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),

Petitioner,

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.

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THE ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT EXCLUDE CERTAIN EVIDENCE AND TESTIMONY FROM TRIAL

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The undersigned Respondents respectfully request that the Court preclude the introduction of evidence, argument, and testimony on the matters set forth in the following Motions in Limine:

(1) Motion in Limine 1 – Preclude Unsworn Testimony by Counsel-Witnesses

(2) Motion in Limine 2 – Preclude Testimony and Evidence from Inside Institutional Investors on Topics Previously Blocked During Discovery

(3) Motion in Limine 3 – Preclude Reference to or Argument that all Certificateholders Absent From this Proceeding Support the Settlement

LEGAL STANDARD

The function of a motion in limine is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. *State v. Metz*, 241 A.D.2d 192, 198 (1st Dep't 1998); 4 N.Y. Prac., Com. Litig. in N.Y. State Courts § 36:1 (3d ed.). Even in a trial to the Court, a motion in limine can be a valuable tool for streamlining the case or focusing attention on an important issue before the trial begins. 4 N.Y. Prac., Com. Litig. in N.Y. State Courts § 38:6. The Court's authority to rule on a motion in limine stems from its "inherent authority to manage the course of trials." *Id.* (internal quotations omitted).

MOTION IN LIMINE 1

PRECLUDE UNSWORN TESTIMONY BY COUNSEL-WITNESSES

The issue of "unsworn testimony" may arise during the course of trial because several of the settlement proponents' lawyers were directly involved in the process leading up to the proposed settlement. As a result, they each have personal knowledge of the facts at issue. To the extent they will appear at trial as advocates, they should be precluded from making any

statements that reflect personal knowledge of facts or personal views concerning this case, unless they are testifying under oath.

The New York Rules of Professional Conduct provide that a lawyer shall not "in appearing before a tribunal on behalf of a client . . . assert personal knowledge of facts in issue except when testifying as a witness," N.Y. Rules of Prof'l Conduct R. 3.4(d)(2), and shall not, "assert a personal opinion as to the justness of a cause [or] the credibility of a witness[.]" *Id.* at 3.4(d)(3); *see also* ABA Model Rules of Prof'l Conduct R. 3.4(e); Tex. Disciplinary Rules of Prof'l Conduct R. 3.04(c)(2), (3) ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness," or "state a personal opinion as to the justness of a cause [or] the credibility of a witness[.]").

Courts routinely recognize this rule (often referred to as the "unsworn witness rule") and find that a violation of it deprives opponents of a fair trial. *See, e.g.*, *Sanchez v. Manhattan & Bronx Surface Transit Operating Auth.*, 170 A.D.2d 402, 405 (1st Dep't 1991); *People v. Paperno*, 429 N.E.2d 797, 800-01 (N.Y. 1981); *People v. Blake*, 139 A.D.2d 110, 114 (1st Dep't 1988); *Doody v. Gottshall*, 930 N.Y.S.2d 174 (Table), 2010 WL 6777093, at *5-6 (N.Y. Sup. Ct. Monroe Cnty. Apr. 22, 2010); *Senn v. Scudieri*, 165 A.D.2d 346, 355 (1st Dep't 1991); *Valenzuela v. City of N.Y.*, 59 A.D.3d 40 (1st Dep't 2008). For example, in *Senn*, the First Department held that a new trial was warranted when trial counsel "improperly acted as an unsworn witness, by offering 'unsworn statements [alleging] personal knowledge of the facts[.]'" 165 A.D.2d at 355. There, "counsel improperly included what he alleged to be his personal knowledge of the facts" during his cross-examination of an adverse witness. *Id.* at 356. The jury verdict was set aside and the matter was remanded for a new trial.

Similarly in *Sanchez*, the court held that trial counsel violated the unsworn witness rule during summation and direct examination of her own witness. 170 A.D.2d at 405. There, trial counsel "identified herself as a co-employee of a clerk testifying on behalf of defendant," she referred to her client as "we" and "us" and "in summation referred to [her client's] case as 'my side of the story.'" *Id.* The court found that counsel improperly "placed her own credibility on the side of her client and made herself an unsworn witness." *Id.* (citing *Caraballo v. City of New York*, 486 A.D.2d 580 (1st Dep't 1982); *Weinberger v. City of New York*, 97 A.D.2d 819 (2d Dep't 1983)).

In *Valenzuela*, trial counsel improperly acted as an unsworn witness in the following ways:

- During cross-examination of the plaintiff, defense counsel was asking where third base would have been in a particular photo when plaintiff's counsel interjected and stated that the photograph showed where the pitcher's mound would be.

- When defense counsel objected and argued that statements made by plaintiff's counsel amounted to testimony, plaintiff's counsel stated, "[y]ou were never there," and "I was there. That's the pitcher's mound."

- During the trial, plaintiff's counsel accused defense counsel of lying and characterized defense counsel's statements as "an absolute fabrication, your Honor, that a truck could enter that property." Plaintiff's counsel further stated, "[a]s an officer of the court, your Honor, I'm telling your Honor that that is an absolute fabrication."

- During summation, plaintiff's counsel "again alluded to his knowledge of the field and implied that there was a fence that a pick up truck could not pass through. Counsel also alluded to his unsworn testimony that a photo depicted the pitcher's mound, not third base."

59 A.D.3d at 41-44. The *Valenzuela* court considered counsel's statements improper because they amounted "to a subtle form of testimony, as to which the opposing party [could not] cross-examine." *Id.* at 44 (citing *Paperno*, 429 N.E.2d at 801).

The opportunity to cross-examine is an essential element of a fair trial. *See In re*

Greenebaum, 201 N.Y. 343 (1911); *In re Lynch*, 227 A.D. 477 (1st Dep't 1930). Courts consider it to be a right that cannot be denied. *See Hill v. Arnold*, 226 A.D.2d 232, 233 (1st Dep't 1996) ("Cross-examination of an adverse witness is a matter of right in every trial of a disputed issue of fact."); *see also Dwyer v. Wishnefsky*, 71 N.Y.S.2d 149 (1st Dep't 1947); *Sullivan v. Sullivan*, 246 A.D. 55 (1st Dep't 1935); *Murov v. Celentano*, 3 Misc. 3d 1, 776 N.Y.S.2d 430 (2d Dep't 2003)S. Thus, to the extent opposing counsel is allowed to make statements that amount to unsworn testimony insulated from cross-examination, the Respondents will be deprived of a fundamental right and, consequently, will be severely prejudiced.

For the reasons set forth above, Respondents respectfully request that the Court enter an order barring all counsel who appear before the Court as advocates on behalf of the settlement proponents from revealing during trial any personal knowledge of the facts or personal views concerning the matter, unless such counsel are—at the time such statements are made—testifying under oath.

MOTION IN LIMINE 2

PRECLUDE TESTIMONY AND EVIDENCE FROM INSIDE INSTITUTIONAL INVESTORS ON TOPICS PREVIOUSLY BLOCKED DURING DISCOVERY

At trial, the settlement proponents intend to use the Inside Institutional Investors' support for the settlement as "highly probative evidence that the settlement is reasonable and fair." *See, e.g.*, Doc. No. 740 at 5. However, during discovery, the settlement proponents repeatedly blocked discovery related to the Inside Institutional Investors' evaluation of and rationale for supporting the proposed settlement. Allowing the Inside Institutional Investors to

present testimony or evidence at trial on the information previously blocked during discovery is improper and unduly prejudicial to Respondents.

It is well-settled that the attorney-client privilege cannot at once be used as a shield and a sword. *See McKinney v. Grand St., Prospect Park & Flatbush R.R. Co.*, 10 N.E. 544, 544 (N.Y. 1887). Where a party blocked its adversary from conducting discovery on information based upon assertions of privilege, the blocking party cannot then offer testimony or evidence on that topic at trial. *See* 44 N.Y. Jur. 2d Disclosure § 75; *Sibley by Sibley v. Hayes*, 126 A.D.2d 629, 631 (2d Dep't 1987) (physician-patient privilege). Thus, a "court should exclude any testimony or evidentiary presentations . . . at trial if that same testimony or evidence was withheld . . . during discovery based on attorney-client privilege." *In re Residential Capital, LLC*, No. 12-12020(MG), 2013 WL 1497203, at *5 (Bankr. S.D.N.Y. Apr. 12, 2013) (discussing exclusion of evidence to preclude advice-of-counsel defense at trial, where evidence blocked on grounds of privilege during discovery).

During the depositions of BlackRock, PIMCO, MetLife, and Robert Bostrom (former in-house for Freddie Mac), counsel for the Inside Institutional Investors consistently invoked the attorney-client privilege and the common interest privilege, instructing the witnesses not to answer numerous questions regarding communications (1) between and among the Inside Institutional Investors and (2) between the Inside Institutional Investors and their counsel. In drawing this line of privilege, the Inside Institutional Investors blocked discovery on key issues, including:

(1) **The IIIs' evaluation of the merits of the proposed settlement**, including their evaluation of the underlying claims, BofA's primary and successor liability, Countrywide's ability to pay, and their potential claims against BofA/Countrywide;

(2) **The IIIs' strategy in negotiating the settlement**, including whether loan files should be reviewed and how they arrived at the agreement on $8.5 billion; and

(3) **The IIIs' rationale for supporting the settlement**.

In short, Respondents were denied discovery into the Inside Institutional Investors' analysis of and rationale for supporting the settlement. Without this information, the Court and Respondents cannot test the significance of the Inside Institutional Investors' support.

For the reasons set forth above, the Court should exclude from trial any testimony or evidentiary presentation by the settlement proponents regarding the topics that were blocked in deposition. During trial, Respondents will object to such testimony and evidence if and when the issue arises, and will be prepared to direct the Court and parties to the pinpoint citations where that specific information was previously blocked by privilege during discovery. More importantly, given the lack of evidence of the Inside Institutional Investors' rationale for supporting the settlement, the settlement proponents cannot justifiably assert that the Inside Institutional Investors' support of the settlement is "highly probative" of its reasonableness.

MOTION IN LIMINE 3

PRECLUDE REFERENCE TO OR ARGUMENT THAT ALL CERTIFICATEHOLDERS ABSENT FROM THIS PROCEEDING SUPPORT THE SETTLEMENT

In Wednesday's presentation at the First Department, counsel for the Inside Institutional Investors stated that "93% of the certificateholders support this settlement." This is the latest iteration of the Inside Institutional Investors' claim that certificateholders absent from these proceedings are somehow supporters of the proposed settlement. There is no evidence in the record to support a statement that any absent certificateholder supports or opposes the proposed settlement. The investors supporting the settlement are parties in this case. They are a minority

of certificateholders. The investors opposing the settlement are in this case. They are also a minority of certificateholders. The majority of the certificateholders have not stated their position one way or the other, and to suggest that they necessarily support the settlement is speculative.

Notably, while Bank of America has offered to pay the Inside Institutional Investors' attorney's fees, parties opposing the proposed settlement are absorbing the not insubstantial fees and costs necessary to do so. It is quite possible that absent certificateholders have chosen not to incur such expenses, but are hoping the Respondents' efforts create a process by which a more favorable recovery for their losses is achieved. Indeed, each absent investor is entitled to rely upon this process to determine what the appropriate result should be. Any assertion that these certificateholders are "supporting" the settlement is speculative, without foundation, unduly prejudicial, and should not be permitted in opening statement or at trial.

CONCLUSION

In conclusion, Respondents respectfully request that the Court grant the motions in limine and (1) preclude the unsworn testimony by counsel-witnesses, (2) preclude testimony and evidence from the Inside Institutional Investors on topics previously blocked during discovery by privilege assertions, and (3) preclude reference or argument that all certificateholders absent from this proceeding support the settlement.

DATED: May 31, 2013

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