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), 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

Kapnick, J.

THE PETITIONERS' BRIEF IN SUPPORT OF ENTRY OF PROPOSED FINAL ORDER AND JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF CONTENTS

(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

TABLE OF AUTHORITIES

(continued)

Page

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The case for the Settlement was laid out in the Trustee's Verified Petition in June 2011. Since then, it has been confirmed in every respect. The Court has heard from five Trustee witnesses, every one of whom testified that the Trustee agreed to the Settlement because it was in the best interests of Certificateholders. The Court has heard testimony from each of the Trustee's pre-settlement advisors, whose qualifications are unchallenged and who explained the nature of their assignments and the basis for their conclusions. And the Court has heard from litigation experts who confirmed that the Trustee's process was consistent with or exceeded trust industry practice, that the $8.5 billion payment and the unprecedented servicing remedies worth billions more are an outstanding result for the Trusts, that the case for successor liability against Bank of America—which was always uncertain—has, if anything, weakened further since the Trustee secured the Settlement, and that the Trustee's decision to enter into the Settlement and thereby avoid years of costly litigation with no certain outcome—was eminently reasonable.

After more than two years of proceedings, an eight-week hearing, 21 fact and expert witnesses, and 235 documents received into evidence, a record has been developed that overwhelmingly supports each of the proposed findings. This brief identifies the evidence that supports each paragraph in the Proposed Order (a copy of which is attached for reference).[1]

The findings and conclusions fall into six main categories: (1) those concerning the Article 77 proceeding itself (¶¶ b–e of the Proposed Order and Part I of this brief); (2) the Trustee's power to settle (¶¶ f–g, Part II); (3) the settlement negotiations (¶ j, Part III); (4) the Trustee's decisionmaking process (¶¶ h–i, Part IV); (5) a conclusion that the Trustee acted in

[1] Entry of the Proposed Final Order and Judgment (the "Proposed Order") is a condition to the effectiveness of the Settlement Agreement. *See* PTX 1 ¶ 2(b) ("If at any time Final Court Approval of the Settlement shall become legally impossible . . . the Settlement Agreement shall be null and void" with limited exceptions).

good faith and did not abuse its discretion (¶ k, Part V); and (6) various ancillary conclusions regarding the intended effect of the Court's order (¶¶ *l*–v, Part VI). On each of these points there is ample evidence—far more than could be summarized in this brief—to support the findings in the Proposed Order; on many of the most important findings, the evidence is not even disputed.

The evidence is overwhelming—the Court should approve the Settlement and enter the Proposed Order.[2]

ARGUMENT

Standard of Review

Issuance of a judicial instruction concerning a trustee's decision is within the discretion of the trial court. *See In re Jensen*, 107 A.D.3d 1222, 1222 (3d Dep't 2013) (affirming Article 77 approval because there was "no basis to disturb Supreme Court's exercise of discretion"); *In re Estate of Palma*, 17 A.D.3d 817, (3d Dep't 2005) (affirming approval of executor's settlement of claim because "[i]nasmuch as the record indicates that petitioners herein attempted to preserve as much of the estate as possible by avoiding expensive litigation, we conclude that they did not breach their fiduciary duties to the estate and the Surrogate's Court did not abuse its discretion in approving the compromise"); *see also* Dkt. 12 at 11-15; Dkt. 228 at 7-11.

[2] Several proposed findings have been the subject of prior briefing. For the Court's convenience, the relevant submissions include: the Verified Petition (Dkt. 1); The Bank of New York Mellon's Memorandum of Law in Support of Its Verified Petition Seeking Judicial Instructions and Approval of a Proposed Settlement (Dkt. 12); The Bank of New York Mellon's Brief in Support of the Settlement (Dkt. 750); The Bank of New York Mellon's Response to Objections (Dkt. 793); and The Bank of New York Mellon's Reply in Further Support of the Settlement (Dkt. 822).

I. Findings Concerning the Article 77 Proceeding

A. This Court Has Jurisdiction (paragraph b).[3]

This Court is authorized to provide judicial instructions and approve the Settlement Agreement by granting the Verified Petition. The Objectors do not contest this. *See* Dkt. 12 at 11-15. Section 7701 of the CPLR provides that, with certain exceptions not relevant here, "[a] special proceeding may be brought to determine a matter relating to any express trust." CPLR 7701. This section "should be broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants." *Matter of Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 (1st Dep't 1982). The Trustee's request for approval of the Settlement and entry of the Proposed Order is a "matter of interest" within the Court's jurisdiction pursuant to CPLR 7701. *See In re Application of IBJ Schroder Bank & Trust Co.*, No. 101530/1998, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (Article 77 proceeding approving settlement involving assets of a securitization trust).

The Court also has jurisdiction over the Trustee, the Covered Trusts and the Trust Beneficiaries:

> Where a trust is administered under the supervision of the courts of a State, those courts have jurisdiction to determine the interests of all claimants, resident or non-resident, with respect to the administration of the trust. These courts have jurisdiction not only to determine the interests of the beneficiaries of the trust in the trust property, but also to determine the extent of the liabilities, if any, incurred by the trustee to the beneficiaries in the administration of the trust.

Restatement (Second) of Trusts § 220 cmt. c (1959).

B. The Notice Was Adequate (paragraphs c, d).

There is no dispute that the Trustee's program to disseminate notice of this Article 77 Proceeding was adequate. The Trustee engaged Garden City Group to carry out the notice

[3] Paragraph a of the Proposed Order adopts defined terms from the Settlement Agreement.

program ordered by the Court ("June 29 Order") (Dkt. 13). *See* Tr. (Kravitt) 1456:24-1459:5; Tr. (Bailey) 2226:3-2227:3. The Trustee, together with Garden City Group, complied with that Order. *See, e.g.*, Tr. (Fraga) 3460:11-13, 17-18. The notice program was reasonably calculated to provide all Trust Beneficiaries with notice of the Article 77 Proceeding (Dkt. 12 at 19-20; Dkt. 11 at 4-5), was one of the most robust notice programs ever implemented by Garden City Group (Tr. (Fraga) 3454:7-10, 20-24), and far exceeded the requirements of the Governing Agreements. *See* Tr. (Bailey) 2282:10-13; Tr. (Landau) 2542:17-2543:25.

C. Potentially Interested Persons Have Had a Full and Fair Opportunity to Be Heard (paragraph e).

This Court has permitted "anyone having an interest in the mortgage-securitization trusts" covered by the Settlement (June 29, 2011 Order) to participate in the Article 77 Proceeding even without having to lodge a substantive objection. *See* Dkt. 107. Although most have since withdrawn, dozens of parties—including the New York and Delaware Attorneys General—appeared and were afforded the opportunity to participate. *See* Dkt. 319. The period for fact and expert discovery lasted more than eighteen months and included 39 depositions, the production of hundreds of thousands of pages of documents, including privileged communications, and the exchange of 15 expert reports. The parties argued numerous discovery motions and appeared at numerous full-day conferences before the evidentiary hearing began. As counsel for one group of Objectors acknowledged, the Court "has been extremely generous in permitting discovery in the context of [this] settlement proceeding." Tr. (Kaswan) 60:14-15.

Following the submission of voluminous statements in support of and opposition to the Settlement, the evidentiary hearing commenced on June 3, 2013, has lasted more than 30 days, and has involved examinations of 21 fact and expert witnesses and the receipt into evidence of 235 documents.

II. Findings Concerning the Trustee's Power

A. The Trustee Has Authority to Enter Into the Settlement Agreement (paragraph f).

Under the Governing Agreements, the Trustee has authority to enforce the Seller's repurchase obligations upon breach of a representation and warranty, and pursue remedies arising out of any breach of the Master Servicer's obligations under those agreements. *See, e.g.*, Dkt. 12 at 7-10; Dkt. 750 at 13-14; PTX 71 § 2.01(b). Case law confirms that the authority to commence litigation on behalf of the certificateholders "is committed solely to the trustee." *Asset Securitization Corp. v. Orix Capital Mkts.*, LLC, 12 A.D.3d 215, 215 (1st Dep't 2004); *see also* Dkt. 12 at 7-9; Dkt. 750 at 13-14. Here, the Trustee, not the Certificateholders, is the party to the PSAs; like any other party to a contract, it has the power to enforce the contract.[4]

The Trustee's power to bring suit necessarily is accompanied by the authority to settle claims: "[A]n incident to the right to sue or be sued is the power to compromise or settle suits." *Levine v. Behn*, 169 Misc. 601, 605 (Sup. Ct. N.Y. Cnty. 1938), *rev'd on other grounds*, 282 N.Y. 120 (1940); *see also* Dkt. 12 at 9-10; Dkt. 750 at 14. In analyzing the identical issue, the First Department in *IBJ Schroder* held that "the same provision of the trust agreement, which . . . gave the [securitization] trustee the power to commence the underlying action . . . includes the power to settle that action." *IBJ Schroder*, 271 A.D.2d 322, 322 (1st Dep't 2000). The Objectors' own expert has written that private-label RMBS securitization trustees "have wide settlement

[4] The majority of the Objectors appear to concede the Trustee's authority to enter into the Settlement Agreement. In their demand for a jury trial, the Objectors conceded that the Trustee "could have settled the underlying claims without court approval." Dkt. 704 at 1; *see also* Tr. (Reilly) 220:18-22 ("[T]here is nothing in the four corners of [the PSA] that necessitates court approval for settlement. . . . [The Trustee] didn't have to ask [the Court] to approve what they did."). And in their opposition to the Settlement, AIG and other Objectors urged the Court to order the parties to engage in mediation of the Trust Released Claims, necessarily implying an understanding that the Trustee had the authority to mediate and settle on behalf of the Covered Trusts. *See* Dkt. 588 at 7.

authority." Adam J. Levitin, *Clearing the Mortgage Market Through Principal Reduction: A Bad Bank for Housing (RTC 2.0)*, The Pew Charitable Trusts, 20 n.57 (2012), *available at* http://-www.pewstates.org/uploadedFiles/PCS_Assets/2012/Clearing_the_Mortgage_Market.pdf.

B. The Trustee's Decision to Settle Is Discretionary (paragraph g).

The PSAs allow—but do not require—the Trustee to bring suit on (and settle) the claims released by the Settlement. Under well-settled law, "[t]he [trustee's] exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees." *Restatement (Second) of Trusts* § 187 cmt. a (1959). "If it is reasonably prudent to compromise [trust] claims . . . the trustee can properly do so"; thus, a "trustee *has discretion* whether to sue or compromise claims or submit them to arbitration." *Id.* § 192 cmt. a (1959) (emphasis added); *see also* Dkt. 750 at 15; Tr. (Kravitt) 1524:12-13; 1554:14-20; 2115:17-19; 2117:7-8.

III. Findings Concerning the Settlement Negotiations (paragraph j)

A. The Negotiations Were Arm's-Length (paragraph j).

Testimony from all parties established that the settlement negotiations were hard-fought, adversarial, and contentious, demonstrating that the Settlement Agreement is the product of "arm's length negotiations." *See, e.g.*, *In re Residential Capital LLC*, 2013 WL 4874346, at *9 (Bankr. S.D.N.Y. 2013) (finding that negotiations were at arm's length where sophisticated and experienced counsel for settlement parties negotiated over period of five months and had several in person and telephonic meetings); *In re September 11 Litig.*, 723 F. Supp. 2d 534, 543-44 (S.D.N.Y. 2010) (settlement negotiations were "arm's length" where, among other things, "there was no collusiveness and no illegitimate secrecy, and alleged commonality of some [negotiating parties] had no effect on the settlement") (internal citations omitted).

On October 18, 2010, the Institutional Investors sent Countrywide and the Trustee a purported "Notice of Non-Performance." PTX 108. The Notice of Non-Performance was a "[t]otal surprise" to Bank of America and caused its stock price to plummet. Tr. (Laughlin) 691:22-25, 692:26-693:11; Tr. (Smith) 327:2-5; Tr. (Fischel) 3496:10-3497:6 ("implausible on its face" that investors were seeking to benefit Bank of America when their first public action caused billions of dollars in market loss). Shortly thereafter, the Trustee reached out to the Institutional Investors and on November 3, 2010, Mr. Kravitt met with Ms. Patrick. *See* Tr. (Kravitt) 1321:22-1324:15.

The Trustee then organized the first tri-party meeting, which took place on November 18, 2010. *See* PTX 158; *see also* Tr. (Kravitt) 1344:14-25. That meeting was marked by tension, hostility and confrontation. *See* Tr. (Laughlin) 695:21-25 ("we were in a bit of a standoff"), Tr. (Kravitt) 1344:26-1345:11, Tr. (Bailey) 2202:19-24. The Institutional Investors outlined their position regarding Countrywide's and Bank of America's liability. Counsel for Bank of America and Countrywide countered with various legal defenses, promising that they were "prepared" to "fight." Tr. (Laughlin) 694:17-695:20; *see also* Tr. (Kravitt) 1334:14-19; 1335:8-10, 1417:9-15. Counsel for the Institutional Investors made it clear that they intended to pursue their claims aggressively. Tr. (Laughlin) 696:14-697:2. Despite the hostility and tension, the meeting proved to be constructive in starting the discussions regarding a possible settlement. Tr. (Laughlin) 695:21-25; Tr. (Kravitt) 1344:26-1345:11.

From November 2010 through June 2011, there were several face-to-face meetings, nearly daily conference calls, and thousands of emails exchanged, including no fewer than 80 drafts of terms and provisions of the Settlement Agreement. *See* PTX 613; Tr. (Kravitt) 1388:10-1390:19. In addition to many smaller meetings and calls, large group meetings were held in

January, February, and April 2011, involving counsel for all parties, business representatives from Bank of America and several Institutional Investors, and the Trustee's experts. *See, e.g.*, PTX 21; PTX 25; PTX 28; PTX 36; PTX 562; PTX 604. The Trustee actively participated in all aspects of the lengthy settlement discussions and often took the lead. Tr. (Smith) 318:21-25, 411:6-412:3; Tr. (Laughlin) 809:22-26; Tr. (Kravitt) 1388:12-1390:19, 1399:9-1400:25, 1421:3-9; 1862; Tr. (Stanley) 3173:2-15.

Throughout the settlement negotiations, "the parties were in serious disagreement" over many issues. Tr. (Laughlin) 706:12-15; Tr. (Waterstredt) 826:13-18; Tr. (Kravitt) 1388:3-9; Tr. (Bailey) 2203:3-5; *see also* Tr. (Smith) 403:17-19. On several instances hostility predominated, and the parties "became very loud or very agitated." Tr. (Waterstredt) 826:13-18; Tr. (Kravitt) 1388:3-9. At one presentation in February 2011, Bank of America's lead negotiator, Terry Laughlin, threw the presentation materials (PTX 562) back at the Institutional Investors. *See, e.g.*, Tr. (Laughlin) 807:4-15; Tr. (Smith) 363:22-364:12; s*ee also* Tr. (Kravitt) 1429:19-21.

An initial area of marked disagreement between the parties was whether the purported Notice of Non-Performance triggered the running of a 60-day cure period under the PSAs after which an Event of Default could be declared. *See* Tr. (Kravitt) 1366:20-24, *see also id.* 1698:6-12. The Institutional Investors believed the notice was sufficient, and Bank of America vigorously disagreed. The Trustee took no position, instead encouraging the other parties to constructively focus on negotiating substantive issues. *See, e.g.*, *id.* 1361:14-19, 1366:20-1367:7. In furtherance of that goal, and to stave off time-consuming and far less constructive litigation, about whether the alleged Notice of Non-Performance triggered any cure period, the parties ultimately entered into a Forbearance Agreement. The Forbearance Agreement temporarily suspended the running of any time period under the PSAs "to the extent" that it was commenced

by the purported Notice of Non-Performance, which was extended several times over the course of the negotiations. PTX 38; PTX 377; *see also* Tr. (Smith) 335:6-10; Tr. (Kravitt) 1361:15-19, 1367:19-26; Tr. (Bailey) 2194:6-12, 2310:13-21; Tr. (Landau) 2546:2-2547:26, 2548:2-6. It also tolled the statute of limitations for claims by the Trusts against Bank of America or Countrywide.

Another substantial area of disagreement among the parties was the settlement payment. Initially, Bank of America offered approximately $1.5 billion and then raised its offer to $4.5–$5 billion. Tr. (Laughlin) 714:2-18. Mr. Bailey recalled that it was "clear" that the parties were far apart after Bank of America's initial presentation (PTX 20). Tr. (Bailey) 2199:7-26, 2203:3-5. These offers were rejected, as the Institutional Investors demanded $12 to $16 billion at the outset. *Id.*; *see also* Tr. (Smith) 391:18-20.

In April 2011, Bank of America's Mr. Laughlin told the parties that he thought the bank could pay as much as approximately $6 billion or $6.5 billion, but in order for Bank of America's board of directors to consider that, the Institutional Investors needed to drop their settlement demand to under $10 billion. *See* Tr. (Laughlin) 714:19-24; Tr. (Smith) 398:9-14. In response, the Institutional Investors lowered their demand to $9.8 billion. *See* Tr. (Smith) 398:15-16. Almost immediately, the Institutional Investors, with the Trustee's support, withdrew the $9.8 billion demand, and "presented an $8.5 billion, take it or leave it, fill or kill" demand. Tr. (Smith) 398:17-399:11. It was clear that, if Bank of America did not accede to the $8.5 billion demand, it would face aggressive litigation. Tr. (Laughlin) 714:25-715:14, 716:25-717:9, 810:6-811:7, 816:3-9; Tr. (McCarthy) 5023:6-11.

Notably, Bank of America attempted to negotiate several concessions from the Institutional Investors and the Trustee, all of which were rejected. Among other things, in response to the $8.5 billion take-it-or-leave-it demand, Bank of America offered $7 billion. That

was rejected. *See* Tr. (Smith) 399:10-14; Tr. (Laughlin) 715:15-22. Bank of America proposed that it pay in installments over time. That was rejected as well. *See* Tr. (Smith) 399:16-22, 402:8-12; Tr. (Laughlin) 715:23-24. Finally, just weeks before the settlement agreement was entered into, Bank of America sought a general securities claim release provision, which seriously threatened the success of the settlement negotiations. That, too, was rejected. *See* Tr. (Smith) 402:13-16; Tr. (Laughlin) 715:25-716:8. Bank of America's eventual agreement to the $8.5 billion demand was far from a foregone conclusion. *See* Tr. (Laughlin) 716:13-18 ("we entered into the negotiations, never thinking we would pay an amount that high . . . it was a really difficult decision to ultimately agree on that number").

B. The Negotiations Focused on the Strengths and Weaknesses of the Trusts' Claims (paragraph j).

While the negotiations unsurprisingly involved threats, posturing, fits and starts, and back-and-forth over the terms of the Settlement, they also incorporated the exchange of a significant amount of data and information about the Trusts' claims. The parties exchanged information relevant to servicing, repurchase liability, and successor liability, and also explained the strengths and weaknesses of their legal positions.

1. Servicing claims

The Institutional Investors laid out the basis for their servicing claims in the Notice of Non-Performance, which the Trustee and its counsel studied. PTX 108; Tr. (Kravitt) 1323:8. Bank of America, as Master Servicer, disputed each of those allegations, arguing that they were "invalid claims" that did not "have any merit." *See* Tr. (Laughlin) 759:8-15. In particular, Bank of America pointed to the lack of evidence that its servicing practices had caused cognizable damages, given the high threshold for servicer liability under the PSAs. PTX 28.7-8. Bank of America further disputed that industry practice required the servicer to put back loans that breach

representations and warranties. *See* PTX 28.7; Tr. (Kravitt) 2074; *id.* 2129:7-15. Finally, Bank of America argued that, even if the Master Servicer were required to put back loans, it could not have recovered from Countrywide any more than Countrywide could pay. PTX 28.8-9. In other words, suing the Master Servicer would not be an effective end run around the limits on Countrywide's resources, which were far less than the settlement amount that the Trustee obtained. *Id.*

On loan servicing more generally, Bank of America emphasized the vagueness of the "prudent servicing standard" as well as the heightened standard for servicing liability—gross negligence or willful misconduct—in Section 6.03 of the PSAs. PTX 28.8.

The parties discussed loan modifications as well. In fact, as far back as 2009, one of the Institutional Investors that now supports the Settlement, Kore Capital L.L.C., raised that claim with respect to twenty Countrywide securitizations in a letter to the Trustee and the Master Servicer. Tr. (Smith) 649:11-25. The Master Servicer responded with the same position that it advanced in *Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC* v. *Countrywide Fin. Corp.*, No. 650474-2008 (Sup. Ct. N.Y. Cnty. Oct. 7, 2008): that the Governing Agreements authorize modifications on distressed loans that comply with customary and usual servicing practices without requiring that the modified loans be repurchased. Early in the settlement negotiations, Mr. Kravitt flagged that issue in a "List of Settlement Issues" sent to counsel for Bank of America. PTX 179.

2. Loan-repurchase claims

The parties also exchanged considerable data concerning damages caused by the failure to repurchase loans that breached representations and warranties. Several meetings were devoted to the analysis of each side's estimates of collateral losses and underwriting defects. (For more detail, see Part IV.B.1 below.) The Institutional Investors presented a detailed spreadsheet

projecting losses for various subsets of loans in the trusts, setting out and attempting to justify each assumption. "[T]he purpose of this document was to establish a new anchor for the discussion or the negotiation and what the repurchase exposure of Bank of America was." Tr. (Smith) 671:3-6. The spreadsheet forecasted potential damages under five scenarios corresponding to different defect rates. PTX 562; Tr. (Smith) 357:24-358:9 ("[W]e broke out for the deals that were being negotiated the current deal balance, the deal count by loan type, and the actual realized loss as of that date, the serious delinquency of each one of those categorizations of securitizations and then . . . the trailing three months of severity. And we used that as source data to then apply assumptions to . . . each of the categories of serious delinquency. And then . . . [we added estimates for] the loans [that] had been modified, but were then reperforming to arrive at a total estimated loss assumption for the aggregate of these deals.").

Bank of America's approach was "to just be transparent," to "lay it all out there and let the group decide . . . its merit." Tr. (Scrivener) 983:11-15, 984:2-11, 999:4-8. Following those orders, Tom Scrivener (the Finance Executive for Bank of America's Legacy Asset Servicing Division) provided commercially sensitive data about repurchases of Countrywide loans from the GSEs, including detailed breakdowns of the rates of repurchase and the reasons for repurchase. *Id.* 1017:7-1019:6. Bank of America also disclosed its loss projections for each of the Trusts aggregated from loan-level information. *Id.* 984:22-985:5, 987:10-17. Mr. Scrivener was "uncomfortable" providing that information to the bank's adversaries; he has "never" disclosed that information to any other potential adversary and testified that "I don't know of anyone else that has." *Id*. 1018:10-23.

Mr. Scrivener had several meetings with the Trustee's mortgage-finance expert, Brian Lin of RRMS Advisors, to discuss his analysis in detail. Mr. Scrivener testified that Lin "forced

me to spend a lot of time going through each page and asked a lot of questions about what we were doing with the extrapolation." Tr. (Scrivener) 1051:15-19. Those conversations were "[n]ot necessarily pleasant. [Lin] didn't agree with some of the things that we had done, pointed out some concerns that he had with what we had done." *Id.* 1052:15-18.

3. Document-exception claims

The Institutional Investors also claimed that the Covered Trusts had been damaged by Countrywide's failure to deliver all of the required mortgage documentation. Specifically, they argued that Section 2.02 of the PSAs required that certain mortgage documents, including the original mortgage notes endorsed in blank, be maintained in the mortgage loan files, and that missing documents were delaying or preventing foreclosures to the detriment of the Covered Trusts. *See* Tr. (Bailey) 2216:18-21. Throughout the negotiations, "there was a fair amount of discussion about what exceptions existed, how those were to be corrected, [and] what the Trustee would need to do in order to verify that an exception had been corrected." *Id.* 2218:12-15; *see also* 2218:20-23. There were also discussions about how to fashion the appropriate remedy. Tr. (Kravitt) 1448:25-1449:5, 2135:25-2136:6.

4. Countrywide bankruptcy and successor liability claims

At the February 2011 meeting, Mr. Laughlin stated that Countrywide only had about $4 billion of claim-paying ability and that Bank of America was prepared to put Countrywide into bankruptcy if "at any point" its repurchase exposure grew too large. Tr. (Smith) 367:7-25, 373:5-20; Tr. (Laughlin) 717:10-718:8 (told Institutional Investors that Bank of America "would pursue that [bankruptcy] option if necessary."). Mr. Laughlin testified that he was "[a]bsolutely not bluffing", and that Bank of America had done the "work [of] understanding" a Countrywide bankruptcy. Tr. (Laughlin) 719:8-17. Mr. Laughlin also testified that the option of a Countrywide bankruptcy remains if the Settlement is not approved. *Id.* 719:14-17.

Bank of America also made a legal presentation on successor liability to both the Institutional Investors and the Trustee. PTX 28; Tr. (Smith) 368:15-24; Tr. (Waterstredt) 941:7-13; Tr. (Kravitt) 1424:3-17. The presentation covered Bank of America's acquisition of Countrywide, PTX 28.2-4, and was followed by Bank of America's delivery to the Trustee of a substantial number of related documents. Tr. (Kravitt) 1424:26-1425:25. The Institutional Investors considered Countrywide bankruptcy to be a real risk, and hired bankruptcy counsel to help evaluate that risk. *See* Tr. (Smith) 373:5-374:17, 377:16-17, 678:21-679:18, 680:10-18; Tr. (Waterstredt) 847:25-848:8, 945:16-21.

5. "Materially and adversely affects" language

Bank of America argued that even if loans materially breached a representation and warranty, to require repurchase, the Trustee would still have to prove a causal relationship between each breach and the loan's non-performance. *See* Tr. (Smith) 390:18-22; Tr. (Scrivener) 1111:10-14. That position was based on the requirement in Section 2.03(c) of the PSAs that a breach "materially and adversely affects" Certificateholders' interest in a loan before repurchase is required. The Institutional Investors disagreed with Bank of America's interpretation. *See* Tr. (Waterstredt) 917:25-918:12; Tr. (Smith) 405:14-18 (causation was a "risk" but also "something we thought we may prevail on"). Instead, they argued that Section 2.03(c)'s adversity requirement should be measured at the time that the loan is sold to the Covered Trust. *See* Tr. (Scrivener) 1128:9-15; Tr. (Waterstredt) 917:25-918:12.

C. The Negotiations Focused on the Alternatives to Settlement (paragraph j).

Bank of America had no illusions about what the alternative to a settlement was. In November 2010, Mr. Laughlin reached out to some of the Institutional Investors to "understand how committed they were to . . . pursuing the claims." Tr. (Laughlin) 699:5-7. During these "very tense discussions," the investors' response was uniform: they were "going to pursue these

claims." *Id.* 699:17-700:7. Continuing throughout the negotiations, therefore, it was clear to Bank of America that failure to reach a settlement satisfactory to the investors and the Trustee would lead to litigation:

> We were very, very concerned that if we did not reach an agreement, that the Institutional Investors would again become much more hostile, including going public in essentially saying that the settlement discussions had come to an end, and I was concerned that they would begin revealing and making claims that would affect the Bank of America stock price.

Id. 717:4-9; *see also id.* 816:17-21 ("The investor group and the Gibbs & Bruns law firm were very aggressive. They basically asserted and told me they would pursue all means available to them to bring a lawsuit against us to represent their clients."). Indeed:

> It was very clear to me, very clear . . . that if the parties did not reach a settlement and that we did not agree to the investor group's demands, final demands, that they were going to use all means, resources available to them to make a claim, including bringing forth a potential lawsuit.

Id. 810:26-811:7; *see also* R-391.3 (investors threatened that "Bank of America's competitors . . . would prefer that Bank of America find itself mired in years of heated and costly litigation with our clients and the Trusts regarding repurchase and servicing liabilities"). Indeed, as negotiations progressed, the Forbearance Agreement "was extended for increasingly shorter periods of time" by the Trustee and the Institutional Investors "to ratchet up their pressure on B of A and Countrywide." Tr. (Kravitt) 1368:3-5, 1369:2-6.

The Trustee made it clear that it was prepared to sue if an acceptable settlement was not reached. Tr. (Laughlin) 816:22-817:11. Kevin McCarthy, BNYM's head of litigation, who supervised the matter internally, confirmed that "there's no doubt in my mind that Bank of America understood that we were . . . in a position to commence litigation." Tr. (McCarthy) 5023:6-11. At all times, the Trustee considered "a number of options" if the parties could not negotiate an acceptable settlement, and "[l]itigation was one of those options." Tr. (Bailey)

2468:3-4. Mr. McCarthy "took substantial steps to retain [litigation] counsel to" "pursue litigation of certificate holders' repurchase rights." Tr. (McCarthy) 5035:24-5036:4. In short, the record is clear that the Settlement was negotiated under the threat of litigation.

D. The Negotiations Focused on the Terms of the Settlement (paragraph j).

Beyond the negotiations concerning the settlement amount (*supra* at III.A.), there also were extensive negotiations over the other settlement terms. The parties exchanged more than 80 drafts, and virtually every provision was rewritten, revised, and discussed. *See* PTX 613. The servicing provisions alone went through more than 20 drafts (*id.*), and the allocation and distribution terms also were the subject of numerous meetings and drafts. *See, e.g.*, PTX 386. The parties also participated in detailed negotiations and exchanges of draft documents related to the Institutional Investor Agreement, the Proposed Final Order and Judgment, and the Settlement Agreement's other exhibits. *See, e.g.*, PTX 437, 475, 491, 517, R-118, R-119.

The Trustee and its counsel were involved every step of the way. Mayer Brown marked up or commented on "every draft" of the Settlement Agreement, and the parties, including the Trustee, "negotiate[d] those proposed comments." Tr. (Kravitt) 1397:2-5; *see also* Tr. (Smith) 411:6-412:3 (on servicing, "from the design to the implementation, all the way throughout, [the Trustee] has been very involved"). The Trustee took a particularly active role in preparing to implement the Settlement Agreement (*see, e.g.*, PTX 645 (Crosson Dep. Tr.) 88:16-89:7) and in drafting its servicing provisions. Tr. (Smith) 411:6-412:3; Tr. (Kravitt) 1400:4-19; Tr. (Bailey) 2204:21-23, 2218:8-2219:11, 2223:21-2224:5; *see also, generally*, Tr. (Kravitt) 1450:8-1451:22. Internally, Mr. Bailey spent "easily half, probably maybe up to 60 percent" of his time over these months on the settlement, including attending negotiating sessions, reviewing "numerous drafts" of the Settlement Agreement, and discussing each draft with Mayer Brown. Tr. (Bailey) 2189:13-19, 2197:6-11, 2203:18-26, 2205:2-4. Individual sections were "drafted, revised

countless times," and discussed internally by the Trustee and with Mayer Brown. Tr. (Bailey) 2203:22-2204:8 ("We'd usually get on the phone with Ms. Chavez, with usually Mr. Ingber, and Ms. Lundberg and we would run through the draft and discuss what worked, what didn't work."). *See, e.g.*, PTX 386; Tr. (Kravitt) 1388:12-1390:19, 1399:17-22.

On the mechanism for distributing the settlement payment within each Trust, the Trustee consulted with a waterfall analytics firm, Emphasys Technologies, Inc. *See* Dkt. 753 at 6 ("ETI's work was . . . to enable Mayer Brown to draft paragraph 3 of the Settlement Agreement"). Additionally, the Trustee's servicing expert, Brian Lin, evaluated the servicing provisions of the Settlement. *See* PTX 14. Mr. Lin and RRMS participated in the negotiations and advised the Trustee and its counsel on various aspects of the servicing improvements. Tr. (Bailey) 2211:14-20. Finally, the releases of Countrywide and Bank of America were carefully drafted by the parties, and their precise terms were the product of much deliberation. *See, e.g.*, PTX 359, 380, 383; Tr. (Kravitt) 1393:10-11, 1400:21-22, 1407:23-1408:14.

IV. Findings Concerning the Trustee's Decisionmaking Process

A. The Institutional Investors and Other Investors Support the Settlement (paragraph h).

As stated formally in the Institutional Investor Agreement, the Institutional Investors supported the Settlement Agreement at the time it was signed. *See* PTX 3; PTX 500; Tr. (Kravitt) 1463:13-1464:12; Dkt. 740; Dkt. 763. They continue to do so. At the hearing, Kent Smith of PIMCO testified that the Settlement is a "great deal. It's therefore fair and reasonable and . . . I hope that it's accepted." Tr. (Smith) 437:5-7; *id.* 403 ("It's my assessment that we got the best deal that was available, and that it's a great deal for our clients."). Scott Waterstredt of Met Life agreed, testifying that if the Settlement is not approved, "there is a serious risk that we would

recover far, far less than that amount [$8.5 billion] and that's a big concern to me . . . I would ask the Court to approve the settlement." Tr. (Waterstredt) 850:14-24.

The Institutional Investors are not alone. In February, one investor, Monarch Alternative Capital, wrote the Court to refute AIG's mischaracterization of Monarch's position:

> Monarch does *not* oppose the Settlement. To the contrary, Monarch supports it. Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire Settlement based on the actions of what appears to be a small minority of objecting holders.
>
> We urge the Court to approve the Settlement promptly for the benefit of all of the Trusts' Certificateholders.

Feb. 4, 2013 letter to the Court, Dkt. 752, Ex. 39.

The Federal Housing Finance Agency, conservator for Fannie Mae and Freddie Mac, appeared in the case to state that

> FHFA, as Conservator, considers it positive that the proposed settlement includes subservicing requirements, specific terms for the servicing of troubled mortgages and the curing of certain document deficiencies. Additionally, FHFA is encouraged that a consortium of significant market participants supports the proposed settlement. Nonetheless, to fulfill its statutory obligation to preserve and conserve [GSE] assets, the Conservator considers itself bound to object not only to obtain additional information developed in discovery, but also to be in a position to voice a substantive objection to the proposed settlement, should a now unforeseen issue arise that is to the detriment of the [GSEs].

Aug. 30, 2011 Appearance & Cond'l Objection (S.D.N.Y. doc. #15). After discovery, the FHFA withdrew its conditional objection. Dkt. 587 (May 3, 2013).

B. The Trustee Conducted a Factual and Legal Investigation (paragraph h).

1. <u>The Trustee conducted a factual investigation.</u>

The Trustee conducted a thorough factual investigation—some itself, some through Mayer Brown, and some through a group of experts hired to advise on the issues relevant to the

settlement decision. The Trustee and its advisors received (and in many cases elicited) a variety of information and incorporated it into their evaluation of the issues and claims.

a. The Trustee and its experts received information from the Institutional Investors and Bank of America on loan performance and defect rates.

To assist in its investigation of loan repurchase damages, in March 2011, the Trustee hired RRMS Advisors to provide, among other things, an independent opinion on possible damages related to breach of the loan-repurchase obligation. Tr. (Kravitt) 1433:22-1434:13. RRMS's lead expert was Brian Lin. Mr. Lin has an MBA (with a triple major) from New York University and 16 years of industry experience in RMBS and mortgage finance, including heading the Lehman Brothers desk responsible for private-label securitization and managing Lehman's relationship with the GSEs, including Fannie Mae and Freddie Mac. *See* Tr. (Lin) 3817:7-24; 3818:2-8; 3924:11-13. Since joining RRMS, he has worked on numerous projects, including for the GSEs, regarding mortgage valuation and servicing. *Id.* 3817:7-24. The Court permitted him to testify as an expert witness at the hearing, agreeing with Objectors' counsel that "he is an expert." *Id.* 3832:20.

i. Information from Bank of America

As noted, Mr. Scrivener made several presentations regarding Countrywide's potential repurchase exposure. *See* Tr. (Scrivener) 975:8-9; PTX 21, 23, 25, 26, 36; *see also* PTX 31. The presentations contained extensive confidential data, often in response to requests from the Trustee and the Institutional Investors. Tr. (Scrivener) 992:7-12, 1016:19-1017:25. Among other things, Bank of America provided detailed data on: the performance of loans in the Covered Trusts (*e.g.*, PTX 25.5-11, PTX 36.6), Countrywide's repurchase experience with the GSEs (*e.g.*, PTX 23, PTX 25.2, PTX 26), and comparisons between loans purchased by the GSEs and loans in the Covered Trusts (*e.g.*, PTX 31). The repurchase data was among the most important,

because Mr. Lin agreed that the GSE repurchase rate, adjusted upward to reflect differences between the GSE loans and the Covered Trusts, was a reasonable estimate of the defect rate in the Covered Trusts. Tr. (Lin) 3923:13-14; PTX 444.106.

Because Countrywide had no significant repurchase experience with private-label securitizations, the miniscule repurchase rate from other private-label trusts would not have been useful. Tr. (Scrivener) 1085:25-1086:6. Likewise, although monoline insurers had made aggressive repurchase demands, Countrywide disputed the vast majority of them, and litigation was still ongoing. *See, e.g.*, Tr. (Kravitt) 1753:11-14. With the GSEs, however, Bank of America had experience with respect to approximately 100,000 loans. Unlike the private-label or monoline experience, therefore, the GSE experience produced an actual "repurchase rate" that could be used as an indication of the level of breaches in the loan population. Tr. (Scrivener) 1033:22-1034:7.

Generally, loans sold to the GSEs and loans put in private-label trusts have "a lot of common DNA[]." Tr. (Lin) 4004:23-26. The Countrywide "GSE experience" involved loans originated on the same underwriting platforms—meaning the same offices, personnel, and procedures—as loans in the Covered Trusts, with a similar distribution of vintages. Tr. (Scrivener) 1169:16-24, 1005:17-23; Tr. (Kravitt) 1414:10-22; PTX 25. The decision to sell a loan to the GSEs, to a private-label securitization, or to someone else, came at the end of the underwriting process. Tr. (Scrivener) 1005:24-1006:22; *see also* Tr. (Kravitt) 1414:17-22.

Mr. Lin studied the presentations in detail. Tr. (Lin) 3863:18-3866:21. The data on the GSE loans came from two databases that feed into Bank of America's public disclosures and are also used for its own investment decisions. Tr. (Scrivener) 986:10-17. Those databases are subject to Sarbanes-Oxley controls, as well as supervision from regulators and Bank of

America's outside auditors. *Id*. 986:26-987:9, 995:9-12, 1069:20-22. The summary of that data that Bank of America presented during the negotiations is also represented to be accurate in the Settlement Agreement. PTX 1 § 13(b).[5] This was not "made for settlement" information.

Starting with that underlying data, Mr. Scrivener presented various analyses to account for differences between the GSE population and the Covered Trusts that were relevant to the likely breach rate. The parties consciously set aside differences between those two portfolios that would be relevant only to "credit risk" (the risk of loss). Tr. (Scrivener) 1005:9-16. Thus, for example, although GSE loans tended to have smaller loan size, higher FICO scores, and lower loan-to-value ratios (*i.e.*, more equity at origination), Mr. Scrivener and Mr. Lin both determined that those variables were not correlated with the breach rate, and thus the repurchase rate (the "manufacturing risk"). Tr. (Lin) 3933-34, 4024:8-4025:12; Tr. (Scrivener) 1002:6-1005:16, 1007:13-1008:4, 1038:7-16.

Differences in the factors relevant to the breach rate—loan type, documentation type, and early-default history—were all accounted for by reweighting the GSE repurchase data. Tr. (Scrivener) 1008:5-1009:25; *see also* 1035:24-1038:6. The result was an adjusted GSE repurchase rate (several percentage points higher than the actual GSE rate) that Mr. Lin agreed could properly be used as an estimate for the Covered Trusts.

Philip Burnaman, the Trustee's mortgage-finance expert at the hearing, confirmed that, based on his experience in mortgage finance, it was reasonable to use the GSE repurchase experience as a proxy. Tr. (Burnaman) 2741:15-19. In Mr. Burnaman's expert opinion, there were "great similarities" between the GSE and PLS loans for several reasons, including that both were originated on a common platform. *Id.* 2936:23-2937:7, 3048:7-20.

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[5] This representation gave Mr. Lin confidence in the GSE data. Tr. (Lin) 4001:18-24.

ii. Information from the Institutional Investors

The Trustee and RRMS also considered a presentation given by the Institutional Investors, which included breakdowns of projected losses for each type of loans in the Covered Trusts, as well as "scenarios" of varying repurchase rates. PTX 562.

Scott Waterstredt, a director at Met Life who participated "in all of the aspects of the negotiations," testified that the Institutional Investors' analysis incorporated "the most aggressive numbers we could [take] and show[ed] high loss numbers." Tr. (Waterstredt) 825:5-8, 835:13-14. Those figures were not "discounted . . . for any sort of liability, for any sort of litigation risk." *See* Tr. (Smith) 362:13-14, 371:17-19, 392:12-17. Mr. Burnaman agreed that the higher end of the Institutional Investors' repurchase estimate was "a bit of posturing" and relied on "outliers in the context of the data." Tr. (Burnaman) 2750:26-2751:10, 3046:6-21. Accordingly, he disregarded those figures in his own estimates. *Id.* 2751:7-10.

The Institutional Investors testified that their loan-performance assumptions also reflected their aggressive approach:

- 50% default rate on performing loans was "pretty aggressive," Tr. (Smith) 358:22-359:19;
- 90% default rate for current, modified loans was "very aggressive," Tr. (Waterstredt) 830:18-25; *see also* Tr. (Burnaman) 2748:2-4 (that assumption was "unreasonably high");
- 90% default rate for 60-day delinquent loans "was a little aggressive as well." Tr. (Waterstredt) 831:12-13;
- 66% loss severity rate was "towards the more aggressive side." Tr. (Waterstredt) 832:11-12; *see also id.* 866:26-867:3.

In contrast to the Bank of America repurchase-rate and loss figures, which came from data used for its securities disclosures and internal business decisionmaking, the Met Life representative

testified that he would *not* rely on the Institutional Investors' severity analysis "to project future severity in [his] day-to-day business." Tr. (Waterstredt) 866:26-867:3.

Also in contrast to Bank of America, the Institutional Investors largely refused to provide backup for the figures in their presentation, particularly the estimates of repurchase rates. The repurchase rates were not based on any verified sources. *Id*. 838:15-26; *see also id.* 885:23-26 ("There was no specific data on loan reunderwriting or anything along those lines."). Some of the repurchase-rate scenarios were presented as based on a loan review by an independent "quality control" firm. Tr. (Lin) 3884:9-19. That report was not provided to Mr. Lin despite his request for it. Tr. (Lin) 3885:10-12, 3885:18-21. The Institutional Investors stated only that the loans were "similar" to those in the Covered Trusts. Tr. (Burnaman) 2792:10-14, 2859:21-23. Thus, Mr. Lin had no reason to believe that those repurchase rates were even based on Countrywide loans, even though, as he testified, the identity of the originator is the most important determinate of defect rates. Tr. (Lin) 3930:5-7.

b. RRMS prepared a report on potential representation-and-warranty damages.

Following his discussions with Bank of America and the Institutional Investors, Mr. Lin prepared a summary and critique of those presentations, along with his own estimate of potential damages. Mr. Lin prepared that report without knowing that the parties had tentatively agreed to an $8.5 billion settlement amount. *See* Tr. (Bailey) 2206:15-18; Tr. (Lin) 4030:24-4031:18. His report concluded that both Bank of America's and the Institutional Investors' "overall methodology" for determining Countrywide's repurchase exposure was "reasonable." PTX 444.105-06. He applied "a mix of the methodologies" incorporating his own forecasts of variables underpinning the loan performance figures. PTX 444.109. Mr. Lin agreed that using Countrywide's repurchase experience with the GSEs as a basis for estimating a defect rate was "a proper alternative with appropriate adjustments." PTX 444.106.

Mr. Lin's opinion found that a "settlement range of approximately $8.8 to $11 billion is reasonable *without applying any legal haircuts*." PTX 444.109 (emphasis added). Since Mr. Lin's analysis was based on a population of 543 trusts, it is "reasonable to assume the settlement range would be lower" if adjusted for the 530 trusts covered by the Settlement. PTX 444.110; Tr. (Kravitt) 1443:22-26.

c. The Trustee investigated whether loan-file review was necessary.

The negotiating parties also discussed the possibility of reviewing loan files in the Covered Trusts. Tr. (Smith) 380:10-381:17. The Trustee concluded that a loan-file review, (*i.e.*, a reunderwriting exercise) was unnecessary in light of Countrywide's enormous actual real-world repurchase experience with the GSEs, on loans originated on the same platform, with adjustments made for the differences that the Trustee's expert believed were potentially relevant to defect rates. Tr. (Burnaman) 2738:26-2741:26. That GSE experience was based on loan-by-loan review of over 100,000 Countrywide loan files. *Id.* 2792:22.

Ample evidence supports the Trustee's decision to forego reunderwriting, which was also fully supported by the Institutional Investors. Tr. (Smith) 381:5-11; (Waterstredt) 892:11-20; 893:23-894:8. Before any review even occurred, there likely would have been a battle of the experts over how to construct a sample. Tr. (Fischel) 3522:16-17. Bank of America's counsel underscored that delay when he promised that if the Trustee pursued loan-by-loan review, "our grandchildren would have grandchildren before the trusts saw a dollar of recovery." Tr. (Smith) 380:19-381:2.

There is also no evidence that reunderwriting would have been conclusive or even favorable to the Trusts. The Trustee's counsel testified that, in his experience, "most of the time . . . the parties are arguing over the results of the reunderwriting." Tr. (Kravitt) 1415:24-1416:7. "In the end you have a continuing disagreement over what breached the reps and warranties or

not, and you've got to fight that out"; thus, reunderwriting "just put[s] the conflict one step further back." *Id.* 1446:26-1447:2, 1447:19-22. Professor Fischel and Mr. Burnaman agreed. *See* Tr. (Fischel) 3608:9-22; Tr. (Burnaman) 2762:4-6. As even AIG's expert admitted, reunderwriting inevitably leads to disputes, even within his own firm. Tr. (Cowan) 4272:10-4273:11, 4277:2-15.

This conclusion is borne out by the results of reunderwriting in other cases. For example, in *MBIA v. Countrywide*, MBIA's expert advanced a 91% breach rate, while Countrywide's expert disputed all but a handful of those alleged breaches, leaving the parties with widely divergent views of the merits of their positions. *See* Tr. (Kravitt) 1753:11-14. In *ResCap*, even after loan file review, the parties' estimates of the repurchase claims ranged from $811 million up to $19.6 *billion*. *See* Dkt. 909 at 1, 3-4.

In any event, the Objectors' complaint about the lack of a large scale loan-file review and reunderwriting rings hollow since they themselves chose not to pursue loan-file review after receiving in discovery loan files for 150 loans that they selected. *See* Tr. (June 14, 2012) 36:10-18 (Objector's counsel: "Mr. Mirvis suggested a compromise, which I think the Court understood, as I understood was to be a quick production of a small number of loan files, so we can review them and come back before [Y]our Honor in a relatively short period of time and say here's what the loan files look like, here's what the 150 showed us, now here's why we want more, the full statistical sampling."). There is no evidence that reviewing files from the Covered Trusts would have increased the Trustee's recovery.

In Mr. Burnaman's expert opinion, the decision not to engage in reunderwriting was "a reasonable approach"—it was in "the [Trusts'] best interests to try to come to an agreement with

the potential cost, delay and potential for litigation that might arise if they were going to slug it out on a loan file basis." *Id.* 2762:15-2763:6.

d. The Trustee hired Capstone to analyze Countrywide's ability to pay.

In deciding whether to enter into the Settlement Agreement, a key consideration was how much Countrywide could actually pay. *See* Dkt. 1 ¶¶ 78-81. Bank of America contended that Countrywide could not pay anything in the neighborhood of the $8.5 billion settlement payment. *See* Tr. (Smith) 367:7-25, 373:5-20, 377:9-12; Tr. (Bailey) 2207:2-9; Part III.B.4. above.

The Trustee retained Bruce Bingham, a leading valuation expert at Capstone Advisory Group, to opine on the maximum value that the Trustee could recover from Countrywide. *See* Tr. (Kravitt) 1435:11-19; Tr. (Bailey) 2206:21-26; Tr. (Bingham) 4474:13-23, 4553:10-19; PTX 444.5-17. To assist in this evaluation, Capstone received Countrywide financial statements from Bank of America, reviewed public securities filings, and discussed Countrywide's financials in phone calls with representatives of Bank of America and Countrywide. Tr. (Bingham) 4493:25-4494:4, 4495:15-23, 4538:14-15, 4541:15-26.

The Trustee instructed Capstone to make several optimistic assumptions, most notably that the Trustee would hold 99.9% of unsecured claims against Countrywide. *See* PTX 444.7; Tr. (Bingham) 4553:25-4554:25, 4562:17-20. Thus, for example, Capstone consciously ignored all of the other securities-fraud claimants (who now include AIG) who would compete with the Trustee for any recovery. Each of these assumptions had the impact of *increasing* the estimate of Countrywide's ability to pay. Tr. (Bingham) 4553:25-4554:25. Without these optimistic assumptions, Capstone would have likely returned a far lower value. *See id.* 4553:20-4554:25; PTX 444.8, 444.13-14.

The Trustee did not instruct Capstone to reach any particular conclusion. Tr. (Bingham) 4554:26-4555:10. Capstone concluded that Countrywide had, at most, $4.8 billion to pay unsecured creditors. *See* PTX 444.3-17; Tr. (Bingham) 4555:11-15.

e. The Trustee reviewed mortgage file defects.

During the settlement negotiations, the Institutional Investors claimed that foreclosures had been delayed or prevented because of missing mortgage documents. *See* Tr. (Bailey) 2216:18-21 ("[T]he Institutional Investors' position was that, part of the harm to Certificate Holders was a lack of documents necessary to foreclose in a timely fashion on a defaulted borrower."). To investigate the scope of the problem and evaluate possible remedies, the Trustee generated reports of loan-level data on missing documents. *See, e.g.*, Tr. (Kravitt) 1833:23-1834:5, 2133:14-16, 2151:6-10. Based on that review, the negotiating parties settled on cure provisions that focused on document deficiencies most likely to harm the Covered Trusts:

> [F]irst of all, we did the investigation of what documents were missing and we analyzed how serious it was, how serious were the missing documents or not. We decided that documents that made the most difference were . . . the mortgage, something wrong with the mortgage file and/or the title insurance policy. . . . [W]e didn't feel that missing notes would have made that big a difference. There weren't that many to begin with, and they could be cured through lost note affidavits.

Id. 2133:14-24.

2. <u>The Trustee conducted a legal investigation.</u>

a. The Trustee hired experienced counsel.

The Trustee engaged experienced and knowledgeable legal counsel to assist with its factual and legal investigation. Jason Kravitt and Mayer Brown were retained promptly following the Notice of Non-Performance. *See* Tr. (Kravitt) 1320:17-1321:7. The Mayer Brown team included an experienced group of litigators, lawyers "who were experienced in RMBS litigation," and lawyers experienced in transactional work, insolvency, real estate, and tax. Tr.

(Kravitt) 1319:18-1320:12; *see also id.* 1316:7-1318:9; Tr. (Landau) 2518:22-2519:8, 2526:11-20, 2573:21-2574:3; Tr. (Bailey) 2203:8-13.

Immediately following its retention, Mayer Brown began providing detailed advice to the Trustee about, among other things, whether the Notice of Non-Performance triggered an Event of Default, alternative approaches to the Notice of Non-Performance, and potential scenarios that could unfold—including the option of litigation with Countrywide and Bank of America. *See, e.g.*, R-1458, R-1454, R-1467. From the start, Mr. Kravitt sought to lead the parties down "the path that . . . would be most constructive"—while always recognizing that litigation was an option. Tr. (Kravitt) 1322:8-9, 1340:3-6, 1324:3-6, 1564:6-10, 1571:12-17, 1584:3-11. Throughout the process, Mayer Brown analyzed various legal and factual issues, including the Trustee's rights and obligations under the Governing Agreements, and advised it with respect to the strategy for negotiations. Tr. (Kravitt) 1393:5-15, 1676:8-9, 2007:5-12, 2151:12-15; *see also id*. 2152:13-15; Tr. (Bailey) 2197:12-15; 2255:5-2256:4, 2344:9-12, 2400:18-2401:2; PTX 160. Mayer Brown "always k[ept] [the Trustee] up-to-date with regard to the issues" and provided the Trustee with advice on critical aspects of the Settlement. Tr. (Kravitt) 1525:6-10; *see also* Tr. (Bailey) 2189:4-12, 2197:12-16, 2245:9-10, 2401:24-2402:2, 2489:17-26.

b. The Trustee hired Professor Daines to advise on successor liability.

The Trustee also considered whether, in the event that Countrywide was not able to pay the full amount of any judgment, Bank of America would be obligated to pay the debts of Countrywide based on theories of successor liability, veil piercing or similar legal theories (collectively, "successor liability"). *See* Dkt. 1 ¶ 82. To aid it in this assessment, the Trustee sought and obtained an independent expert opinion from Professor Robert Daines of Stanford Law School. *See id.* ¶ 83; PTX 444.18-75; *see also* Tr. (Daines) 1302:2-18; Tr. (Kravitt) 1435:15-22; Tr. (Bailey) 2207:18-2208:10. Professor Daines is the Pritzker Professor of Law and

Business at Stanford, where he has taught law courses on corporations, mergers and acquisitions, corporate governance, corporate finance and corporate law and legal theory and is the Director of the Rock Center for Corporate Governance. Tr. (Daines) 1279:12-17, 1280:15-23.

Professor Daines was asked to opine on the Trustee's likelihood of success on a veil piercing and successor liability claim against Bank of America. *See* PTX 444.18. In evaluating these claims, the Trustee asked Professor Daines to examine a set of transactions between Countrywide and Bank of America that were completed in 2008, and determine whether they were a basis for the Trustee to recover from Bank of America as a successor to Countrywide. PTX 444.18; Tr. (Daines) 1302:5-1303:2. The Trustee made clear that Professor Daines was to provide his own opinion about the law based on the facts presented. *See* Tr. (Daines) 1302:24-1303:2, 3305:25-26, 3339:2-4. Professor Daines understood his job as rendering an "independent assessment of how these veil piercing or successor liability claims would play out" (*id.* 3340:12-15), and was not told what conclusions to reach (*id.* 3344:7-17, 3436:8-16).

Based on his analysis of law and policy, Professor Daines opined that a veil piercing claim against Bank of America "would likely fail." *See* PTX 444.22. In his 58-page report, he explained that veil piercing is a "rare exception to the general rule of limited liability"; "[t]he common formulation is that courts will hold a shareholder liable for the corporation's debts when: (1) the debtor corporation is completely dominated or controlled by its shareholder; and (2) when failing to pierce would result in a fraud, injustice or a wrong." PTX 444.32.

Regarding a claim of successor liability, Professor Daines opined that, "[g]enerally speaking, a corporation which acquires the assets of another corporation is not liable for the seller's debts." PTX 444.44-45. Professor Daines concluded that "a successor liability case would be difficult to win unless the Transactions materially reduced the value of the legacy

Countrywide subsidiaries" because it "is simply too hard to explain why BAC should be liable—and a fundamental rule of corporate transactions set aside—if the Transactions [with Countrywide] caused no harm to Investors." PTX 444.55; *see also* Tr. (Daines) 3241:10-18, 3242:11-23, 3243:7-24, 3245:6-14. Professor Daines, assisted by Capstone (*id.* 3333:14-3334:21), found no indication that Bank of America materially underpaid for Countrywide's assets, as evidenced by Bank of America's use of fair value accounting for the merger (*see id.* 3432:5-3433:11; 3395:24-3396:4, PTX 18.27). Professor Daines testified that his conclusion was supported by the uncontested opinion of Dr. John McConnell in the *MBIA* litigation that fair value was paid. *See id.* 3261:2-12.

c. The Trustee hired Professor Adler to advise on the PSA's "materially and adversely affects" language.

The Trustee also considered Countrywide's argument that causation was an essential element of any repurchase claim under Section 2.03 of the PSAs. Dkt. 1 ¶¶ 68-77; *see also* Tr. (Kravitt) 1783:14-1785:19; Tr. (Bailey) 2208:19-2209:8. To evaluate that argument, the Trustee engaged Professor Barry E. Adler, the Bernard Petrie Professor of Law and Business at New York University, to provide an independent expert opinion on the meaning of the "materially and adversely affects" language in Section 2.03(c). *See* PTX 444.76-88; *see also* Tr. (Kravitt) 1436:24-1437:17; Tr. (Bailey) 2208:19-2209:8. As a leading contracts law scholar, Professor Adler was more than qualified to render his opinion. Tr. (Adler) 4458:14-20, 4458:25-4459:4.

Like the other advisors, Professor Adler confirmed that he was asked to analyze the law and to provide his own impressions of the competing interpretations of the contract's language; he was not asked to support a predetermined outcome. *See id.* 4382:17-26. He concluded that "it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders should turn on the harm caused by the

breach." PTX 444.88. It was Professor Adler's opinion that, "given the competing interpretations as expressed in the case law, there was no way to know which interpretation would prevail in any particular dispute in the case I was presented with." Tr. (Adler) 4457:22-25.

C. The Trustee Evaluated the Settlement and the Strengths and Weaknesses of the Trusts' Claims (paragraph i).

The Trustee evaluated the proposed settlement, using the fruits of its factual and legal investigation, and its first-hand participation in the negotiations. It considered the views of the Institutional Investors, its expert advisors, and its own internal experience with litigation, bankruptcy, debt workout, and loan servicing. The Trustee's use of expert advisors, its synthesis of the available information, and its approval process were "far beyond what was required" by industry standards. Tr. (Landau) 2542:25-2543:25. As set forth below, the Trustee's evaluation made clear that the Settlement was in the best interests of Certificateholders.

1. Support of the Institutional Investors

"[T]he baseline" for the Trustee was that the Settlement "was a heavily negotiated arm's length transaction between sophisticated parties." Tr. (Bailey) 2206:5-8; *see also id.* 2491:14-24. Indeed:

> You are dealing with 22 of some of the most sophisticated investors in the world and they approved it. So, you know, in my mind, that's, it's market tested. Here is the investor telling me, I want the deal.

Tr. (Stanley) 3128:7-10. That large, diverse, and sophisticated group of 22 investors collectively owned or managed more than $8.4 trillion of assets. *See* Dkt. 14 at 2; Tr. (Fischel) 3492:12-15. They include arms of the federal government (the Federal Reserve Bank of New York and the Federal Home Loan Bank of Atlanta), prominent investment managers acting as fiduciaries for their clients, and institutions managing their own money. Each independently decided to support

the Settlement. Tr. (Waterstredt) 847:16-19. Collectively, those investors held at least 24% of the securities, including holdings in 502 of the 530 trusts. PTX 500.1; Tr. (Fischel) 3490:11.

The Trustee's consideration of the investors' views is supported by the contracts, by industry practice, and by economic logic. Under the PSAs, if investors holding at least 25% of Certificates give a direction, "the Trustee shall not be liable with respect to any action taken, suffered or omitted to be taken by it in good faith in accordance with [the direction] relating to . . . exercising any trust or power." PTX 71 § 8.01(iii). Section 10.08, too, permits 25% of investors to sue on the Trusts' behalf in certain circumstances. Because the Trustee here saw an opportunity to recover for many trusts in which the Institutional Investors lacked 25%, it did not require or receive a formal direction. PTX 71 § 10.08. Nonetheless, it is entirely consistent with the PSAs—and industry practice—for the Trustee to strongly consider the views of such a substantial group of holders. *See* Tr. (Landau) 2519:15-2520:25.

Daniel Fischel, Professor of Law and Business Emeritus (and former Dean) at the University of Chicago Law School, explained that the investors' support is also "powerful *economic* evidence" of the reasonableness and adequacy of the Settlement and supporting the trustee's decision to enter into the proposed settlement. Tr. (Fischel) 3491:18-3492:24 (emphasis added). He concluded that "if the Trustee had not done [its own investigation], even if the Trustee had relied *solely* on the support of the Institutional Investors in light of the facts and circumstances of this case that I described, that would be sufficient." *Id.* 3483:5-11 (emphasis added).

2. Loan-repurchase claims

The Trustee considered three main factors in evaluating repurchase claims. As set forth in the Trustee's June 2011 Verified Petition, and confirmed at the hearing, the first—its likely ability to collect no more than $4.8 billion from the party with the contractual repurchase

obligation—was sufficient, by itself, to justify a settlement that was billions more than that figure. In addition, the Trustee considered the likely range of damages recoverable in litigation (which itself exceeded the proposed settlement only slightly and did not discount for any legal issues), and the cost, uncertainty, and delay of litigation.

a. The Trustee considered the likely recovery from Countrywide.

As discussed in Part IV.B.1.d. above, Capstone advised the Trustee that Countrywide's assets would allow for a maximum recovery of $4.8 billion by all of its unsecured creditors, including (to the extent that the Trustee succeeded in proving its claims) the Trustee. *See* Tr. (Kravitt) 1435:13-19; Tr. (Bailey) 2206:21-26; Tr. (Bingham) 4553:10-19, 4555:11-15; PTX 444.5.

This was one of the most important factors in the Trustee's evaluation of the Settlement. *See, e.g.*, Tr. (Lundberg) 4634:15-17. As Mr. Bailey testified, "[i]f the sole asset that the Trustee and the Certificate Holders have to collect against . . . is Countrywide, and Countrywide only has 4 billion of assets, even if we were the only creditor, that would tend to indicate there was a fairly limited recovery available." Tr. (Bailey) 2212:8-18; *see also id.* 2213:4-8. Similarly, Mr. Stanley testified that Capstone's valuation of Countrywide was highly influential in his decision to approve the Settlement. Tr. (Stanley) 3124:17-3125:6, 3126:11-12.

Based on Capstone's analysis, the Trustee concluded that Countrywide would be unable to pay a future judgment that exceeds or even approaches $8.5 billion. *See* Tr. (Bailey) 2212:8-18, 2213:4-8, 2214:10-20; Tr. (Stanley) 3124:7-3126:12. Under these circumstances, the Trustee's decision to accept and lock in a one-time, lump-sum payment of $8.5 billion on behalf of the Covered Trusts, rather than proceed with litigation that may result in a recoverable judgment, if any, billions of dollars *less* than that amount, was made in good faith and is

reasonable. *See* Tr. (Bailey) 2214:10-20; Tr. (Stanley) 3124:7-3126:12; *see generally* Tr. (Lundberg) 4626:26-4627:6.

b. The Trustee considered claims of successor liability against Bank of America.

The Objectors' expert, Professor Coates, testified that many plaintiffs (including class counsel, who have fiduciary duties to all class members) treat successor liability claims as "only . . . a throw-away component" of a complaint against Countrywide. Tr. (Coates) 5081:4-20. The Trustee took those extra-contractual claims far more seriously. As discussed in Part IV.B.2.b. above, the Trustee retained Professor Daines to consider whether it could recover damages from Bank of America as a successor to Countrywide. *See* PTX 444.18-75; *see also* Tr. (Daines) 1302:2-18; Tr. (Kravitt) 1435:15-19; Tr. (Bailey) 2207:18-2208:10.

Professor Daines's opinion that the Trustee was unlikely to recover from Bank of America was a critical factor in the Trustee's decision. *See* Tr. (Lundberg) 4626:26-4627:6; Tr. (Bailey) 2212:26-2213:8. Mr. Bailey testified that the challenges that the Trustee faced in recovering *any* amount from Bank of America was important to his conclusion that $8.5 billion was "a reasonable amount." Tr. (Bailey) 2214:8-20. Mr. Stanley stated that the legal "hurdles" to recovering from Bank of America were a key component of his decision to vote to approve the Settlement. Tr. (Stanley) 3125:17-3126:12.

At the time of Professor Daines's report, no court had found Bank of America liable as a successor to Countrywide Home Loans Inc. That is still the case. What has changed is that another 17 decisions, by three different judges, have dismissed (or refused leave to amend to bring) such claims—including in a case brought by AIG.[6] Tr. (Daines) 3236:18-21, 3237:6-

[6] *See Rodenhurst v. Bank of Am.*, 2011 WL 4625696 (D. Haw. Sept. 30, 2011); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164 (C.D. Cal. 2011); *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216 (C.D. Cal. 2012); *Thrivent Fin. for Lutherans v. Countywide Fin. Corp.*, 2012 WL 1799028 (C.D. Cal. Feb. 17, 2012); *Dexia Holdings, Inc. v.*

3238:18. AIG sought leave to amend by putting the entire discovery record from *MBIA* before the court. Even with that additional record, the *AIG* court rejected successor liability claims at the pleading stage. Tr. (Daines) 3237:20-3238:7, 3362:3-8. And even *MBIA's* expert on successor liability—Professor Coates—gave (then retracted) an opinion that the Trustee had only a 45%-65% chance of winning on that claim. Tr. (Coates) 5116:16-23.

c. The Trustee considered the likely range of damages for breaches of representations and warranties.

Countrywide's limited ability to pay and the formidable challenges to recovering against Bank of America, coupled with the Institutional Investors' unwavering support for the Settlement, were more than sufficient reasons for the Trustee to enter into the Settlement Agreement. But the Trustee considered much more, including the likely size of its claims against Countrywide. It considered an opinion from Brian Lin, which found that the losses attributable to Countrywide's failure to repurchase were likely to be in the range of $8.8 to $11 billion, before accounting for issues that were addressed separately, like the ability to collect from Countrywide. PTX 444.102-110. That report also explained, and therefore disclosed to anyone

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Countrywide Fin. Corp., 2012 WL 2161498 (C.D. Cal. June 1, 2012); *Thrivent Fin. for Lutherans v. Countywide Fin. Corp.*, 2012 WL 2161002 (C.D. Cal. June 1, 2012); *Serna v. Bank of America, N.A.*, 2012 WL 2030705 (C.D. Cal. June 4, 2012); *Nat'l Integrity Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 U.S. Dist. LEXIS 184429 (C.D. Cal. June 29, 2012); *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 3578666 (C.D. Cal. Aug. 17, 2012); *Minn. Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 6742119 (C.D. Cal. Dec. 6, 2012); *Bank Hapoalim B.M. v. Bank of America Corp.*, 2012 WL 6814194 (C.D. Cal. Dec. 21, 2012); *United Western Bank, F.S.B. v. Countrywide Fin. Corp.*, 2013 WL 49727 (C.D. Cal. Jan. 3, 2013); *Fed. Hous. Fin. Agency v. Countrywide Fin. Corp.*, 2013 WL 1189311 (C.D. Cal. 2013); *AIG v. Countrywide Fin. Corp.*, 2013 WL 1881567 (C.D. Cal. 2013); *Fed. Hous. Fin. Agency v. Countrywide Fin. Corp.*, No. 2:12-CV-1059 MRP, Dkt. 246, Order Re Motion for Leave to File SAC (C.D. Cal. June 7, 2013); *Colonial Bank v. Countrywide Secs. Corp.*, No. 11-ML-2265-MRP, Dkt. 168, Order Re Motions to Dismiss (C.D. Cal. June 20, 2013); *AIG v. Countrywide Fin. Corp.*, No. 2:11-CV-10549 MRP, Dkt. 286, Order Re Motion for Leave to File SAC (C.D. Cal. June 27, 2013).

who had not participated first-hand in the negotiations, the Institutional Investors' higher projections, as well as Bank of America's lower projections. *Id.*

The Trustee's employees and legal counsel considered that report, which was also discussed at the Trust Committee meeting. Tr. (Bailey) 2224:22-2225:3. Among other things, the Trustee concluded "that the experience [with] the GSEs was highly relevant to any negotiations that took place over a settlement with regard to the private label portfolio." Tr. (Kravitt) 1416:23-25; *see also generally id.* 1414:10-1416:21 (outlining various bases for Trustee's conclusion that Bank of America's GSE experience was highly relevant).

d. The Trustee considered and rejected Bank of America's proposed "haircuts."

The Trustee also evaluated several "haircuts" that Bank of America argued should apply to the settlement amount. For example, Bank of America calculated a 25.8% "lesser representation discount" to further adjust the GSE-derived repurchase rate to account for differences in the representations and warranties in the GSE and PLS loans. Tr. (Kravitt) 1958:18-23; *see also id.* 2014:22-25, 2016:3-8. Mr. Lin, based on his extensive experience selling loans to the GSEs, opined that "it is common knowledge . . . in the industry . . . [that contracts with] the GSEs ha[ve] more representations." Tr. (Lin) 4009:16-20; *see also id.* 4010:2-26 (it is "highly unlikely" that Covered Trusts had a no-fraud rep similar to the one in the GSE contracts). Thus, he concluded that "it would be easier for the GSEs to prove a breach" of representations and warranties than Certificateholders in the Covered Trusts. *Id.* 2141:8-11. Nonetheless, the Trustee conservatively "did n[o]t use the lesser representation haircut." *Id.* 1968:17-20.

Next, Bank of America applied a 24% "causation" haircut to account for its view that the "material and adverse effect" clause in the PSAs requires the Trustee to prove "loss causation" for each loan. As explained in Part IV.B.2.c above, the Trustee received a report from Professor

Adler on this question, which concluded that Countrywide had at least a reasonable position. Nonetheless, in Mr. Lin's report, which was not a legal analysis, Mr. Lin did not apply any discount to the Trustee's expected recovery based on the causation argument.

Bank of America also argued for a 19.8% "presentation" haircut to account for the fact that claims might lie fallow because trustees do not always pursue them. *See* PTX 36.5-6. Mr. Lin, among others, told Bank of America that this haircut seemed inappropriate because "the Investor Group has already undertaken action(s) to recover damages." *See* 444.108. Mr. Kravitt also testified that the Institutional Investors never gave him any reason to "believe that there was [any] discounting on account of difficulty of bringing enforcement actions when they were negotiating their number." Tr. (Kravitt) 2020:16-21. Accordingly, the Trustee "never gave any weight to that contention" in evaluating the proposed settlement amount. *See id.* 2017:7-13.

e. The Trustee considered the alternatives to settlement.

The Trust Committee compared the Settlement to the alternatives. Mr. Stanley testified that he focused on the certainty and immediacy of the payment: "the type of thoughts that were going through my mind is, if I'm sitting in the investor role, how am I going to get to this cash and the speed at which I'm going to get it." Tr. (Stanley) 3124:13-17. The "next best alternative" "was going down a very challenging road" of litigation and then attempting to collect from Countrywide, which was "very, very ugly in terms of certainty of the payment and the probability of when it was going to be made." *Id.* 3125:9-16. Although, as noted above in Part III.C., litigation was an option that the Trustee prepared for, it decided that the litigation alternative was not "reasonable in light of the results that were reached in the settlement." Tr. (Bailey) 2482:4-6.

In addition to the issues previously discussed, the Trustee also considered the uncertainty over whether it would need to prove that a breach caused a loss on each loan. *See* Tr. (Bailey)

2213:3-26. The Trustee "made no specific discount" for that defense, however. Tr. (Kravitt) 1784:21-1785:6. The settlement amount of $8.5 billion was only slightly below Mr. Lin's low-range estimate of $8.8 billion (*id.* 1785:3-19), which did not account for legal defenses, delay, or uncertainty of litigation. In the Trustee's view, "there was *no need* to figure out whether we should take a discount on account of the material and adverse effect clause because the damages [*i.e.*, settlement amount] were so close to what our expert told us were the real damages." *Id.* 1785:10-19 (emphasis added); *see also generally id.* 1795:26-1796:2. Nonetheless, it was an issue that was discussed and considered by the Trust Committee, and the Trustee concluded that it would have been a compelling reason to discount the damages range.

3. Servicing

a. Servicing claims

The record also shows that the Trustee thoughtfully analyzed the servicing claims. The PSAs require the Master Servicer to "service and administer the Mortgage Loans in accordance with the terms of this Agreement and customary and usual standards of practice of prudent mortgage loan servicers." *See* PTX 71 § 3.01. Mr. Kravitt, one of the nation's leading experts on securitization, testified that the contractual standard itself posed an obstacle to recovery:

> that is a very amorphous standard. It's very difficult to prove when or how much that's violated. For example, if you could compare servicing between two servicers, it's very difficult to because everybody has a different portfolio. But if you could, if one servicer were 10 percent less effective than another is that a breach of employing prudent servicing standards?

Tr. (Kravitt) 1450:21-1451:2.

Mr. Kravitt's analysis is echoed by the published views of the Objectors' expert, Professor Levitin: "When default levels at all servicers surpass historical levels, it becomes *near impossible* to ascribe the relative percentage of losses to servicer behavior or the innate character of the underlying mortgages in a pool." Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28

YALE J. ON REG. 1, 68 (2011) (emphasis added); *see also id.* 39 ("The heterogeneous nature of PLS makes it difficult to compare different servicers' effect on MBS performance. It is impossible to separate out the quality of the servicing from the quality of the underlying loans."). The Master Servicer's *liability*, moreover, is limited even further, to "willful misfeasance, bad faith or gross negligence" (PTX 71 § 6.03), a point that Bank of America emphasized. *See* PTX 28.8. That standard has been confirmed in recent cases. *See Assured Guar. Mun. Corp. v. Flagstar Bank*, 892 F. Supp. 2d 596, 606 (S.D.N.Y. 2012); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 2013 WL 1845588, at *12-*13 (Sup. Ct. N.Y. Cnty. 2013). Finally, as set forth in Part III.B. above, the servicing claims were subject to intense factual disputes as well.

b. Servicing remedies

The Trustee concluded that it would be "far more valuable" to focus on servicing remedies—to "create value going forward that would . . . produce a higher standard of servicing than even the [PSAs] required"—than to try to recover damages for past violations, while leaving servicing practices unchanged. Tr. (Kravitt) 1450:3-1451:22; *see also id.* 1437:18-23. This decision was based on the difficulty of proving that the PSAs' servicing standard had been violated; the "tougher [liability] standard" of "bad faith, intentional wrongdoing, reckless disregard or gross negligence"; and also the difficulty of quantifying any damages caused by any breach. *Id.* 2101:17-20, 2103:22-24. The Institutional Investors shared this concern, as well as the Trustee's enthusiasm for the servicing remedies. *See* Tr. (Waterstredt) 944:22-26 ("trying to ever identify gross negligent serviced loans would be extremely difficult. And that[,] while it was a claim that we could assert, it would be difficult to either value or litigate that specific claim").

That conclusion applied equally to the loan-modification theories. As Mr. Kravitt testified, it was necessary to "evaluate the different issues, their strength and what you think you can get out of them, how much time they will take, whether they will detract from other things

you are doing or whether they will be helpful to the things you are doing." *Id.* 2138:24-2139:4. Bank of America "had the best of the argument" regarding the PSAs' language and, importantly, that taking a position against loss mitigation modification would "conflict with the [government] policy encouraging modifications," which "was really becoming the central policy strategy of many different levels of the United States government." *Id.* 2139:5-13, 2173:14-15.

The Trustee reasoned that the Settlement allows it "to accomplish all the good aspects [of servicing reform] without any of the bad aspects," such as higher costs and disruption associated with firing and replacing the Master Servicer on a million loans. Tr. (Kravitt) 1760:14-15. The remedies "were so much more valuable than the ones" the Trustee might have achieved through litigation. *Id.* 2101:21-25; *see also id.* 2133:7-13. In the Trustee's and the Institutional Investors' view, this was "the best servicing relief we could possibly get," "the highest set of servicing standards that we could think of that would be effective." *Id.* 2134:3-4, 2135:11-13; *see also generally id.* 2134:12-2135:13 (discussing benefits of servicing provisions).

In a separate opinion, Mr. Lin analyzed the servicing improvements. PTX 14. He concluded that the Settlement's servicing provisions were "reasonable and in accordance with or exceeding customary and usual standards of practice for prudent mortgage loan servicing and administration." PTX 14.2. The report stated that the Settlement "can be viewed as an industry precedent setting, pro-active approach." *Id.* The Trustee's expert, Mr. Burnaman, quantified those conclusions, estimating that just a subset of the servicing improvements will provide between $2 billion and $3 billion in value to the Covered Trusts. *See* Tr. (Burnaman) 2730:3-5.

4. Loan-documentation claims

As with the servicing claims, the Trustee and the Institutional Investors concluded that it would be hard to establish damages arising from document deficiencies, particularly for loans that had not yet entered the foreclosure process. Tr. (Kravitt) 2056:22-25. After discussing the

matter with its internal Document Custody group, the Trustee concluded that "the release we gave with regard to those rights was the price of the remedy we received," a remedy that the Trustee "felt was superior to what was in the [PSAs]." *Id.* 2057:18-21. "Just as [the Trustee] accepted $8.5 billion for breach of warranty, [it] accepted a set of remedies for document defects . . . as the exercise of [its] enforcement discretion." *Id.* 2056:15-19. This remedy is especially valuable because it imposes on the Master Servicer (Bank of America) an obligation that otherwise would fall on the Seller (Countrywide) and would, therefore, be limited by Countrywide's ability to pay. *See* PTX 71 § 2.02; Tr. (Kravitt) 2124:13-19, 2125:14-2126:5, Tr. (Burnaman) 2764:9-18.

V. The Trustee Acted In Good Faith and Did Not Abuse Its Discretion (paragraph k).

A. The Trustee Acted in Good Faith (paragraph k).

1. The Trustee believed that the Settlement was in the best interests of Certificateholders.

The record establishes that the Trustee acted in good faith. The duty of loyalty is "the duty of a trustee[] not to profit at the possible expense of his beneficiary." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952). In the analogous context of corporate boards, "directors are *presumed* to have acted properly and in good faith, and are called to account for their actions only when they are *shown* to have engaged in self-dealing or fraud, or to have acted in bad faith." *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 (2d Cir. 1980) (emphasis added).

Every witness testified that the Trustee entered into the Settlement because it believed it was in the best interest of Certificateholders. *See* Tr. (Stanley) 3124:15 (made decision as "if I'm sitting in the investor role"); PTX 646, Griffin Dep. (played 9/25/2013) 148:3-4 ("We looked at this as being very beneficial for holders."); Tr. (Bailey) 2488:12-14 (Trustee acted without direction because "a potential settlement appeared to be the most potentially beneficial route to

follow on behalf of all the Trusts and Certificate Holders"). There is no evidence that any allegedly improper factors actually influenced the Trustee's decision.

2. The Trustee's extensive internal controls demonstrate good faith.

The good faith of the Trustee's decision is underscored by its extensive internal review processes. As soon as the Trustee received the Notice of Non-Performance, the matter was referred to the Default Administration Group, including Loretta Lundberg, as well as to in-house counsel Robert Bailey. *See* Tr. (Bailey) 2187:16-2188:3, 2191:2-7. The BNYM employees with day-to-day responsibility for settlement negotiations, including Ms. Lundberg and Mr. Bailey, kept their superiors informed of the negotiations and the process of evaluating the Settlement. *Id.* 2190:19-26; *see also id.* 2192:6-2193:11, 2238:19-2239:13. The settlement negotiations were discussed at senior management meetings, Tr. (Stanley) 3097:23-3098:8, and members of the Corporate Trust Committee were briefed on significant developments as they occurred. Tr. (Bailey) 2192:6-2193:11, 2223:21-2224:11. The Trustee's approval of the Settlement was formalized in a final Trust Committee meeting. *See* R-134; *see also* Tr. (Bailey) 2227:19-23. Prior to that meeting, Mr. Bailey "had spoken to each [of the Committee's members] personally about the settlement." *Id.* 2227:9-18. During the meeting, the Settlement Agreement, expert reports, and many other topics, including the decision to forego loan-file review and the bases for use of the GSE experience, were discussed. Tr. (Bailey) 2219:24-2220:5, 2225:11-25, 2408:17-18, 2409:2-4, 2414:11; Tr. (Stanley) 3106:8-3106:12. Mr. Landau testified that these procedures, including the conduct of the Trust Committee meeting, were prudent and reasonable, and in accordance with industry custom and practice. *See* Tr. (Landau) 2517:24-2518:10, 2518:11-2519:10, 2527:4-2529:16, 2539:18-2540:15.

3. There is no viable theory of conflict of interest.

None of the Objectors' theories of conflict identifies a "profit" to the trustee or a "detriment" to the Certificateholders, and the Objectors have adduced no evidence that any of their so-called conflicts *influenced* the Trustee's decision to accept an $8.5 billion settlement. As Professor Fischel testified, "all of the claims in this case about the conflicts of the Trustee are fundamentally flawed"; "the Trustee acted ethically and honorably and in the best interest of the trust[s] and the certificateholders at all points in time." Tr. (Fischel) 3484:17-23.

1. Forbearance Agreement. Undisputed evidence shows that the Trustee believed that its entry into the Forbearance Agreement with the Institutional Investors and Bank of America was in the interests of the Certificateholders. The agreement did not limit the rights of any holders other than the Institutional Investors (Tr. (Kravitt) 1367:4-18; Tr. (Bailey) 2320:5-7), allowed for constructive dialogue about a possible settlement, avoided litigation about whether an Event of Default had occurred (Tr. (Kravitt) at 1361:14-19), tolled the statute of limitations on Trustee claims against Bank of America and Countrywide (*see* PTX 38), and allowed the Institutional Investors to use extensions of the forbearance period and threats of an Event of Default as a carrot and a stick to win concessions from Bank of America. *See* PTX 38; Tr. (Kravitt) 1367:13-18; Tr. (Landau) 2546:2-2547:26; Tr. (Bailey) 2338:18-20.

2. Indemnity. The Trustee already had an indemnity in Section 8.05 of the PSAs and was entitled to receive an indemnity that it deemed adequate before taking any action (PTX 71 § 8.02(vi)). There is undisputed testimony that the purpose of such indemnities is to *overcome* conflicts, and that such confirmations of indemnity are consistent with industry custom and practice. Tr. (Fischel) 3528:9-12; Tr. (Landau) 2555:22-2557:7 (it "almost presents the Trustee with a conflict if you don't have [an indemnity]" because an indemnity allows the Trustee to pursue Certificateholders' interests without concern for financial risk). The confirmation of the

existing indemnity that the Trustee received added nothing—as this Court has already noted. *See* Dkt. 825 at 16 n.3 ("It is clear from the December 10, 2010 letter . . . that BNYM did not obtain indemnification beyond what was provided for under the PSAs.").

3. "Expanded" Bar Order. The draft "expanded" bar order in the draft Proposed Final Order and Judgment was not contained in the Settlement Agreement, was removed promptly after the Institutional Investors requested that it be removed, Tr. (Kravitt) 1893:9-11, and could only have been approved (had it been submitted to the Court) if the Trustee offered sufficient evidence to support it. In the end, it was never proposed to the Court, the Trustee never received any such bar order, and it did not influence the Trustee's decision. *See* Proposed Order.

4. The Further Assurances clause. Undisputed evidence shows that the parties' mutual agreement to support the Settlement, subject to Court approval, was necessary to achieve the benefits in the Settlement. As Mr. Kravitt testified, "you can't enter into a settlement agreement if it's an option. Nobody is going to sign a settlement agreement if the parties they sign with have the option of attempting to get a better agreement the day after it's signed." Tr. (Kravitt) 1538:6-10; 1554:21-26. Professor Fischel confirmed the Trustee's logic: "If the parties themselves determine that it's in their economic interest to enter into the proposed settlement, then they want that proposed settlement to be durable, they don't want it to be so fragile that any party can back out at any time . . . if they want to second-guess their earlier action." Tr. (Fischel) 3538:16-24. The Further Assurances clause prevents Bank of America from backing out based on, among other things, the dramatic improvement in the housing market since 2011 and corresponding drop in the Trusts' likely damages, or the unbroken string of defense wins on successor liability. *Id.* 16-18 (further assurances clause does not create a conflict because it's

"reciprocal"). As a result of the Further Assurances clause, thousands of Certificateholders will *benefit* because Bank of America remains bound by its $8.5 billion obligation.

5. Business from Bank of America. General business relationships are not a conflict as a matter of law. *See, e.g.*, *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1992). Moreover, undisputed evidence shows that the Trustee has not received a single new trusteeship from Bank of America or Countrywide since 2011 (and virtually none in the two years prior to the Settlement), and that any relationship had no bearing on the Trustee's decision to enter into the Settlement. Tr. (Fischel) 3543:14-3544:15.

B. The Settlement Is Within the Trustee's Broad Discretion (paragraph k).

"Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." *Restatement (Third) of Trusts* § 50, cmts. a, b (2007). Courts have admonished trustees to "tread cautiously" in the face of "protracted investigation or potentially costly litigation." *In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632, 635 (1st Cir. 2000). The Trustee's decision to accept $8.5 billion, along with document cures and servicing improvements worth billions more, instead of pursuing costly and uncertain litigation, was not an abuse of discretion. *In re Residential Capital, LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y. Sept. 13, 2013), at 19-20 (approving settlement in light of, among other things, "anticipated scope of discovery"; describing "enormous discovery burden required" in RMBS case "involv[ing] only five securitizations").

After two-plus years of litigation, the record mandates that conclusion: The Objectors have presented no evidence and no expert opinion that the Settlement is a bad deal, let alone such a bad deal that it could be called an abuse of discretion. *See* Tr. (Cowan) 4254:15-26 (agreeing that he is "not testifying to what a reasonable settlement would have been" and "never actually

considered that"); *id.* 4304:18-20 ("did not arrive at [his] own value for the right amount of expected losses in these trusts"); Tr. (Frankel) 4720:19-4721:4 ("no opinion on whether the $8.5 billion settlement amount itself is reasonable"; "I did not look at the number."); Levitin Dep. 47:20-22 ("I'm not opining in this case about what any actual number, settlement number should be."); *id.* 49:6-12 ("not directly" giving opinion "on the adequacy of the $8.5 billion settlement amount"); Tr. (Coates) 4791:2-8 (was asked only "to review the verified petition and supporting documents that related to the Trustee's evaluation of the ability to sue Bank of America").

In contrast, four of the Petitioners' experts testified that the Settlement is fair and reasonable. Mr. Burnaman, based on an extensive analysis of data on losses and repurchase rates, and the parties' negotiating positions, opined that "the 8.5 billion settlement amount . . . represents a reasonable outcome to this negotiation." Tr. (Burnaman) 2728:14-20. Mr. Lin, of course, had already opined that a range of $8.8 to $11 billion was a reasonable measure of damages alone before accounting for other relevant discounts. At the hearing, he testified that "I'm very confident that losses will come in probably most likely to my *low* range." Tr. (Lin) 4063:2-3 (emphasis added). Professor Fischel, based on his consideration of the Institutional Investors' support, the market's reaction to the Settlement, and the key drivers of the Trustee's decision (including the "ability to pay" and successor liability issues), testified that "the proposed settlement . . . was reasonable and adequate both as of the time of the petition date and for that matter as of today, both on its own terms and in terms of the Trustee's decision to enter into the settlement." Tr. (Fischel) 3482:9-13. Finally, Mr. Landau testified that, based on approximately 50 years of experience in the corporate trust industry and his review of the record, the Trustee's process of negotiating, evaluating, and entering into the Settlement was reasonable, prudent, and consistent with custom and practice in the industry. *See* Tr. (Landau) 2503:21-24, 2544:19-

2545:18. Mr. Landau testified that "[i]t was clear that [BNYM] went way above and beyond what it had to do here," compared with the typical level of participation by corporate trustees in settlement negotiations. *Id.* 2525:23-2526:10.

None of this testimony is disputed. In fact, on key topics, including mortgage finance, trust administration, and the economic analysis of settlement decisions, the Objectors put forth no witness at all. There is no basis at all for finding an abuse of discretion on this record.

VI. Remaining Findings and Conclusions

A. The Prior Findings Support the Approval of the Trustee's Actions (paragraph *l*).

Paragraph *l* is a finding that the Court "approves the actions of the Trustee in entering into the Settlement Agreement in all respects." That finding is appropriate, because the other findings establish that the Trustee acted reasonably and in good faith. The PSAs state that "the Trustee shall not be liable for an error of judgment made in good faith . . . , unless it shall be finally proven that the Trustee was negligent in ascertaining the pertinent facts." PTX 71 § 8.01(ii). *See also* Apr. 24, 2012 Tr. at 101 (THE COURT: "I think probably the scope of the discovery and the case . . . is going to be, was were the trustee's actions taken within their reasonable discretion."). If the Court makes finding g, it will have found that the Settlement "is a matter within the Trustee's discretion" (*i.e.*, it is a matter of "judgment"). Finding i would establish that the Trustee evaluated the Settlement "appropriately" (*i.e.*, at least non-negligently). And finding k would establish that the Trustee's decision was "in good faith, within its discretion, and within the bounds of reasonableness." Those findings establish that the Trustee's actions in negotiating, evaluating, and entering into the Settlement can be approved by the Court, and that therefore the Trustee cannot be liable for its conduct relating to those activities. *See* ¶ p.

B. The Settlement Agreement Is Valid and Enforceable (paragraphs m, n, o).

Paragraphs m, n, and o establish that the Settlement Agreement and, in particular, the release paragraphs, are effective and binding on all parties. As explained above in Part II.A., the Trustee has the power to settle claims provided that it does so reasonably and in good faith. Having found that predicate in paragraph k, it follows that the Settlement should be approved and is "fully enforceable" (paragraphs m, n). Moreover, as also explained in Part II.A., the claims being settled all belong to the Trustee on behalf of Certificateholders, not to individual holders. Because any claim that holders could bring on their own would have to be derivative, the release in the Settlement Agreement necessarily prevents individual Certificateholders from suing Bank of America or Countrywide for the same relief (paragraph o).

C. The Bar Orders Are Appropriate (paragraphs o, p, q).

Paragraphs o, p, and q make explicit the legal conclusion that follows from the factual findings above, as well as the *res judicata* effect of that conclusion. Such "bar orders" are common. *See, e.g.*, Order, *In re Fin. Guar. Ins. Co.*, No. 401265/12 (N.Y. Sup. Ct. Aug. 16, 2003); Order, *In re Res. Cap., LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y. Sept. 20, 2013); Final Order and Judgment, *Delima v. Exxon Corp.*, 2002 WL 34091488 (N.J. Sup. Ct. May 29, 2002) ("each Class Member releases and discharges Plaintiffs and Plaintiffs' Counsel from every and all . . . claims . . . against Plaintiffs' and Plaintiffs' Counsel . . . that are based upon or arise out of the institution, prosecution, assertion, or resolution of this action or the Settled Claims."); Order, *Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 152 (E.D.N.Y. 1995) (similar); *In re United Telecomm. Inc. Sec. Litig.*, 1994 WL 326007, at *6 (D. Kan. June 1, 1994) (similar).

The Court's findings bind the Trustee and all beneficiaries, as well as the other Potentially Interested Persons, including anyone who may believe that they have standing to sue the Trustee on the matters litigated here. Reaching a single judgment that binds all parties is one

of the essential features of the Article 77 procedure. *Cf. Greenspun v. Lindley*, 36 N.Y.2d 473, 477 (N.Y. 1975) ("we incidentally note the pragmatic as well as the theoretical advantages which would appear to flow from a conclusion that the rights of all shareholders of this real estate investment trust in comparable situations should be determined on a trust-wide basis rather than in consequence of the litigants' choice of forum or the assessment by several courts as to which State it is where the investment trust may be said to be present."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 311 (1950) ("every right which beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree.") (citing New York cases).[7]

D. The Trustee Is Entitled to Continue to Be Compensated Under the PSAs (paragraph r).

Paragraph r states that the Trustee has not "impair[ed]" any preexisting "rights it has under the applicable Governing Agreements to be compensated for the fees and expenses it incurs." There is nothing about the Trustee's decision to enter into the Settlement that should preclude the Trustee from recovering the fees and expenses to which it is entitled under the PSAs.

[7] A bar order is especially appropriate here because at least five pending lawsuits against the Trustee are based at least in part on the Trustee's Settlement-related conduct. *See Am. Fidelity Assurance Co. v. The Bank of New York Mellon* (W.D. Okla. 11-1284); *W. & S. Life Ins. Co. v. The Bank of New York Mellon* (Hamilton Cnty. Ohio Com. Pleas A1302490); *Knights of Columbus v. The Bank of New York Mellon* (Index No. 651442/2011); *Sterling Fed. Bank v. Countrywide Fin. Corp.* (N.D. Ill. 11-cv-2012); *Bankers Ins. Co. v. Countrywide Fin. Corp.* (M.D. Fla. 11-cv-1630). The Settlement-related portions of those claims would be barred by principles of *res judicata*.

E. The Orders In Paragraphs s, t, u, and v Are Appropriate.

The last four paragraphs of the Proposed Order provide certainty and finality concerning payment of the settlement amount and tax-related issues (¶ s), state that all objections have been considered and overruled (¶ t), that this Court retains jurisdiction over the Settlement and its Order (¶ u), and that the Clerk should enter the judgment immediately (¶ v). These findings are appropriate, and we request that the Court include them in its final order.

CONCLUSION

For all of the foregoing reasons, the Court should issue the Proposed Final Order and Judgment.

Dated: October 11, 2013
New York, New York

Respectfully submitted,

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