SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

-against-

WALNUT PLACE LLC, et al.,

Intervenor-Respondents,

Index No. 651786/2011

Assigned to: Kapnick, J.

MEMORANDUM OF LAW IN OPPOSITION TO THE TRUSTEE'S MOTION REGARDING THE STANDARD OF REVIEW AND SCOPE OF DISCOVERY

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The Steering Committee of the Intervenor-Respondents and Objectors ("Intervenors") respectfully submits this memorandum in opposition to the Bank of New York Mellon's motion regarding the standard of review and scope of discovery.[1]

INTRODUCTION

Before a single deposition has been taken, and before any meaningful discovery has begun, The Bank of New York Mellon ("BNYM" or "Trustee") asks the Court to adopt a highly deferential standard of review. BNYM argues that all the Court must do is determine whether its actions in entering into the proposed settlement were within "the bounds of its reasonable discretion." The Trustee then argues that because the standard of review is so deferential, the scope of discovery in this proceeding must also be narrow. In short, BNYM is asking this Court to prematurely determine the standard of review and then use that ruling as a shield to prevent and narrow discovery on the wide-ranging issues it has affirmatively presented in this proceeding.

BNYM is wrong about the standard of review for two reasons. First, BNYM is putting the cart before the horse. Under well-established law, a court can and should intervene in a trustee's decision where the trustee operated under a conflict of interest, acted in bad faith, failed to exercise its discretion, or otherwise acted improperly or unreasonably. A court cannot determine whether to intervene until it has a fully-developed record to review. Here, serious allegations of conflict and self-interested conduct on BNYM's behalf already exist. Second, the

[1] The Steering Committee submits this memorandum in opposition on behalf of all Intervenors except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; Ambac Assurance Corporation; The Segregated Account of Ambac Assurance Corporation; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; Cranberry Park II LLC; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policeman's Annuity and Benefit Fund of the City Of Chicago; and The Westmoreland County Employee Retirement System.

manner in which the proposed settlement appears to have come about distinguishes this case from the authorities BNYM relies upon in support of its request for a deferential standard of review.

BNYM's attempt to narrow discovery also must fail. BNYM frames this proceeding as addressing only the single issue of the reasonableness of its decision and thereby seeks to prohibit discovery into any materials other than those BNYM identifies as supportive of that decision. BNYM's proposed discovery restriction is nonsensical as BNYM *itself* has presented multiple issues to this Court that go well beyond whether the Trustee's decision to settle was an abuse of discretion. As set forth in the Intervenors' memorandum in support of their motion to compel discovery as well as BNYM's Proposed Final Order and Judgment, BNYM asks this Court to approve, among other things, all of its *conduct* in negotiating and approving the settlement as well as the *substantive fairness* of the settlement terms. BNYM ignores the wide-ranging relief it has requested when it attempts to reduce this proceeding to a single issue. Further, irrespective of the standard of review, discovery is required for both Intervenors and the Court to evaluate whether BNYM appropriately ascertained the pertinent facts and made (as discussed above) its decision in a reasonable and non-conflicted manner.

Despite BNYM's representations to the contrary, only very limited discovery has occurred in this case—all of it unilaterally determined by BNYM. Wide gaps in the settlement negotiation timeline still exist and numerous questions remain unanswered about who did what, when, and why. BNYM and the Institutional Investors have indicated that the process began with a June 17, 2010, letter from the Institutional Investors' counsel to BNYM which demanded a meeting with the Trustee. According to BNYM, the settlement process that was ultimately undertaken involved "dozens of face-to-face meetings and conference calls" and "extensive

dialogue among the parties." The Intervenors know next to nothing else about what occurred during these meetings and who participated. BNYM and the Institutional Investors have shielded any information that would shed light on those facts. Of the documents that BNYM has produced, only a small percentage concern the settlement itself and the process by which it was reached. No depositions have yet occurred, not even of the Trustee. Given the anemic state of the factual record, neither Intervenors nor this Court have the facts needed to evaluate whether BNYM exercised its discretion appropriately and free of conflict. The "standard of review" ruling that BNYM seeks is dramatically premature.

ARGUMENT

I. The Scope of Discovery Is Driven By The Issues Presented to the Court, Not By The "Standard of Review"

New York law is clear: the scope of discovery is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy . . . ." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968). Under this standard, as BNYM concedes, the "scope of discovery is determined by the issues to be adjudicated." (BNYM's Standard of Rev. Memo. at 11, Doc. No. 228.) BNYM's argument that the standard of review somehow limits discovery is thus misplaced, because it improperly "conflates the standard of review with the standard for discovery." *Mergel v. Prudential Life Ins. Co. of Am.*, No. 09 CV 00039(HB), 2009 WL 2849084, at *1 (S.D.N.Y. Sept. 1, 2009) (rejecting ERISA trustee's argument that because its benefit determination was subject to an abuse of discretion standard, the beneficiary could not obtain discovery into the trustee's alleged conflict of interest).[2]

This is not a single-issue case. Rather, the issues to be adjudicated include whether BNYM is actually entitled to the judicial deference that it assumes. This question should not be

[2] New York's liberal discovery standard is equivalent to the standard applied under the Federal Rules of Civil Procedure. *Mann ex rel. Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 29 (1st Dep't 2006).

decided now, without a factual record that is developed through appropriate discovery. (*See* Section II, *infra*.) The issues to be adjudicated here also include—at BNYM's request—an evaluation of the reasonableness of BNYM's conduct and of the settlement terms. BNYM injected these issues into this proceeding through the relief it requested in the Proposed Final Order and Judgment ("PFOJ") (*see* PFOJ, Doc. No. 7) and discovery should be allowed into any facts which bear on the appropriateness of that requested relief. (*See* Section III, *infra*.)

II. Whether BNYM's Decision To Enter the Settlement Is Entitled to Judicial Deference Is Dependent on Factual Questions that Merit Discovery

A trustee is not entitled to judicial deference in all circumstances. To the contrary, as the authorities that BNYM itself cites make clear, a court can and will interfere with a trustee's exercise of discretion where "the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." *In re Stillman*, 107 Misc.2d 102, 110 (Sur. Ct. N.Y. Cnty. 1980). In such circumstances, the trustee abuses its discretion. *Id.* The *Stillman* court held that the trustee, though acting in good faith, abused its discretion by unreasonably refusing to distribute principal to the beneficiaries. *Id.* at 111. In so ruling, the court closely examined the facts of the case. *Id.* at 103-10.

"Similarly, an abuse of discretion occurs when a trustee, even in good faith, exercises a power in a manner that is inconsistent with the duty of loyalty or the duty of impartiality." Restatement (Third) of Trusts § 87, cmt. c (2007) (internal citations omitted). New York courts accordingly do not defer to a trustee who operates under a conflict of interest. In some cases, an action taken by a conflicted trustee *must* be set aside altogether. *See City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 132 (1943). At a minimum, a court must review a conflicted trustee's conduct and actions "with strict scrutiny and with special care." *Milea v. Hugunin*, No.

08-2941, 2009 WL 1916400, at *8 (Sup. Ct. Onondaga Cnty. June 1, 2009) (Article 77 proceeding); *see also In re Bruches*, 67 A.D.2d 456, 461-63 (2d Dep't 1979) (trial required where the facts indicated the trustee exercised his discretion based on improper motives); *Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416 (4th Dep't 1986) ("One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully.").

Here, numerous factual questions exist regarding whether BNYM acted from an improper motive, was conflicted, failed to exercise its discretion, or otherwise acted improperly. For example, some Intervenors have raised allegations that BNYM acted in its own interests when negotiating and agreeing to the proposed settlement. Furthermore, the Institutional Investors' assertion that they are responsible for orchestrating and accomplishing the proposed settlement distinguishes this case from those in which the courts defer to trustees for actions undertaken by them, and raises questions about whether deference is appropriate here. Similarly, BNYM's favorable treatment of the Institutional Investors has arguably breached the duty of impartiality. Discovery into these issues is necessary before the applicable standard of review can be determined. Even under the standard as articulated by BNYM, this Court must evaluate whether BNYM "acted negligently in ascertaining the pertinent facts." (BNYM's Standard of Rev. Memo. at 10-11.) This Court cannot knowingly assess whether BNYM was negligent in ascertaining the pertinent facts without knowing what the pertinent facts were, something that can only be learned in discovery.

A. Claims that BNYM Acted For Its Own Benefit Exist Here and Merit Discovery

Numerous Intervenors have alleged that BNYM was conflicted in its negotiation of the settlement, including the Walnut Place entities, the AIG entities, and the Attorney General for the State of New York. (*See* Walnut Place Memo. in Support of Pet. to Intervene at 5-7, Doc.

No. 28; AIG's Pet. to Intervene at 9-18, Doc. No. 131; N.Y.A.G.'s Am. Pleading in Intervention ¶ 13, Doc. No. 237-7.) BNYM's actions in the course of negotiating the settlement raise legitimate questions regarding whether BNYM impermissibly acted in its own interest.

Expanded Indemnity. As explained extensively in other pleadings, BNYM negotiated a more favorable indemnity for itself than it would have otherwise received under the terms of the Pooling and Servicing Agreements ("PSA") in at least two regards. First, BNYM and Bank of America agreed to re-construe the Institutional Investors' directions to pursue claims against Bank of America and Countrywide as non-directions. As a result, BNYM purported to shift the indemnification for settlement conduct from itself and/or the Institutional Investors (who should be responsible for the indemnification under the terms of the PSAs) to Bank of America. (*See* Intervenors' Discovery Memo. at 22-23, Doc. No. 213-1.) Second, BNYM negotiated a guarantee from Bank of America for the indemnity that Countrywide owed BNYM under the terms of the PSAs. BNYM argues that the Countrywide entities are near insolvent; if true, the guarantee by Bank of America is a significant financial benefit to BNYM. (*Id.*; *see also* Intervenors' Article 77 Conversion Memo. at 14, Doc. No. 226.)

Event of Default. The PSAs provide that upon an event of default, the Trustee is to be held to a prudent person standard. (*See, e.g.*, CWALT 2004-2CB Pooling and Servicing Agreement § 8.01, Doc. No. 11-1, Ex. A-17 to Ingber Affidavit ["PSA"].) New York law likewise provides that an event of default heightens the Trustee's duties. *See BNP Paribas Mortg. Corp. v. Bank of Am., N.A*, 778 F. Supp. 2d 375, 401 (S.D.N.Y. 2011). There is evidence that one or more events of default occurred and that BNYM either did not fulfill its resultant duties, or sought to negate the occurrence of the event(s) of default. As one example, the October 18, 2010, Notice of Non-Performance sent by the Institutional Investors to BNYM

triggered a 60-day cure period under the PSAs. If BNYM did not cure the default within those 60 days, an event of default would occur and BNYM's heightened duties would be triggered. With heightened duties would come even greater potential liability to certificateholders. Rather than cure the event of default, BNYM and the Institutional Investors entered into what they termed "forbearance agreements" in an attempt to prevent the event of default from occurring. (Settlement Agreement § 7.) While these agreements are specifically referred to and relied upon in the Settlement Agreement, BNYM and the Institutional Investors have not produced these agreements in discovery. Notably, the PSAs do not permit the Trustee to contractually avoid an event of default or the duties that go along with it through an agreement with a minority of the trust beneficiaries.

Release of Liability. BNYM also used the settlement negotiations in an effort to secure protection from its own potential liability to certificateholders. The PFOJ includes a term under which certificateholders are to be barred and enjoined from suing BNYM for its settlement-related conduct. (PFOJ ¶ p [barring certificateholders from seeking relief from BNYM for "any claims arising from or in connection with the Trustee's entry into the Settlement . . . ."].) It is unclear whether the settlement agreement would be consummated if a final judicial order excluded this provision. (*See* Settlement Agreement § 2 [conditioning the settlement on judicial approval].)

While BNYM denies that any of the above actions amount to a conflict of interest or were otherwise improper, (BNYM's Responses to Objections at 8-13, Fed. Doc. No. 126), that determination cannot and should not be made on a bare factual record. The conflicts of interest have been raised by the pleadings in this case and must be adjudicated. Discovery into the facts surrounding BNYM's conduct is necessary and appropriate before the Court can or should

determine the applicable standard of review. *See Mergel*, 2009 WL 2849084 at *1 ("[T]he role that the conflict may have played in the outcome can only be assessed after discovery has been allowed and complied with."); *see also Parker v. Hartford Life and Accident Ins. Co.*, No. 08-60034-CIV, 2008 WL 2025326, at *1 (S.D. Fla. May 9, 2008) (declining to rule on the standard of review and limit the scope of discovery because "any determination of the standard of review to be applied . . . is properly made at summary judgment or at trial . . . .").

The cases BNYM cites in support of a purportedly deferential standard of review are not contrary to this conclusion. The *IBJ Schroder* court, in ultimately deferring to the trustee's showing that the settlement was reasonable, expressly noted that there was no evidence in the record "to show that the trustee's actions" were "based on some ulterior motive or that the trustee [was] somehow itself interested in the transaction other than in its fiduciary capacity . . . ." *In the Matter of IBJ Schroder Bank & Trust Co.*, No. 101530/98, slip op. at 5 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000). Here, unlike in *IBJ Schroder*, there is evidence that the Trustee acted in a self-interested manner in negotiating the settlement, as discussed above. As a result, *IBJ Schroder* is not on point and does not support the application of a deferential standard of review for BNYM's actions. If, as alleged, BNYM was itself interested in the transaction other than in its fiduciary capacity, BNYM's actions must be "scrutinized most carefully." *Birnbaum*, 117 A.D.2d at 416. *IBJ Schroder* does not indicate otherwise, nor does it suggest that the appropriate standard of review can be determined before necessary evidence is developed. To the contrary, the court evaluated the "evidence in the record" when determining whether to defer to the trustee.

B. <u>The Institutional Investors' Claimed Role in the Settlement Suggests That BNYM as Trustee Did Not Exercise Any Discretion, Thereby Distinguishing This Case From Those In Which The Courts Defer to Trustees Who Actually Exercised Their Judgment</u>

Except in certain circumstances, a trustee "has a duty to perform the responsibilities of

the trusteeship personally[.]" Restatement (Third) of Trusts § 80(1). A trustee may not simply "abandon its discretion" to another, particularly not to one of several beneficiaries of a trust. *See In re Osborn*, 252 A.D. 438, 445 (2d Dep't 1937) (trustee acted improperly by allowing one beneficiary to invade trust corpus at will). Even where a trustee appropriately delegates duties to another, the trustee retains an obligation to carefully select, supervise, and monitor its agent, Restatement (Third) of Trusts § 80(2), and that agent takes on fiduciary responsibilities to the beneficiaries. *Id.* at cmt. g.

It is undisputed that the Institutional Investors were materially involved in the negotiation of the proposed settlement. Counsel for the Institutional Investors stated in this Court that the Institutional Investors went "after [Bank of America] for a year to get this deal done." (Tr. of 8/5/11 Hrg. at 26:8-9, attached to Apr. 13, 2012, Rollin Aff. as Ex. 1.) Similarly, in a hearing before Judge Pauley, counsel for BNYM stated that the Trustee "*was presented* with a settlement that involved these 530 trusts[.]" (Tr. of 9/21/11 Hrg. at 9:8-10, attached to Apr. 13, 2012, Rollin Aff. as Ex. 2 [emphasis added].) In a pre-motion letter to Judge Pauley regarding whether the Settlement Communications[3] are discoverable, BNYM and the Institutional Investors argued that disclosure of the communications would prejudice the Institutional Investors because "[t]he strategy *the Institutional Investors have pursued* in prosecuting these claims against Bank of America and Countrywide is highly sensitive[.]" (Joint Letter to The Honorable William H. Pauley dated Jan. 13, 2012, at 4, attached to Apr. 13, 2012, Rollin Aff. as Ex. 3.) BNYM and the Institutional Investors also justified the $85 million fee to be paid by Bank of America to the Institutional Investors' counsel by arguing that it is appropriate for counsel who "*win a recovery for a group* of beneficiaries" to be handsomely paid. (*Id.* at 5 [emphasis added].) There has also

[3] "Settlement Communications" refers to all communications and documents exchanged between or among BNYM, the Institutional Investors, and Bank of America/Countrywide during negotiation, consummation, and Court submission of the proposed settlement. (*See* Intervenors' Discovery Memo. at 3.)

been widespread press regarding the involvement of the Institutional Investors and their counsel in negotiation of this settlement.

The Institutional Investors' substantial involvement raises serious questions regarding the extent to which BNYM really was exercising *its* discretion in the settlement negotiations. In the cases that BNYM relies upon to argue that a trustee's discretionary decision is entitled to deference, it was the *trustee*—not a self-appointed group of beneficiaries—that made or sought to make the decision(s) under review. *See generally In re Stillman*, 107 Misc. 2d 102; *In re First Deposit & Trust Co.*, 280 N.Y. 155 (1939); *In re Hagymas*, 46 Misc. 2d 492 (Sur. Ct. Rensselaer Cnty. 1965); *In re Shiel's Will*, 120 N.Y.S.2d 632 (Sur. Ct. Westchester Cnty. 1953). Here, in contrast, it is not clear that BNYM conducted the settlement negotiations or made the necessary strategic decisions along the way. Rather, it appears that BNYM delegated that authority to the Institutional Investors. Discovery into the respective roles played by BNYM and the Institutional Investors in the negotiation and consummation of the proposed settlement is therefore necessary before any decision regarding the standard of review is reached.

C. BNYM's Favorable Treatment of the Institutional Investors Indicates BNYM Has Breached Its Duty of Impartiality

BNYM owes all of the beneficiaries the duty of impartiality, which "is an extension of the duty of loyalty to beneficiaries . . . ." Restatement (Third) of Trusts § 79 cmt. b; *In re Garrasi*, No.1400-017, 2011 WL 5843028, at *11 (N.Y. Sur. Ct. Nov. 10, 2011) ("It is well established that a trustee has a duty of undivided loyalty to serve in the best interests of the trust and all of its beneficiaries, and must exercise reasonable care, diligence and prudence at all times."). Because of the duty of impartiality, a trustee's conduct may not "be influenced by the trustee's personal favoritism . . . toward individual beneficiaries," nor may a trustee "ignore the interests of some beneficiaries . . . because a particular beneficiary has more access to the trustee

or is more aggressive . . . ." Restatement (Third) of Trusts § 79 cmt. b. Here, again, there are indications that BNYM has violated its duty of impartiality by treating the Institutional Investors differently than the other beneficiaries. For example, BNYM has claimed that it and the Institutional Investors share a "common interest privilege" to the exclusion of the other certificateholders in the Covered Trusts. (*See, e.g.*, BNYM's Responses to Intervenors' Doc. Requests at 7, attached to Apr. 3, 2012, Rollin Aff. as Ex. 1.) As a result of this claimed privilege, the Institutional Investors are privy to settlement-related materials and information that BNYM is refusing to provide to all the other beneficiaries. As another example, BNYM agreed to a proposed settlement under which the Institutional Investors do not have to pay their own attorney's fees, while all other certificateholders do. There is no reasonable justification for this disparate treatment and this Court is not required to defer to a trustee that violates the duty of impartiality. Restatement (Third) of Trusts § 87, cmt. c.

* * * *

In short, BNYM's request for a ruling regarding the standard of review is, at best, premature. BNYM does not have total and unfettered discretion to settle the claims on any terms, or in any manner, that it sees fit. Numerous questions exist regarding BNYM's conduct, its conflicts of interest, how the settlement came about, and the respective roles played by BNYM and the Institutional Investors in the negotiations. Whether a deferential standard of review is appropriate cannot be known until (as in any case) the facts are properly developed through discovery.

Aside from the need for discovery, other factors counsel against a deferential standard of review in this case. For example, BNYM's decision to enter into the Settlement Agreement implicates matters of significant public interest and has far-reaching effects, which ordinarily

triggers heightened judicial scrutiny. *See Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986) ("The court has a larger role . . . where a . . . settlement judgment resolves . . . any suits affecting the public interest.") (internal quotations omitted). Additionally, and importantly, this matter was initiated by BNYM's *own* petition for judicial approval of the settlement and its settlement-related conduct. BNYM voluntarily sought judicial review. Despite affirmatively placing the settlement and its settlement-related decisions before this Court, BNYM asks the Court to abstain from any meaningful review of those decisions and instead to simply defer to them. BNYM should not be allowed to both petition this Court for its judicial blessing and simultaneously resist judicial scrutiny.

III. BNYM's Requested Relief Entitles Intervenors to Meaningful Discovery Into the Trustee's Conduct, the Settlement Negotiations, and the Settlement Terms

As discussed in the memorandum in support of the Intervenors' motion to compel, BNYM has asked that this Court issue at least eighteen separate and distinct rulings. (*See* Intervenors' Discovery Memo. at 6-8.) Among other things, BNYM seeks a ruling from this Court that the settlement was "the result of factual . . . investigation by the Trustee," that BNYM "appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weakness of the claims being settled," that the negotiations were "arm's-length," and that BNYM acted in "good faith," "within its discretion," and "within the bounds of reasonableness." (*See* PFOJ ¶¶ h, i, j, k.) Such factual findings are necessary for determining whether BNYM complied with applicable terms of the PSAs, which provide that the Trustee must act in "good faith." (*See* PSA § 8.01.) Notably, BNYM also asks that this Court "approve" the proposed Settlement Agreement "in all respects." (*Id.* ¶ n.) This requested finding necessarily calls for judicial approval of the proposed settlement's terms.

Despite the breadth of relief it seeks, BNYM has refused to produce meaningful

discovery into the facts bearing on the appropriateness of that relief. Instead, BNYM claims that the Intervenors (and ultimately the Court) can evaluate the proposed settlement based on the limited discovery it has provided. However, of the documents that BNYM has produced, only a small percentage concern the settlement itself and the process by which it was reached. (*See* Intervenors' Discovery Memo. at 4-5.) Extensive numbers of documents are being withheld on claims of relevance and/or privilege. (*Id.*) Among the documents that BNYM has refused to produce are:

- Settlement Communications;
- Documents sufficient to establish when each of the three key settlement terms were agreed upon; and
- Documents relevant to the circumstances under which Bank of America and Countrywide can walk away from the settlement (even if judicially approved).

(*See* BNYM's Responses to Intervenors' Doc. Requests at 7, 19-21, 31, attached to Apr. 3, 2012, Rollin Aff. as Ex. 1.)

Further, no depositions have occurred to date—not even the deposition of the Trustee that BNYM admits the Intervenors are entitled to take.[4] (*See* BNYM's Standard of Rev. Memo. at 11.) The Intervenors attempted to take the Trustee's deposition while the case was pending in federal court. Rather than appearing for that deposition, BNYM objected to such basic areas of inquiry as:

- How, and how much of, the $8.5 billion settlement amount will be allocated among the Covered Trusts;
- The meaning and effect of each term of the Settlement Agreement, the Institutional Investor Agreement, and the Proposed Final Order and Judgment; and
- Any information pertaining to Settlement Communications.

[4] That not even the Trustee's deposition has occurred further highlights why it is inappropriate for BNYM to be trying to circumscribe the scope of discovery through a ruling on the standard of review now.

BNYM's resistance to meaningful discovery is a barrier to judicial review. Courts have recognized that where, as here, a party seeks judicial approval of a settlement that it negotiated "in a fiduciary or representative capacity for others[,] more searching judicial scrutiny of [the] proposed settlement is required." *Geltzer v. Andersen Worldwide, S.C.*, No. 05 Civ 3339(GEL), 2007 WL 273526, at *1 (S.D.N.Y. Jan. 30, 2007) (denying bankruptcy trustee's motion for judicial approval of a proposed settlement). The court in such circumstances should "exercise more than superficial scrutiny and may not merely rely on the assurances of any party." *Geltzer*, 2007 WL 273526 at *1.

Rather than producing the documents and information necessary to test the relief requested and allow for adequate judicial review, BNYM essentially asks this Court to just accept its assurances that it acted appropriately and that the settlement is fair and reasonable. For example, BNYM has refused to produce Settlement Communications (with a few self-selected exceptions) on the basis that they are irrelevant, privileged, and/or not discoverable without a showing of collusion. As explained in the Intervenors' motion to compel, the Settlement Communications are highly relevant—indeed, they may be the best or only evidence of what really occurred during the settlement negotiations—and not privileged. (*See* Intervenors' Discovery Memo. at 9-13.) BNYM does not cite any New York state authority to support its contention that the Settlement Communications are not discoverable unless there is a showing of collusion. Quite the opposite, New York courts routinely allow discovery into settlement materials, including the settlement negotiations. *See, e.g.*, *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250 (1st Dep't 2002); *Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 307 (1st Dep't 2004); *NYP Holdings, Inc. v. McClier Corp.*, 836 Index No. 601404/04, 2007 WL 519272 (Sup. Ct. N.Y. Cnty. Jan. 10, 2007).

BNYM's argument for a collusion requirement is premised on limited federal law. (*See* BNYM's Standard of Rev. Memo. at 15.). The few federal cases that require a showing of collusion generally do so in the context of class action settlements. (*See id.* [citing 2 MCLAUGHLIN ON CLASS ACTIONS § 6:11 (7th ed.)].) In those cases, class members have ample opportunity to preserve their claims and rights, including by opting-out of the settlement. *See, e.g., Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 606-07 (W.D.N.Y. 2011). Furthermore, in the class action context there are procedural protections for class members, such as requirements that the named plaintiffs be judicially approved as adequate representatives of the class, and that counsel be qualified to represent the interests of the class as a whole. Distinguishably here, certificateholders have no assurance that their interests were adequately represented during the settlement negotiation process and they have not been afforded the opportunity to opt-out of the settlement. Finally, even if evidence of collusive conduct were required (which it is not) there is pre-discovery evidence which suggests the possibility of collusion and merits factual inquiry. (*See generally* Intervenors' Discovery Memo. at Section IV.B.1-3 [discussing several facts that support a finding of collusion, including that BNYM and the Institutional Investors received settlement benefits not accorded to other certificateholders].)

BNYM also greatly exaggerates the scope of the Intervenors' loan file request and the impact allowing discovery of loan files would have on this proceeding. (*See* BNYM's Standard of Rev. Memo at 13.) Through meet and confer sessions with BNYM (and also Bank of America), the Intervenors have made clear that they only seek a manageable sampling of loan files—which should be electronically stored and readily available as part of the Master Servicer's normal course of business—to test the assumptions made by BNYM and its retained expert, Brian Lin, in agreeing to the $8.5 billion settlement amount. (*See* Intervenors' Discovery

Memo. at 14-15 [discussing why loan files are relevant and discoverable]). BNYM's argument that allowing loan file sampling would result in a full trial on the merits is a red herring. To the contrary, the sampling that Intervenors seek is reasonable and narrow, and would allow the Intervenors to evaluate the settlement without a full-blown mini-trial. BNYM asks this Court to declare that it "appropriately evaluated . . . the strengths and weakness of the claims being settled." (PFOJ ¶ i.) Whether BNYM's evaluation of the underlying claims was appropriate cannot be determined without some knowledge about those claims. Facts bearing on the strength of the underlying claims being settled, including a sampling of loan files, are therefore relevant.

BNYM incorrectly asserts that providing Intervenors with the opportunity to take discovery would "do nothing at all to advance the Court's consideration of the Petition." (BNYM's Standard of Rev. Memo. at 13.) To the contrary, development of the facts relevant to BNYM's requested relief would aid the Court in assessing whether BNYM acted reasonably and in good faith and whether the settlement should be approved. Further, discovery is necessary here because BNYM seeks to extinguish the Intervenors' valuable litigation rights. (*See* Intervenors' Discovery Memo. at 8-9.) Those rights should not be extinguished without adequate discovery.

Finally, there is no reason why allowing meaningful discovery would "derail this proceeding." (BNYM's Standard of Rev. Memo at 13.) As a threshold matter, BNYM's contention is based in part on its assumption that Article 77 is appropriate here. (*Id.* at 13-14 [permitting discovery would "transform this proceeding from a summary proceeding . . ."].) As argued in the Intervenors' motion to convert this proceeding, there are numerous reasons why this action should not proceed under the rubric of Article 77. (*See generally* Intervenors' Art. 77 Conversion Memo.) Regardless, in Article 77 proceedings all discovery devices are allowed and

the liberal Article 31 standard for permissible discovery applies. *See* N.Y. CPLR § 408; (Intervenors' Discovery Memo. at 5-6.) The Intervenors could acquire meaningful discovery within a reasonable timeframe if BNYM and the Institutional Investors would start producing the documents that actually shed light on the settlement terms and the process by which they were reached, and began appearing for depositions, rather than objecting at each turn. Indeed, under the discovery schedule set by Judge Pauley, all discovery—fact and expert—would have taken eight months. Given the rights and issues at stake in this case (not to mention the number of parties), such a timeline is reasonable to ensure meaningful and adequate discovery.

CONCLUSION

For the reasons set forth above, the Intervenors respectfully request that this Court deny BNYM's motion for a ruling that (a) the standard of review applicable to the Trustee's decision to enter into the Settlement Agreement is whether the Trustee acted within the bounds of its reasonable discretion, and (b) consistent with that standard, discovery should be limited to documents, information and testimony concerning the basis for the Trustee's decision to enter into the Settlement Agreement (including the documents and information considered by the Trustee in making its decision).

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Respectfully submitted,

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