify for use in this proceeding as if taken herein.

purpose other than impeachment under C.P.L.R. 3117(a) because key settlement proponents did not have an opportunity to cross-examine the witnesses at deposition.[11] The Institutional Investors were not parties to either of these cases and so did not have notice of these depositions, much less an opportunity to attend and cross-examine the witnesses in question. *See* C.P.L.R. 3117(a)(3). Similarly, the Trustee was not a party in *MBIA* and did not participate in depositions in that case. Deposition testimony is routinely deemed inadmissible when offered against a party that was not present or represented at the deposition. *See id.*; *see also, e.g.*, *Bigelow v. Acands, Inc.*, 196 A.D.2d 436, 439 (1st Dep't 1993) ("deposition testimony . . . was not admissible since the plaintiffs, against whom such testimony was sought to be used, were not present or represented at those depositions, received no notice thereof and did not in the first instance elect to read into evidence any of the testimony from those depositions"); *Andrusziewicz v. Atlas*, 13 A.D.3d 325, 327 (2d Dep't 2004) (deposition may not be used against party that "had no opportunity to cross-examine the plaintiff").[12] Thus, the depositions in those cases cannot be offered against the settlement proponents here.[13]

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[11] The *Policemen's Annuity* deposition of Mr. Scrivener is also inadmissible under C.P.L.R. 3117(a)(3) for the independent reason that Mr. Scrivener will be appearing live at the hearing. As the Objectors themselves have noted, "CPLR 3117(a)(3) . . . applies only to witnesses who are unavailable at the time of trial." Ingber Affirmation, Ex. 6 (Letter from Mr. Rollin to Mr. Ingber, May 27, 2013).

[12] Even with regard to The Bank of New York Mellon witnesses deposed in *Policemen's Annuity*, it is not possible to offer this testimony against the Trustee in this proceeding without at the same time impermissibly offering it against the Institutional Investors: the Trustee and the Institutional Investors both seek approval of the Settlement; anything offered against approval of the Settlement is inherently offered against both of them.

[13] As noted above, the Objectors also offer incomprehensibly vague catch-all categories of documents, including "[p]leadings, orders, exhibits, and other papers filed in" numerous other (sometimes unidentified) litigations. To the extent the Objectors intend to offer depositions taken in any such case in this proceeding, those depositions are inadmissible for reasons that depositions in the *MBIA* and *Policemen's Annuity* actions are inadmissible.

CONCLUSION

Petitioners respectfully request that the Court preclude the Objectors from introducing into evidence irrelevant documents produced in discovery or filed in other cases and not sought in discovery in this case, and that the Court similarly preclude the Objectors from using depositions taken in other cases in this proceeding.

Dated: New York, New York
May 30, 2013

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