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June 4, 2012

By Hand Delivery

Honorable Barbara R. Kapnick
Supreme Court, New York County
60 Centre Street, Room 555
New York, New York 10007

In re: The Bank of New York Mellon, Index No. 651786/2011

Dear Justice Kapnick:

We write on behalf of the members of the Steering Committee of Intervenor-Respondents. On April 3, 2012, the Steering Committee of Intervenor-Respondents filed a motion to compel the production of the mortgage loan files (among other things). The Trustee and the Institutional Investors opposed that motion on April 13, and Bank of America filed an untimely opposition to that motion on May 2. At a hearing on May 8, BofA proposed that it would produce a very small number of loan files as a “test run.” The Court adopted that proposal – over respondents’ objection – on the assumption that those loan files would be produced, analyzed, and presented to the Court in short order, so that the Court could be better informed in deciding whether a statistically significant sampling of loan files should then be produced. The Court directed the parties to do a “first quick evaluation” of between 150 and 500 loan files and present those findings to the Court.

As we explain in more detail below, it has become clear through the meet and confer process that BofA intends that the production and examination of this initial small set of loan files will likely take the better part of seven months. Respondents believe that any possible benefits of such an exercise are far outweighed by the delay that it will cause. Respondents also are concerned that they will be severely prejudiced if they are forced to wait several months before the Court rules on whether a statistically significant sampling of loan files must be produced in this proceeding. We therefore respectfully request that the Court rule on the pending motion to compel the production of loan files. To further inform the Court’s decision, we submit with this letter a short affidavit from Charles D. Cowan, a statistician who testified before Justice Bransten in the *MBIA v. Countrywide* case, regarding the number of loan files that would be necessary to create a statistically meaningful sample of the loans in the 530 Trusts that are part of the proposed settlement.

By way of very brief background, Respondents argued to the Court that a review of a statistically significant sample of loan files is necessary to evaluate the assumptions that the Trustee's expert, Brian Lin, made in opining on the reasonableness of the proposed \$8.5 billion settlement amount. The Trustee claims to have relied on Mr. Lin's opinion, and asks the Court to do the same. Mr. Lin himself acknowledges in his report that his assumptions about the breach rate were not based on the loans in these trusts. Instead, they were based on reported breach rates, which Mr. Lin did not independently evaluate, in pools of loans that were qualitatively different from the loans in the trusts. The Trustee put these assumptions squarely at issue by submitting Mr. Lin's report and asking the Court to find that the Trustee "appropriately evaluated . . . the strengths and weaknesses of the claims being settled" and to "approve[] the actions of the Trustee in entering into the Settlement Agreement in all respects."

Unless respondents are permitted to obtain a statistically significant sampling of loan files, the extent to which the Trustee's assumptions may have understated Countrywide's repurchase liability will remain unknown. The beneficiaries, who are to be bound by a settlement negotiated by BofA, on the one hand, and its affiliate, Blackrock, and other institutional investors, on the other, are entitled to estimate the *actual* value of the trusts' repurchase claims in order to fairly assess the Trustee's proffered *assumptions* that the settlement amount is reasonable.

Petitioners and BofA argue, however, that reviewing *any* loan files would be tantamount to litigating the "merits" of the repurchase claims to be settled. At the hearing on May 8, Theodore Mirvis, counsel for BofA proposed what appeared to be a compromise:

"We [BofA] provide a subset of loan files, they [Respondents] can pick them, we will sit down, come up with some that we can get them as fast as we can. They can re underwrite them. If they want, we can re underwrite them. The trustee gets to do it. And if they really think this game is worth a candle and can persuade your Honor that this is not just a road to a dead end, we can come back and talk to you about it."

Over respondents' objection, the Court directed the parties to proceed along the lines that Mr. Mirvis proposed. The Court suggested that BofA produce 150 loan files, and when respondents requested that BofA be directed to produce at least 500 loan files, the Court directed Respondents and BofA to meet and confer on the number of loan files that would be produced. As Mr. Mirvis suggested, the Court stated that the purpose of this initial production was to do a "first quick evaluation" and then to explain to the court "why this is so important."

Two days later, we met and conferred with counsel for BofA. We proposed that BofA agree to produce 300 loan files (less than halfway between 150 and 500). BofA refused, and instead insisted that it would produce at most 150 loan files. Counsel for

BofA then stated that production of any loan files may proceed only upon the execution by all parties of a “stipulation.” The stipulation that BofA proposed several days later (and that it apparently intends to ask this Court to so order) demonstrates that the production of 150 loan files will serve no purpose other than monumental delay. A copy of the draft stipulation is attached as Exhibit A. It provides, for example, that:

- BofA and Countrywide shall use “reasonable best efforts” to “substantially complete the production” of the 150 loan files within *ninety days* of the date of the signing of the stipulation.
- Respondents must deliver to BofA a “report” that “shall contain all information, findings, analyses, opinions and conclusions related to the Loan Materials or Subject Loans that Objectors intend to submit to the Court at any time.”
- After delivering this “report” to BofA, respondents must wait *60 business days* (which is at least 82 calendar days) before any “information related to the Loan Materials or Subject Loans may be provided by Objectors to the Court.”
- “It is understood and agreed that, notwithstanding anything else provided herein, Objectors shall not use Loan Materials produced hereunder to allege any statistically or scientifically significant, meaningful, or otherwise reliable findings or results (including for the pool of Subject Loans themselves), or otherwise allege that any findings or results may be extrapolated to other loans, loan files or loan materials in the Covered Trusts.”

Taken together, those provisions provide that: (1) BofA will *try* to produce 150 loan files in 90 days; (2) after respondents review the loan files (which will take several weeks), they must provide a detailed report to BofA; (3) respondents must then wait at least 60 business days before presenting these findings to the Court; and (4) respondents *must agree in advance that none of the work that they do with these loans files will be “meaningful, or otherwise reliable findings or results.”* In short, the “compromise” BofA has in mind is a seven-month process that is pre-determined to yield no meaningful results.

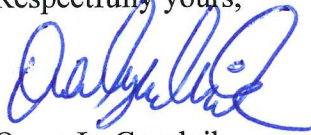
After receiving this draft stipulation, respondents telephoned counsel for BofA to ask whether these 150 loan files could be produced within 30 days, so that respondents could review them and present the findings to the Court in short order. Counsel for BofA stated that production of the 150 loan files within 30 days was “off the table.” Counsel

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for BofA also refused to agree to produce the loan files without the pre-conditions that BofA demanded in the draft stipulation.¹

These developments make clear that the exercise of producing and reviewing an initial small number of loan files will cause much more harm than good. Respondents respectfully submit that it would be far more efficient for the Court to rule now on the motion to compel production of a statistically significant sampling of loan files, and Respondents therefore respectfully urge the Court to do so. Respondents will be prepared to address the motion at the upcoming hearing on June 14.

Respectfully yours,



Owen L. Cyrulnik

Copies to: Counsel of record by email and ECF

¹ Counsel for BofA stated that they were willing to “discuss” any of the provisions in the proposed stipulation, but did not offer to withdraw any of BofA’s demands. In particular, they stated that it would be “trial by ambush” for respondents to review the loan files and present their findings to the Court without first providing to BofA (1) a report of those findings; and (2) a period of time after BofA receives that report to review its own loan files that is roughly commensurate with the time that it takes respondents to conduct their review.

Exhibit A

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.

STIPULATION AND
[PROPOSED] ORDER

WHEREAS, on November 18, 2011, certain intervenor-respondents and objectors subpoenaed a random sample of 1,000 loan files from each of the 530 Covered Trusts, *i.e.*, 530,000 loan files, from Bank of America Corporation (“Bank of America”) and requested production of the same documents from The Bank of New York Mellon (the “Trustee”);

WHEREAS, on December 16, 2011, Bank of America served the Responses and Objections of Non-Party Bank of America Corporation to Intervenor/Objectors’ Subpoena (the “Responses and Objections”) , which objected to the loan-file request on the bases that such

documents were irrelevant to the Trustee's decision to enter into the Settlement and that, among other reasons, the request was "overbroad, unduly burdensome, and infeasible";

WHEREAS, on April 3, 2012, certain intervenor-respondents and objectors (the "Objectors") moved to compel a "sampling of loan files" from the Trustee;

WHEREAS, on April 13, 2012, the Trustee opposed Objectors' motion to compel, and on May 2, 2012, Bank of America and Countrywide Financial Corporation and Countrywide Home Loans, Inc. (together, "Countrywide") also opposed Objectors' motion to compel loan files;

WHEREAS, on May 8, 2012, the Court held a hearing on, among other things, Objectors' motion to compel loan files;

WHEREAS, at the May 8 hearing, the Trustee and Bank of America continued to object to the relevance of loan files, and Bank of America offered to produce 10-100 loan files for illustrative purposes;

WHEREAS, at the May 8 hearing, Objectors maintained their position on relevance and reduced their request to 500 loan files;

WHEREAS, at the May 8 hearing, the Court stated "this is a different case" than "a lawsuit" of the underlying claims being settled, "[t]his is an approval of a settlement where. . . they didn't look at loan files," and the Court suggested the production of 150 loan files;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the Steering Committee of the Intervenor-Respondents and Objectors (the "Objectors' Steering Committee"), nonparty Bank of America, nonparty Countrywide, the Trustee and the Institutional Investors (each referred to herein as a "party" to this Stipulation and Order, although Bank of America and Countrywide are nonparties to this action), through their undersigned

counsel of record, in accordance with the guidance provided by the Court at the May 8, 2012 hearing, as follows:

1. Bank of America and Countrywide shall produce on a rolling basis certain non-privileged loan materials for 150 loans selected by Objectors' Steering Committee and listed by Countrywide-loan number on the attached Exhibit A (the "Subject Loans"). The non-privileged loan materials for the Subject Loans shall hereinafter be referred to as "Loan Materials." Such production will be made to [a designated representative of Objectors' Steering Committee].

2. The Loan Materials shall consist of, to the extent reasonably available and located after a good faith search of the files at Bank of America and Countrywide that are reasonably likely to contain documents within the scope of what Bank of America and Countrywide are undertaking to produce, for each Subject Loan, (i) the loan origination documents, including, to the extent applicable, the credit reports, underwriting work sheets, underwriting exceptions granted, appraisal or valuation results, title commitment and policy, AUS findings, loan approval, loan application (Form 1008 and all supporting documents), mortgage note, mortgage or deed of trust, mortgage insurance certificate and HUD1; (ii) closing loan tapes, to the extent not publicly available; (iii) loan servicing records, including, to the extent applicable, call notes, [foreclosure files and communications with borrowers]¹ and loss mitigation files; and (iv) [entries from the PAT/CLAIMS System reflecting external communications relating to a mortgage-insurance claim denial and/or a repurchase demand on the Subject Loans]². At Objectors' request, the above definition of Loan Materials includes materials not typically produced in response to loan-file requests in other litigations and extends beyond the typical definition of loan files understood and employed by Bank of America and Countrywide in their

¹ Under review

² Under review

business practices. The parties understand and agree that the description of the contents of Loan Materials in this paragraph [2], including the enumeration of documents in each subparagraph, is solely descriptive of the types of documents that Bank of America and Countrywide are undertaking to search for in accordance with the limitations set forth above, and that nothing in this Stipulation and Order is a statement or admission that any particular document can or should be found in any particular location or file or is currently in existence, or that the documents enumerated herein have any legal or other significance.

3. Bank of America and Countrywide shall produce to [a designated representative of Objectors' Steering Committee], to the extent reasonably available and located after a good faith search of the files at Bank of America and Countrywide that are reasonably likely to contain documents within the scope of what Bank of America and Countrywide are undertaking to produce, the underwriting guidelines for the loan types represented in the Subject Loans, which were in effect from the earliest date of origination of a Subject Loan to the latest date of origination of a Subject Loan.

4. Bank of America and Countrywide shall use reasonable best efforts to substantially complete the production contemplated by paragraphs [2] and [3] within [ninety (90)] days of the date of this Stipulation and Order. It is understood and agreed that this timeframe for production of documents is solely limited to the production contemplated by this Stipulation and Order and will not be argued to apply to the production of any other loan materials or other documents, including for additional loans in the Covered Trusts. It is further understood and agreed that the production contemplated hereunder is subject to and without waiver of the Responses and Objections, and that given Bank of America's and Countrywide's undertaking to produce only non-privileged documents a privilege log will not be produced.

5. [Objectors shall pay the costs associated with completing the production contemplated by paragraphs [2] and [3] within __ (__) business days of Bank of America's or Countrywide's tender to [a designated representative of Objectors' Steering Committee] of an invoice for those costs.]

6. In addition to the requirements of the [Stipulation and Order Governing the Exchange of Confidential Information] entered in this proceeding, which shall apply to the Loan Materials and other documents produced hereunder, any person or entity accessing the Loan Materials shall treat "nonpublic personal information" (as that term is defined by the Gramm Leach Bliley Act, 15 U.S.C. § 6802, et seq., and its implementing regulations) as confidential and shall abide by all federal, state, and local laws prohibiting the use and dissemination of such nonpublic personal information. Further, no person or entity will call, subpoena or otherwise contact any borrower identified in the Loan Materials.

7. To the extent Objectors engage in any process, investigation, reunderwriting or review of the Loan Materials to determine whether any Loan Materials allegedly evidences (i) any breach of a representation or warranty contained in the Pooling and Servicing Agreements or any other applicable governing agreement (the "Governing Agreements"), (ii) any basis to allege any Subject Loan would have been required to be repurchased under the terms of the Governing Agreements, and/or (iii) any other analysis of the Loan Materials or Subject Loans, Objectors shall deliver a report of their findings, analyses, opinions or conclusions to Bank of America, Countrywide, the Trustee and the Institutional Investors. This report shall contain all information, findings, analyses, opinions and conclusions related to the Loan Materials or Subject Loans that Objectors intend to submit to the Court at any time.

8. No information related to the Loan Materials or Subject Loans may be provided by Objectors to the Court until [sixty (60)] business days have elapsed from the date that Objectors have delivered to Bank of America, Countrywide, the Trustee and the Institutional Investors the report referenced in paragraph [7].

9. In the event that Bank of America, Countrywide, the Trustee or the Institutional Investors determines to provide information to the Court related to the Loan Materials or Subject Loans, such information shall first be provided to Objectors and the other parties; in the event that Objectors or any other party, in response, intends to provide information to the Court related to Loan Materials or the Subject Loans, such information shall first be provided to Bank of America, Countrywide and the other parties. In each case provided for in this paragraph [9], there shall be a period of __ (__) business days in advance of any information related to the Loan Materials or Subject Loans being provided to the Court, for the party receiving such information to respond or object thereto or seek relief from the Court with respect thereto.

10. It is understood and agreed that, notwithstanding anything else provided herein, Objectors shall not use Loan Materials produced hereunder to allege any statistically or scientifically significant, meaningful, or otherwise reliable findings or results (including for the pool of Subject Loans themselves), or otherwise allege that any findings or results may be extrapolated to other loans, loan files or loan materials in the Covered Trusts.

11. It is understood and agreed that the purpose of the Loan Materials production provided for herein is not to litigate the underlying claims that are subject to the Settlement. All provisions of this Stipulation and Order shall be construed in accordance with this purpose.

12. Paragraphs [12] through [15] shall govern discovery in connection with any person or entity who Bank of America, Countrywide, Objectors, the Trustee or the Institutional

Investors will or may call as an expert or other witness in this action to present evidence related to the Loan Materials or Subject Loans (a “Loan File Witness”). Notwithstanding any provision of law to the contrary, including CPLR 3101 (or any other potentially applicable case law or rule), Bank of America, Countrywide, Objectors, the Trustee or the Institutional Investors shall not be required to disclose or produce in discovery or at any hearing or trial any:

- (i) drafts of reports, declarations, affidavits, or other supporting materials related to the Loan Materials or Subject Loans for loans in the Covered Trusts, including materials, studies, charts, illustrative documents, or exhibits, prepared by the Loan File Witness, persons working under the Loan File Witness’s supervision, parties, their in-house or outside counsel, employees, or consultants; this provision shall apply regardless of whether such drafts have been disclosed or otherwise transmitted to any party or parties who have retained the Loan File Witness, or their in-house or outside counsel, employees, or consultants (or any co-parties or the co-parties’ counsel, or other parties that share a common interest or their counsel);
- (ii) notes or other documents prepared by the Loan File Witness, or persons working under the Loan File Witness’s supervision, unless relied upon as a basis for the Loan File Witness’s opinions;
- (iii) documents or information constituting or reflecting oral or written communications between the Loan File Witness and persons working under the Loan File Witness’s supervision, unless relied upon as a basis for the Loan File Witness’s opinions; or
- (iv) documents or information constituting or reflecting oral or written communications between the Loan File Witness or persons working under the Loan File Witness’s supervision on the one hand, and, on the other hand any party or parties who have retained the Loan File Witness, or their in-house or outside counsel, employees, or consultants (or any co-parties or the co-parties’ counsel, or other parties that share a common interest or their counsel), unless relied upon as a basis for the Loan File Witness’s opinions.

13. Each Loan File Witness, persons working under the Loan File Witness’s supervision, the parties and their counsel, employees, and consultants are free to discard, and need not preserve, copies of any of the documents listed in paragraphs [12](i) through [12](iv) above.

14. Each Loan File Witness shall be required to:

- (i) Identify by bates number all documents, other than Loan Materials and other documents produced hereunder, produced in discovery by any party or nonparty to this action on which the Loan File Witness has relied as a basis for his or her opinions;
- (ii) Identify by Countrywide-loan number all Loan Materials on which the Loan File Witness has relied as a basis for his or her opinions;
- (iii) Identify by deponent name and date of deposition all deposition testimony on which the Loan File Witness has relied as a basis for his or her opinions, and specify which pages of the transcript he or she has relied upon if less than the entire transcript;
- (iv) Identify by deponent name, date of deposition, and exhibit number, each deposition exhibit on which the Loan File Witness has relied as a basis for his or her opinions;
- (v) Identify and produce all documents, deposition testimony or other information not included in paragraphs [14](i) through [14](iv) above upon which the Loan File Witness has relied as a basis for his or her opinions in this matter (provided that the Loan File Witness need not produce copies of case law, statutes, regulations and articles);
- (vi) Identify any other litigation, arbitrations, or proceedings in which the Loan File Witness has submitted a report, declaration, or affidavit or has testified at trial, arbitration hearing, other hearing, by deposition, by affidavit, by declaration or by submission of a report, within the preceding five years. Parties shall not be required to identify the litigation, arbitration, or proceedings referenced herein to the extent prohibited by applicable confidentiality obligations.
- (vii) Identify any publications authored by the Loan File Witness in the last 10 years.

15. Notwithstanding anything to the contrary herein, it is understood and agreed that no party shall inquire into a Loan File Witness's other engagements, assignments or testimony, whether completed or ongoing, for the same clients or other clients, regarding reunderwriting of mortgage loans, application of underwriting guidelines, breaches of representations and warranties regarding mortgage loans, and/or repurchases of mortgage loans, except to the extent that such information is publicly available.

16. Bank of America and Countrywide shall be entitled to participate in this proceeding for all matters relating to the Loan Materials or Subject Loans, including in any

hearing or communication with the Court with respect thereto or any discovery with respect thereto (including of Objectors' Loan File Witness(es)) and shall make their Loan File Witness(es) with respect thereto available for discovery on the same basis as Objectors' Loan File Witness(es), in each case without the need for nonparty subpoena or other process other than appropriate notices under the CPLR.

17. It is understood and agreed that any loan file or other loan materials other than the Loan Materials, as well as any discovery from other litigations, arbitrations or proceedings, will not be used in any way in this proceeding.

18. It is understood and agreed that Objectors reserve all rights to seek loan materials for loans in the Covered Trusts other than the Subject Loans. It is further understood and agreed that Bank of America, Countrywide, the Trustee and the Institutional Investors reserve all rights to object to the production of loan materials for loans in the Covered Trusts other than the Subject Loans, including objecting to the scope of loan materials requested in any subsequent production, and to object to the use of Loan Materials or any other documents produced hereunder, or any information derived therefrom.

19. Upon entry of this Stipulation and Order by the Court, all parties to this proceeding shall be bound by its terms as if they were parties to this Stipulation and Order, including all intervenor-respondents and objectors regardless of whether those parties are represented by Objectors' Steering Committee.

Dated: [May] __, 2012

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So Ordered:

Hon. Barbara R. Kapnick

[May] __, 2012