

**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.**

**AFFIRMATION OF JASAND MOCK, ESQ. IN OPPOSITION TO  
OBJECTORS' MOTION TO COMPEL PRODUCTION OF LOAN FILES**

JASAND MOCK, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury and C.P.L.R. § 2106 that:

1. I am an associate of the law firm Wachtell, Lipton, Rosen & Katz (“Wachtell Lipton”), attorneys for non-party Bank of America Corporation (“Bank of America”) in this proceeding.

**A. The Loan File Request**

2. On November 18, 2011, while this action was in federal court, the attorneys for several of the objectors in this proceeding (the “Propounding Objectors”)<sup>1</sup> served on Bank of America a subpoena (the “Subpoena”). The Subpoena, which was attached as Exhibit 1 to the Affirmation of Elaine P. Golin, Esq. in Support of The Memorandum of Non-Parties Bank of America and Countrywide in Opposition to Objectors’ Motion to Compel Production of Loan Files (the “Golin Affirmation”), filed in this proceeding on May 2, 2012, requested, *inter alia*:

A random sample of 500 loan files for performing loans and 500 loan files for non-performing loans in each of the Covered Trusts. For purposes of this request, the term “loan files” means (i) the complete loan originator, servicer, and master servicer file, including but not limited to origination 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, HUD1, etc.; (ii) applicable underwriting guidelines; (iii) closing loan tapes and mortgage loan schedules; (iv) evidence of all conveyances and assignments; (v) all loan servicing records, including without limitation, call notes, foreclosure files and communications, loss mitigation files; (vi) all mortgage insurance rescission-related documents; (vii) all records concerning repurchase analysis, demands, investigations, communications; and (viii) servicing guidelines and procedures. For the purposes of this request, a “performing loan” is a mortgage loan where the borrower is less than 60 days delinquent in his or her payments, or not delinquent at all; a “non-performing loan” is a mortgage loan where the borrower is at least 60 days delinquent in his or her payments.

(The “Loan File Request”) Subpoena at Request No. 8. The Loan File Request called for information relating to 530,000 loans.

3. The Golin Affirmation describes discussions, meet-and-confers, and other communications concerning the Loan File Request through May 2, 2012.

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<sup>1</sup> The Subpoena stated that it was being served on behalf of the “AIG entities,” the Federal Home Loan Bank of San Francisco, the Federal Home Loan Bank of Seattle, RMBS Acquisition Co. LLC, the Walnut Place entities, and the “Public Pension Fund Committee.”

4. During a May 8, 2012 proceeding before the Court, the relevant excerpt of the transcript of which is attached as Exhibit 1 hereto, Mr. Cyrulnik stated that the Propounding Objectors “never truly intended to pursue” their original request for 530,000 loans, Ex. 1 at 70:3-8, but that they were instead seeking 7,500 loans. Ex. 1 at 71:12-22. The Court suggested a production of 150 loans and directed counsel for the Steering Committee of the Intervenor Respondents and Objectors (the “Objectors”) and counsel for Bank of America to meet and confer. Ex. 1 at 86:14-26; 91:3-9.

5. On May 11, 2012, Ms. Golin, along with Theodore Mirvis and Carrie Reilly, also of Wachtell Lipton, met and conferred with Mr. Cyrulnik and Mr. Reilly, as representatives of the Objectors. I understand from my colleagues that Messrs. Cyrulnik and Reilly insisted that Objectors unilaterally select the loans to be produced and that they refused indicate how the loans would be selected. In response to the concern that the Steering Committee might select a skewed set of loans, Objectors’ counsel stated that the Objectors would “not argue [the 150 loans] were a statistically adequate sample.” Mr. Reilly also said that the Objectors would give Bank of America “assurances” that the Objectors would not “extrapolate” from the sample.

6. Later on May 11, 2012, Ms. Golin sent an email to Mr. Cyrulnik stating that Bank of America and Countrywide would begin producing loan documents for 150 loans on a rolling basis once the parties agreed to a stipulation governing the production of the loan documents, a protective order was in place, and he provided us with a list of loan numbers. A true and correct copy of Ms. Golin’s email to Mr. Cyrulnik is attached hereto as Exhibit 2.

7. On May 17, 2012, I was present when Ms. Golin and Ms. Reilly again conferred with Mr. Cyrulnik concerning the categories of documents that would be produced in response to the Loan File Request. Ms. Golin told Mr. Cyrulnik that the Loan File Request was unprece-

mented in scope in terms of the types of loan-related documents being requested, which increased the burden and the amount of time needed to collect responsive materials. During that meet and confer, the contours of an agreement were reached on the categories of documents that would be produced in response to the Loan File Request. In response to Mr. Cyrulnik's question regarding the timing of production, Ms. Golin explained that the hope was to be able to substantially complete production within 90 days of agreement on terms and identification of the loans, but that that time frame had not been confirmed by Bank of America and Countrywide. Ms. Golin also told Mr. Cyrulnik that we intended to commence production on a rolling basis to provide more readily accessible portions of the requested materials as soon as possible. Mr. Cyrulnik did not make any demand that production be completed within 30 days.

8. The next day, May 18, 2012, as previously discussed with Mr. Cyrulnik, Ms. Reilly sent him, by email, a proposed draft stipulation and order governing the production of loan materials (the "Draft Stipulation"). Ms. Reilly's cover email stated in the subject line and in the body of the email that the Draft Stipulation was "for discussion purposes only," and further expressly stated that the Draft Stipulation was being "provided on a 'without prejudice' basis for discussion . . . ." A true and correct copy of Ms. Reilly's email to Mr. Cyrulink, attaching the Draft Stipulation, is attached hereto as Exhibit 3.

9. In keeping with the discussions with the Objectors, the Draft Stipulation proposed that Bank of America and Countrywide produce on a rolling basis certain non-privileged loan materials for 150 loans selected by the Steering Committee (the "Loan Materials"). The Loan Materials would consist of the following, 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:

- i. 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, and loss mitigation files; and
- iv. entries from a particular database reflecting external communications relating to a mortgage-insurance claim denial and/or a repurchase demand.

10. The Draft Stipulation proposed that Bank of America and Countrywide commence production of Loan Materials on a rolling basis and use reasonable best efforts to substantially complete production of Loan Materials within 90 days. Ex. 3 at ¶ 4. The 90-day window was bracketed for discussion and reflected our best estimate of an expedited time for production of substantially all Loan Materials. Furthermore, as reflected elsewhere in the Draft Stipulation and in Ms. Reilly's May 18, 2012 email to Mr. Cyrulnik, we were still reviewing the feasibility of collecting Loan Materials from certain sources, Ex. 3 at ¶ 2.

11. On May 31, 2012, I was present when we again conferred with Mr. Cyrulnik. In the period between sending Mr. Cyrulnik the Draft Stipulation on May 18 and the May 31 meet-

and-confer, we did not receive any comments or counterproposals from the Steering Committee. During the May 31, 2012 meet-and-confer, Mr. Cyrulnik asked if we would commit to producing the Loan Materials within 30 days or less, without any of the terms in the Draft Stipulation. Ms. Golin explained that it was not possible to produce loan files in that time frame given the scope of the Objectors' request, even as narrowed. Ms. Golin also emphasized that we would commence production on a rolling basis, and that substantial production would be made quickly. She also proposed that, if Mr. Cyrulnik provided us with the loan numbers for the 150 loans, we would immediately begin collecting the documents.

12. Ms. Golin and Mr. Mirvis both asked Mr. Cyrulnik for comments or counterproposals on the Draft Stipulation. Mr. Mirvis stated that we were willing to discuss anything in the stipulation, provided that we would be given an opportunity to respond to the Objectors' reunderwriting before it was presented to the Court. Mr. Mirvis and Ms. Golin also both stated that the terms and time frames in the Draft Stipulation — in particular the time for responding to reunderwriting or other analyses of the Loan Materials — were open for discussion, and that we were primarily concerned with establishing a reciprocal and balanced schedule to avoid being “ambushed” by Objectors providing their own review of the loan materials to the Court without our being in a position to provide a rebuttal in a timely fashion. Ms. Golin told Mr. Cyrulnik that if the Objectors finished their reunderwriting in two weeks, we would do our best to respond in the same amount of time. Mr. Cyrulnik responded that the Objectors would need more than two weeks to reunderwrite the loans, but he did not say how long he anticipated their reunderwriting process would take. In response to Ms. Golin's request for specific comments, Mr. Cyrulnik stated that he viewed the meet and confer as an information-gathering exercise and offered no comments or counterproposals.

13. Objectors still have not provided us with loan numbers or comments to the Draft Stipulation. Instead, on Monday morning, June 4, 2012, Mr. Cyrulnik sent his letter to the Court. Later on June 4, 2012, Ms. Golin sent an email to Mr. Cyrulnik. A true and correct copy of Ms. Golin's email is attached hereto as Exhibit 4. In her email, Ms. Golin reiterated that our offers "to discuss any aspect of the proposed stipulation, including time periods, and to begin collection of the 150 loan files — still stand."

**B. Evaluation of Time Frame for Collection and Production**

14. I have been involved, together with colleagues at Wachtell Lipton, in an effort to ascertain the feasibility and likely time frame for a production of loan materials in response to the Loan File Request. In order to produce the loan materials, as well as to estimate the necessary time frame for collecting and producing documents, my colleagues and I have engaged in discussions with multiple sets of outside counsel to Bank of America and Countrywide in other litigations in which loan materials were produced, with Bank of America and Countrywide employees, and with consultants from Ernst & Young and the Huron Consulting Group ("Huron"), both of which have experience with Bank of America and Countrywide data and document systems. I have personally been involved in approximately 25 such calls. I understand that my colleagues have also had numerous such conversations without my participation.

15. Even as narrowed through negotiations, the scope of what Bank of America and Countrywide would be undertaking to produce in response to the Objectors' Loan File Request is unprecedented in any other situation or case involving Bank of America and/or Countrywide of which we are aware. Based on the Objectors' definition of "loan files," the Loan Materials we would search for include not only materials from the loan origination documents, but also repurchase and mortgage insurance claim records and "loan servicing records" over the life of the

loan, including foreclosure files, that reside outside the primary electronic repository of loan documents maintained by Bank of America.

16. Based on our conversations with other outside counsel, Bank of America and Countrywide personnel, consultants at Ernst & Young, and Huron personnel seconded to Bank of America, we have identified at least nineteen separate sources that would be required to be searched for Loan Materials to respond to the Objectors' request. These sources include hard-copy files, electronic repositories, and electronic databases — including legacy Countrywide databases that are no longer active and have been archived, and materials that are not stored at Bank of America or Countrywide. While processes for collecting, reviewing and producing loan materials from certain sources have been developed over the course of different litigations by various outside counsel, Bank of America and Countrywide personnel, and consultants, including Ernst & Young and personnel seconded to Bank of America from Huron, we are not aware of any other situation or case in which all of the materials that would need to be searched and collected to respond to Objectors' request have been searched and collected in response to a loan-file request.

17. Loan origination documents such as those listed in Objectors' request for “origination 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, HUD1, etc.” (Subpoena at Request 8(i)), are typically first sought from iPortal, the primary electronic repository for loan origination documents maintained by Bank of America. If and when it is determined that documents are not available through iPortal, hard-copy files are also recalled from offsite storage facilities, if available. To meet the expedited



timeframes for production of the Loan Materials in this case, we would collect and produce from both iPortal and hardcopy files in the first instance. In addition to collecting from iPortal and hardcopy records, Objectors' request for "underwriting worksheets" and "underwriting exceptions granted" requires that we also search several additional databases that we believe may contain responsive information.

18. We have also identified several additional separate sources that we believe may contain responsive information to Objectors' request for "all loan servicing records, including without limitation, call notes, foreclosure files and communications, loss mitigation files" (Subpoena at Request 8(v)). Moreover, Objectors' demand for "foreclosure files" will require collection of materials from outside law firms involved in any foreclosure of any of the identified loans.

19. Furthermore, Objectors requested "all mortgage insurance rescission-related documents" and "all records concerning repurchase analysis, demands, investigations, [and] communications." Subpoena at Requests 8(vi) & 8(vii). While this request has been narrowed through the meet-and-confer negotiations, to respond to the narrowed request, we will still need to search for entries in an electronic system separate from iPortal.

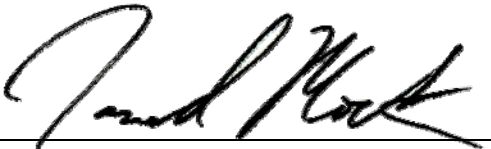
20. In our discussions referred to above, we also sought to determine potential time frames and burdens of collecting Loan Materials. The estimated time frames we have received for searching each of the distinct sources for responsive materials varies source-by-source and ranges from approximately one week for the most accessible sources, to months for sources that are more difficult to access, such as certain servicing systems. (These estimates assume that the processes previously developed for collection are still in place, that the personnel at Bank of America and Countrywide familiar with the systems and collection processes are available, and

that these collections are given priority status. If unforeseen difficulties are encountered, the actual time for collection could exceed estimates.) In this regard, Ernst & Young personnel advised us that the proposed 90-day timeframe was aggressive based on their experience. We have also been told by outside counsel familiar with collection of loan servicing records responsive to Request 8(v) of the Subpoena that they did not think it would be possible to produce such records for 150 loans in 30 days and that it would take months to collect and produce from some of these systems.

21. Once collected, Loan Materials from the distinct sources will need to be organized and loaded to a review and production platform. Further, Loan Materials from several sources will also need to be reviewed for responsiveness and/or privilege prior to production. Each of these activities will increase the total time it takes to produce the requested Loan Materials.

22. When all of these factors are taken together, it seems reasonable to assume that 90 days is an aggressive and expedited schedule for production of the Loan Materials for 150 loans.

Dated: New York, New York  
June 11, 2012

  
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Jasand Mock

# **EXHIBIT 1**

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: CIVIL TERM: PART 39

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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 LP (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 LP (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,

Index Number:  
651786-2011

for an order, pursuant to CPLR 7701, seeking judicial  
instructions and approval of a proposed settlement.

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Supreme Court  
60 Centre Street  
New York, New York 10007

May 8, 2012

BEFORE:

HONORABLE BARBARA KAPNICK,  
Justice of the Supreme Court

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Proceedings

communications as far as I know with our clients and Bank of New York/Mellon, so it is a non issue.

MR. INGBER: We will start on a date. Look and see. We will start on a date that we had your first communication with Bank of America.

THE COURT: So I think that maybe now you will be able to go back and create an order, because I want this.

MS. PATRICK: Yes.

THE COURT: And so, do all of you want this? Clearly -- so that we can get this started?

MR. REILLY: Right.

THE COURT: Can you indicate in there there is going to be this more detailed privilege log and that you will --

MR. REILLY: We will come back if we have a problem.

THE COURT: And you will go with that and let me know what you are pursuing with that.

The only other thing, maybe now if you want to deal with briefly and I appreciate that there has been a lot of progress made on that, might be about the loan documents.

Now, I know that Mr. Mirvis had some very nice young associates from his office late one -- late after the courtroom had been closed, for the reasons we all know, deliver to our chambers a box of materials and we all said

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Proceedings

to each other gosh, I wonder what this is, and apparently it was two copies, it was only like half a box, of a memo and some documents basically in opposition to that portion of the motion to compel that sought loan files.

And you were upset about that, but I said look, we will probably take a brief look at his brief, and why don't you make a brief response to the loan files and let -- if we are able to reach it, because we kind of -- you indicated and it seems it made sense we would start with the settlement negotiation issues.

Why don't we see briefly what we can do with the loan files, so since we have a little bit of time, why don't you deal with it? I am not promising I will make a determination. I understand his papers came in late, but then there could be just another motion. I try to, on discovery, take a little bit more of a less formal -- I have never had such a formal argument in discovery in my recollection. So, Mr. Cyrulnik, you want to deal with that.

MR. CYRULNIK: I am happy to briefly address the loan file issue. I hope the Court received our letter yesterday in which we try to keep this as short as possible.

THE COURT: The three-page letter -- and we read it. We also read it.

MR. CYRULNIK: I will not repeat it. We think this is very simple.



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Proceedings

THE COURT: Everybody thinks everything is simple and crystal clear. I am not sure I agree with you.

MR. CYRULNIK: We think more simple than most of the other things. It is hard to believe that we are actually here arguing about whether loan files are relevant in the case. I understand the argument Mr. Ingber is making about the complexity of the production of and review of and presentation of loan files, but it is hard to imagine and first time I sat in Mr. Mirvis' office and heard about this, I was actually quite shocked that we are arguing here about whether loan files are relevant to the case from a relevance and discovery perspective.

The claims that the trustee proposes to settle here -- and just to take a step back as to what those claims are, they are CUTPA claims. The claims the trustee is settling are claims for breaches of representations and warranties, not the PSAs that Mr. Mirvis' client Countrywide that he is now representing here together with Bank of America, made about the loans that are in the pools that our clients bought certificates in and had this case been litigated by Bank of New York against Bank of America, the whole case would have been about loan files, because the way you prove a breach of representations and warranties, as the Court well knows Bank of America and Countrywide made certain representations about the lines in the pools, owner

## Proceedings

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2 occupied, what was the LTD ratio, all sorts of other  
3 representations. They are all about the individual loans  
4 and the way you go about proving, as Justice Bransten has  
5 been dealing with forever, the way you go about proving that  
6 those representations and warranties were important is, you  
7 look at the individual loan files and you look at them --  
8 not each and every one of them -- but you look at them on a  
9 sampling basis.

10 THE COURT: Look, Judge Bransten's case is a  
11 different case. You're talking about the MBIA versus  
12 Countrywide and I have read her decision and I know what she  
13 has done, but her case is very different in a very -- is a  
14 very different postured case than this case and what Bank of  
15 New York and maybe what Bank of America have said is look,  
16 if we are going to litigate the underlying claim, loan  
17 claim, what the heck was the purpose of entering into this  
18 settlement? Because it was all to try to say look, we  
19 evaluated what we thought were the strengths and the  
20 weaknesses of the claimants and whether or not there is  
21 going to be a -- whether they will take over their claims or  
22 not, which I know is a big issue before Judge Bransten and  
23 we have considered all of those things and this is sort of  
24 what we have done. If we were going to look through all of  
25 these underlying loan modifications -- these loan files,  
26 what was the point of settling this case? And that is

## Proceedings

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2 oversimplification, but that is one of the things they said.

3 MR. CYRULNIK: Justice Bransten ordered  
4 production of 100,000 loan files. Our original request as  
5 Mr. Mirvis keeps telling the Court was for 1,000 loan files  
6 for each trust, 530, which we never intended to truly pursue  
7 but it was hundreds of thousands of loan files, tens of  
8 thousands of loan files.

9 We are trying now to test the trustee's assumption  
10 that it figured out the right value of the claims before it  
11 started looking at everything else. If the trustee says --  
12 and this is another thing, the trustee stands up and says we  
13 didn't look at a single loan file before we entered into the  
14 settlement, and we say that was an entirely incorrect way to  
15 go about valuing these claims. They submitted an expert  
16 report from Mr. Lin, which is what they relied on to figure  
17 out what the claim is worth and Mr. Lin relies on what Mr.  
18 Mirvis refers to as Fannie Mae and Freddie Mac re purchase  
19 experience, which to me sounds like a Disney World fantasy,  
20 but if you purchase Fannie Mae and Freddie Mac, they were  
21 entirely different loans and the one here -- how do I know  
22 that? Because Brian Lin said so in his report that Bank of  
23 New York submitted, and he said on Page 4 of his report, he  
24 said I believe that it would have been easier to compare two  
25 analogous portfolios rather than to utilize a comparison  
26 between conforming and nonconforming portfolios. Conforming

## Proceedings

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2 is Fannie Mae and Freddie Mac. Non-specific performings are  
3 the private loans issued here. However, due to the lack of  
4 available information, he goes on to say he used the  
5 portfolio -- the Fannie Mae and Freddie Mac portfolio loans  
6 to do his analysis, due to the lack of available  
7 information. We are not asking to look at or litigate over  
8 or have mini trials on every single loan file that would  
9 become available in this case. Like Brian Moynihan says he  
10 wants to do hand to hand combat over every loan, Mr. Mirvis  
11 in his brief reserves the right -- we are not asking too  
12 much. We are asking for a very reasonable and small number  
13 of loan files to be produced so that we can test the  
14 trustee's assumptions that it didn't have to look at a  
15 single loan file to arrive at an assumption about how many  
16 loans would have breached reps and warranties and we started  
17 at 10,000, we came down to 7500 and we are not suggesting  
18 that is a magic number, but it is what we, in consultation  
19 with our expert, think will allow us to construct a good  
20 sampling to show the Court and what we are saying is, it  
21 just seemed impossible to imagine that loan files are  
22 irrelevant to this case.

23 Now, I think it is fair to say that there is an  
24 argument to be had over what we will do with the loan files  
25 and how we will present it and how it affects the schedule,  
26 but I think the most important question for the Court to be

## Proceedings

1  
2 concerned about now is, how long is it going to take Bank of  
3 America to produce 7500 loan files? How long will it take  
4 Bank of America to do that?

5 In our view, in our understanding, it should not  
6 take very long as all. I don't think it will take a matter  
7 of days.

8 THE COURT: If they hire 50 more people, is what  
9 you said?

10 MR. CYRULNIK: That is for us. Just to be  
11 clear, your Honor, the production of the loan files is what  
12 they're giving us, the files. The review of the loans is  
13 what we will be willing do to, so the 50 reviewers and the  
14 two months, for 50 reviewers, that is people we will hire to  
15 re underwrite the loan files. That is at our expense and  
16 that is our endeavor. All we want them to do is get copies  
17 of the loan files and give them to us. We will do all of  
18 the rest of the work and the point I wanted to make to your  
19 Honor is the question before the Court today is not you know  
20 what will we do with the loan files? How hard will it be  
21 for us to review them? How long will it take for us to  
22 present it to the Court?

23 The question is, can they produce 7500 loan files  
24 in a reasonable time frame that will allow this schedule to  
25 move forward? And we think they absolutely can, and that is  
26 how we know it. We know they have produced many more loan

## Proceedings

1  
2 files in other cases in time frames that suggest that they  
3 should be able to get these loan files produced in a couple  
4 of months.

5 THE COURT: Are these different loan files that  
6 were produced in the other cases? Is there any overlap?

7 MR. CYRULNIK: There is no overlap between these  
8 and the MBIA loan files before Justice Bransten. There is  
9 some overlap between these and other cases in which I Bank  
10 of America has produced loan files, but not entirely  
11 overlap, because there is all of the trusts that Countrywide  
12 issued essentially except for the MBIA ones that are at  
13 issue in the settlement, so we have to construct the sample  
14 and present to the Court a cross section that allows us to  
15 cover all of the different kind of loans and vintages of  
16 loans and years of loans that are in this pool.

17 But you know, I -- we think that Bank of America  
18 should be able to produce the loan files in a timely way and  
19 you will hear from Mr. Mirvis that is simply not possible  
20 and our information, based on credible sources and actual  
21 personal experience is to the contrary, and we suggest that  
22 the Court take our very reasonable compromise number of 7500  
23 loan files and order Bank of America to try to produce them  
24 in 60 days and if Bank of America can't produce them in  
25 60 days, says they physically cannot comply with the order,  
26 we suggest they make a proffer, put forward someone from

## Proceedings

1  
2 Bank of America that is involved in producing loan files and  
3 tell us why they could not do it.

4 Give us an hour to take that person's deposition or  
5 ask them some questions and then we come to the Court and  
6 say we don't think it is physically possible.

7 We don't think that will happen. We think if the  
8 Court orders them to do it, they will figure out a way to do  
9 it.

10 One more thing. You will hear from Mr. Mirvis  
11 that our request for loan files includes multiple parts,  
12 some of which are readily produced, and others of which  
13 required them to go searching and spending a lot of time  
14 finding. That is a detail, your Honor, and it may be that  
15 is a detail this they are using in order to obfuscate the  
16 point, which is we have -- our understanding is that  
17 90 percent of the loan files that we have asked for  
18 90 percent of the information about each loan could be  
19 produced within 30 days, or at most 60 days of when they  
20 start looking for it.

21 There may be certain small elements that we have  
22 asked for about loans that are not part of the standard loan  
23 file or not in the same computer system that will take them  
24 more time and we are happy to meet with them and confer with  
25 them about reducing the burden by narrowing the universe of  
26 information that we are looking for. What we are looking

## Proceedings

1  
2 for is is essentially what they have stored is readily,  
3 easily retrievable, asking for a very small sampling, 530  
4 trusts, less than 20 loan files per trust and we are not  
5 asking for 20, but less than 20 per trustee in the aggregate  
6 and to give us an opportunity to allow our expert to test  
7 the assumptions that BNY/Mellon made that we think are  
8 indefensible.

9 THE COURT: What is the difference between loan  
10 files in each of the trusts and why do you have to get a  
11 certain number from 530? Is there really any difference?  
12 Seems to me that if I were to decide we needed something,  
13 that you could do that on a much lesser number and I don't  
14 understand personally what the difference is between -- in  
15 each trust, except how they get divided up and sort of  
16 haphazardly when that was done and what is the difference.

17 MR. CYRULNIK: Judge, we are not going to be asking  
18 for 20 loan files from each trust. We don't need loan files  
19 from each of the trusts, but there are differences between  
20 the trusts and you can group them into various categories  
21 like, for example, there are big differences between trusts  
22 that were issued in 2005 and trusts that were issued in  
23 2008. There are different products of loans. There are  
24 what we call all the A loans which had certain  
25 characteristics of borrowers; Option Arm loans, which had a  
26 totally different characteristic of the kinds of loans that



## Proceedings

1  
2 were being issued and the kind of representations that were  
3 made and the kind of breaches that you find in different  
4 characteristics of loans. There are activity loan types,  
5 there are different vintages, and we are working with an  
6 expert who is the same expert that testified before Justice  
7 Bransten who is going to use these 7500 loan files to  
8 construct a sample that will show the Court in a  
9 statistically significant way, here is a representation of  
10 all of the hundreds of thousands of loans in the 530 trusts  
11 and we can do that with at most 7500 files, maybe with  
12 something less than 7500, but we want to be able to give our  
13 expert the room to make a sample that gives the Court some  
14 confidence that it is useful.

15 THE COURT: Okay.

16 Mr. Mirvis.

17 MR. MIRVIS: Thank you, your Honor and I  
18 appreciate the opportunity to be heard on this, but it is a  
19 very significant issue to us and I think to the trustee and  
20 the intervenors.

21 The proposal is to get a significant amount of loan  
22 files so they can engage in an underwrite -- re  
23 underwriting, which is in effect litigating the merits of  
24 the repurchase claims. In all of the cases, and all of  
25 arguments which submit there is one more star, one more  
26 guiding principle that all courts have followed: Whenever

## Proceedings

1  
2 there is a proposed settlement before in /KPHES /-RG the  
3 Court's discretion and yes, this is a discretionary decision  
4 for the Court, regardless of context, whether it is standard  
5 of review, whether it is a class action, derivative action,  
6 specification committee, what have you, so even when the  
7 fairness of the settlement terms are at issue, and we say  
8 they are not, but they say it is, put that to one side. In  
9 considering the proposed settlement, courts do not entertain  
10 litigation of the merits of the settled claims. As your  
11 Honor indicated, the parties on both sides of the caption  
12 settle cases precisely not to litigate the merits. They  
13 consider the merits, they think about the strengths and  
14 weaknesses of the various sides, but they settle because  
15 they don't want to litigate. They don't want to get to  
16 some conclusion where one side might lose it all and one  
17 side may win it all. They compromise.

18 There is nothing unusual about the fact that the  
19 trustee, the institutional investors and yes, Bank of  
20 America oppose producing loan files for this purpose. They  
21 are asking the Court for the same kind of sampling and re  
22 underwriting, which, by the way, is not a one way street, it  
23 is not that they re underwriting the files, which takes at  
24 least several months even after they are produced, which  
25 takes many months --

26 THE COURT: What does it mean to re underwrite? I

## Proceedings

1  
2 thought you were just supposed to review loan files. I  
3 don't expect them to -- I am not sure what re underwrite  
4 means. So maybe I do expect them to --

5 MR. MIRVIS: I didn't know what it meant, and that  
6 is why we submitted the short affidavit from Mr. Kempf to  
7 explain it.

8 What re underwriting means is, you take the file,  
9 which on average is between 200 and 600 papers per loan.  
10 That is just the origination file, not the servicing file,  
11 not the foreclosure file, not the loss mitigation file, just  
12 the origination and you hire professionals -- he talked  
13 about hiring 50 at a time, like you can get them up and  
14 running like that, but let's say they could, they take the  
15 files and apply the underwriting guidelines that were  
16 applicable at the time the loans were originally made back  
17 in 2004, 2005, 2006.

18 Now, what does that mean? It is inherently a  
19 subjective process. People are going to disagree. We  
20 know that. We are not guessing. Experts disagree. They  
21 will have a plaintiffs' expert who probably concludes  
22 something like it is a miracle Countrywide made a single  
23 loan that complied. We will have an expert that will say  
24 the opposite, because the standards are inherently  
25 subjective. The standards are, was there a material breach?  
26 We can disagree.

## Proceedings

1  
2 The PSAs talk about customary underwriting  
3 guidelines, all the room in the world for people to disagree  
4 and on top of all that, the underwriting guidelines are  
5 expressly subject to "exceptions and compensating factors".  
6 Countrywide's own materials to the investors highlighted  
7 this. When these loans were underwritten back in the day,  
8 the Pro-Supp that went with them said on a case by case  
9 basis, Countrywide may determine based upon compensating  
10 factors which are not limited, that a borrower not strictly  
11 qualifying and Countrywide may determine based on  
12 compensating factors, a borrower not strictly qualifying  
13 under its applicable risk category, guidelines, merits and  
14 underwriting exception.

15 And by the way, this is not a rare occurrence, to  
16 have a compensating factor on top of the subjective  
17 guidelines. It is subjective on top of subjective, because  
18 Countrywide said it is expected that a significant number of  
19 the mortgage loans will have been originated based on  
20 underwriting exceptions of this type.

21 And that is in the Kempf affidavit, Exhibit C  
22 Page 820, so we don't have to guess.

23 And on top of all that, if you engage in this  
24 litigation and it is a litigation, and the proof that it is  
25 a litigation is in Mr. Cyrulnik's letter to the Court, what  
26 is his argument?

## Proceedings

1  
2 On Page 2, it is well established that sampling  
3 loan files for re underwriting -- and I am trying to explain  
4 in part what it, is appropriate in litigation surrounding  
5 mortgage backed securities. What does he cite? Judge  
6 Bransten's opinion in MBIA and of course, as your Honor  
7 knows, Judge Bransten hardly blessed sampling.

8 What Judge Bransten said was the Court makes no  
9 finding that plaintiffs' proposed method is the only method  
10 that plaintiffs may present or that plaintiffs' method was  
11 not flawed or unsusceptible to challenge. Defendants  
12 referring to Countrywide in that case have raised  
13 significant valid challenges to plaintiffs' methodology.  
14 Defendant cited issues that will be decided by the trier of  
15 fact. That decision will be made at trial. She was  
16 recognizing that she was deferring, yes, it will be a big  
17 issue to be decided. He is trying to have those issues  
18 decided in this case here, and that is just plain wrong.  
19 It is wrong as a matter of principle, not just a burden.  
20 The burden is considerable, and by the way, on top of all of  
21 the -- then there will be interpretation issues; what the  
22 underwriting guidelines mean, what do the representations  
23 and warranties mean, and we point out examples in our papers  
24 and what is the grand daddy, grandfather and I say that  
25 because I became a grandfather two days ago, what is the  
26 grandfather of the all of the reps and warranty disputes?

## Proceedings

1  
2 Causation. We know that.

3 The PSAs says even if there is a material breach,  
4 even if the re underwriting shows that yes, this loan was  
5 made in violation of a rep and warranty or underwriting  
6 guideline, the PSAs say there is no re purchase obligation  
7 unless the breach "materially and adversely affected" the  
8 interests of certificate holders in the mortgage loan. I  
9 think Countrywide has to pre purchase a loan if the breach,  
10 the reason -- if the reason a borrower didn't pay had  
11 nothing to do with the breach. Maybe the borrower lost his  
12 or her job, maybe had unexpected medical bills. Maybe they  
13 stopped paying because of property value going down.

14 That is a hotly disputed issue that is before the  
15 First Department now, and if you bring that into this case,  
16 and we go through months if not more than a year clearly  
17 more than a year of underwriting, re underwriting by them,  
18 re underwriting by us and re underwriting by the trustee.  
19 We say what do you think the defect is? They have to tell  
20 us.

21 Our expert looks at it and says wait a minute, that  
22 is wrong.

23 They say the document is missing. Here is the  
24 document.

25 They say this is material. Not material.

26 You are going to end up with thousands of disputes.

## Proceedings

1  
2 It is avoidable. There is a way out of this and by the way  
3 we do rely heavily on the case law cited in our brief, I  
4 don't have to repeat it here that as I said before, the one  
5 rule that courts have never strayed from in exercising the  
6 discretion about objectors' discovery to settlement is you  
7 don't get to litigate the merits of the claims. I  
8 understand what they are saying in part. Part of what they  
9 are saying is look, we want to be able to argue to the Court  
10 relevance, and I have not said a word about relevance. We  
11 want to be able to show the Court what a loan file looks  
12 like so we can show the Court what the trustee didn't look  
13 at. They want to flesh out their argument. They want to  
14 bring it to life. And they are handicapped in doing that  
15 if they don't have any loan files to display. I understand  
16 that.

17 That doesn't have anything to do with the re  
18 underwriting process, with a sampling that may or may not be  
19 appropriate. Even if you litigate the claims and of course  
20 it is not their claims, we are not here to litigate claims  
21 and that is why we have proposed we will provide and they  
22 can check the files, 10, 20, 40, 100 loan files for them to  
23 look at. They can show them to their re underwriters if  
24 they want and come back to the Court and say look, see how  
25 significant this is?

26 And we can say wait a minute, we disagree and the

## 1 Proceedings

2 Court will say who is right. When I say that this is going  
3 down this road, this is just a road to a pile of disputes, a  
4 pile of collateral issues, because it is litigation and we  
5 are here to settle.

6 So why don't we do it that way? The game is not  
7 over. If they get their 40 loan files and they come back  
8 and persuade the Court that they want to see more, they can  
9 see more. That is a doable job. Origination files.  
10 Forget about -- whatever we can put together in a short  
11 period of time.

12 I don't want to get into details, but all of the  
13 other things Mr. Cyrulnik referred to as details, if they  
14 were details, they are not willing to give up on them.  
15 Their burden is huge. The origination files are one thing.  
16 It is not just a question of pressing a button. Mr.  
17 Cyrulnik say you produced a hundred thousand loan files in  
18 other cases. Are they the same loans? We have no idea,  
19 nor does he. We are now, I can't count, six months since we  
20 got the subpoena. They have never told us which loans they  
21 are talking about. All they did is numbers; 130,000,  
22 10,000, 7500. Maybe if they come back next week, it will  
23 be down to zero.

24 THE COURT: Don't count on that.

25 MR. MIRVIS: But I think as a practical matter, the  
26 one thing that ought to be ruled out from the get go is



## Proceedings

1  
2 litigating the merits and I would as a compromise, I think  
3 it is very practical, we provide a subset of loan files,  
4 they can pick them, we will sit down, come up with some that  
5 we can get them as fast as we can. They can re underwrite  
6 them. If they want, we can re underwrite them. The trustee  
7 gets to do it. And if they really think this game is worth  
8 a candle and can persuade your Honor that this is not just a  
9 road to a dead end, we can come back and talk to you about  
10 it.

11 Thank you.

12 THE COURT: Thank you.

13 MR. CYRULNIK: Mr. Ingber has a very persuasive  
14 manner and I think what has happened in this case, and the  
15 one fundamental problem we think exists in the case is that  
16 he first persuaded Ms. Patrick that she could settle this  
17 case without looking at any loan files and then she  
18 persuaded Mr. Ingber that is okay to settle this case  
19 without looking at a single loan file or take a significant  
20 sample of them and now he is trying to persuade the Court  
21 that we should not be able to look at loan files to figure  
22 out whether that was right or wrong, and it would be  
23 impossible to imagine the Court ordering the findings that  
24 -- the 18 findings or how many findings he is asking  
25 including approval of settlement a full and fair opportunity  
26 to litigate about the settlement or to raise issues about

## Proceedings

1  
2 the settlement, the legal investigation, finding about the  
3 settlement without allowing us the opportunity to say to the  
4 Court for the Court's benefit here is what they would have  
5 found if they had looked at the actual documents they should  
6 have been litigating about.

7 THE COURT: Obviously, if we looked at all of  
8 these loan files, it would take many, many years and that  
9 would -- then the whole settlement would fall apart. So, to  
10 the extent that you can walk out here today with more than  
11 you came in, even if not the whole ball of wax, I would like  
12 to get that going. Despite the fact you told me it is so  
13 clear and everybody tells me they are absolutely right on  
14 the law, sitting here, I don't necessarily see that. You're  
15 all making persuasive arguments and there is something to be  
16 said but I don't want this to go on forever, because I don't  
17 think that is the point of it and I don't think that will do  
18 good, so I want -- and I say that you did use Judge  
19 Bransten's decision and I think you're involved in that  
20 case.

21 MR. CYRULNIK: We are not.

22 THE COURT: The attorney behind you, Quinn Emanuel  
23 is, and I think that -- I read that -- read the part that  
24 Mr. Mirvis read. I read her decision earlier today, and I  
25 know that she said that -- I guess she had gotten past the  
26 Frye issue, but that didn't take away the defendants'

## Proceedings

1  
2 opportunity to say later on that there were problems with  
3 that, but that is a different case. That is a lawsuit.  
4 This is an approval of a settlement where you're right, they  
5 didn't look at loan files.

6 I think that although, you know, you come back with  
7 different numbers, this is reasonable. They can do it in a  
8 number of months. Why don't you start with a smaller number  
9 with -- maybe you can give them an idea, like you said some  
10 are 2004, some are 2005, some are 2006 and I am sure that  
11 that makes a difference until they stopped in 2007 or 2008  
12 or whenever, when everything fell apart and you say there  
13 are different other kinds of things.

14 Why don't you take like, you know, maybe 150  
15 samplings from there that they can do it a relatively easy  
16 time frame, see what you can find in there and if you can  
17 come back and say to me, Judge, I cannot believe that they  
18 are -- Mr. Lin was their person, it is absurd, it is so  
19 clear that we will be able to show that his expert's report  
20 does not hold any water, then I think we have got to have a  
21 larger sampling and then I will have them go back and do  
22 that, and I think that it makes sense, at least to start  
23 with a smaller number that you guys can work with because if  
24 I give you two months to review it, you take two months and  
25 then go back and forth that is six months before we know if  
26 anything makes sense.

## Proceedings

1  
2 Get started with something smaller, a smaller  
3 number. Let's see what you can find out. You may be able  
4 to show me that this is like a disaster here or not.

5 MR. CYRULNIK: Your Honor, may I suggest this,  
6 because I take Mr. Mirvis point and the Court's point?

7 I think that everyone would agree that 100 loan  
8 files is a silly way to start because Mr. Mirvis in his own  
9 brief writes that nobody would ever argue that such a number  
10 was significant. We can start, we can absolutely start  
11 below 7,000 and make a showing to the Court that would allow  
12 to us get more if we need it, but may I suggest to the Court  
13 that we consult with our expert about how small we can go,  
14 but still have a plausible argument that we are presenting  
15 something that is meaningful and then try to meet and confer  
16 with Bank of America with the knowledge that some loan files  
17 should be produced and then see if we can reach an agreement  
18 on where to start, because essentially, without being able  
19 to consult with an expert and tell the Court that we will be  
20 able to present something meaningful, picking random loan  
21 files will not allow to us say anything to the Court other  
22 than these random anecdotal loan files say something. We  
23 would like to say something meaningful to the Court and make  
24 a showing if we need more.

25 So may I suggest that we start with a number that  
26 is meaningful, but while under 7,000, and if we need more,

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Proceedings

come back to the Court, but that is well over 100.

MS. PATRICK: Your Honor, Kathy Patrick for the institutional investors.

THE COURT: I know who you are.

MR. PATRICK: You have taught me well and I am obedient.

MS. PATRICK: Continuing, there is a backdrop issue here that I want to be sure does not get lost in the shuffle. Your suggestion of a hundred or 150 loan files, we do not think any are necessary, but it allows them to illustrate the problem, but here is the thing I am concerned about. There are my clients, who have \$40 billion at stake. There are tens of thousands of other investors who are looking at a million dollars a day in lost opportunity from the value of this settlement and what they are talking about doing is litigating in this case and that is what Mr. Cyrulnik said, litigating, those loan file reviews in this case when those claims have been settled. It is not a cost free process. It should not be a statistical sample, because a statistical sample becomes an argument about litigating the underlying claims and we have settled and we would like very much to have that settlement progress and have that money distributed.

THE COURT: Mr. Mirvis.

MR. MIRVIS: Only to underscore the point. I am

## Proceedings

1  
2 not talking about agreeing to a statistical sampling that  
3 would be used in litigation. I am talking about giving them  
4 enough loan files so they can bring their argument to life  
5 to the Court about what the trustee didn't look at. End of  
6 story.

7 MR. CYRULNIK: At the very minimum, if we will  
8 start this way we will start with 3500 loan files which is  
9 an incredibly small number, so we can make some significant  
10 showing to the Court even if it is not statistically  
11 significant. That is far closer to Mr. Mirvis' number and  
12 nowhere near the number we suggested.

13 MS. PATRICK: How do you need 500 to show an  
14 example of the findings that the trustee might have found  
15 had it looked at loan files?

16 What they are doing is creeping up on trying to  
17 figure out the bare minimum, so that they could turn around  
18 and argue to you is some kind ever statistical sample which  
19 gets us into the litigation. This is an illustrative --  
20 what I understood Mr. Mirvis to be offering was an  
21 illustrative look at the loan files so you could see the  
22 kind of defects and how difficult it is for people to agree  
23 on what is a loan that is subject to re purchase. That is  
24 one thing.

25 500 loan files. And then, the argument and  
26 enabling them to litigate a statistical sample is something

## Proceedings

1  
2 entirely different. We are not litigating. We are  
3 settling. We settled.

4 THE COURT: What about the files that have been  
5 produced in other cases? Does that make a difference?  
6 See, I don't know if those --

7 MR. CYRULNIK: Your Honor, we need some cross  
8 section of the loans and 500, the difference for Mr. Mirvis  
9 between producing 150 loan files and 500 loan files cannot  
10 be material to Bank of America in terms of the cost or  
11 burden of production. We could ask that we -- you see how  
12 afraid everybody is of the loan files actually coming --

13 THE COURT: That is what you say. I don't think  
14 they are afraid. I think they don't think they are relevant  
15 and I think in Judge Bransten's case, that is what the case  
16 is about, that is why MBIA is suing Countrywide in that  
17 case, because of -- I mean, it is a different case, not this  
18 case.

19 MR. CYRULNIK: But they are asking the Court to  
20 sign off on what they settled without knowing what might  
21 have been important to look at and all we want to do is have  
22 an opportunity and we are trying to be incredibly reasonable  
23 by saying we will adopt Mr. Mirvis' concept and the Court's  
24 concept and say the minimum we can imagine making a showing  
25 to the Court with is 500 files available to us to look at.

26 THE COURT: I will think about it. I was hoping to

## Proceedings

1  
2 get things going here, but I don't even know how to divide  
3 it up. I was hoping that you could maybe do that. I mean,  
4 maybe you could try in the next day or two, you and Mr.  
5 Mirvis to sit down and talk and -- in that small number, if  
6 you could divide them up in some way and just agree on the  
7 number that you could get going on that, and if you can't,  
8 let me know what without waiving your rights to your other  
9 arguments and I will just pick something. I would rather  
10 make more sense than just pick numbers out of a hat, but  
11 maybe there is a way to get from certain years and the other  
12 differentiations that you mentioned, that is a very small  
13 number but I don't call it -- I am not calling it a  
14 statistical sampling. That is not what I am calling it.

15 I am just saying to see what, if anything, you  
16 think these will show why, it is so important because if I  
17 have to start reading all of those underlying files or  
18 looking at them, or you will start reviewing them and -- I  
19 think you will turn this into what this isn't and I don't --  
20 maybe one day you will find out this was a good settlement  
21 and it won't be available to your clients or anybody else  
22 and that is, you know, I think about that in the back of my  
23 mind like there is one person who said I am withdrawing from  
24 this, that is okay with me. So I don't want to turn this  
25 into what it isn't. So maybe now that you're in a much  
26 smaller area, you and Mr. Mirvis could figure out a way, do



## Proceedings

1  
2 a first quick evaluation on it and then we can move along.

3 I would like to give you a control date but my  
4 proceeding, I don't know how long it will take since there  
5 is nothing they can agree on. I am hoping it will be over  
6 whatever it is by the very beginning of June with -- I don't  
7 know if you think there will be anything to talk about that  
8 early or if I should do it later. Like I can do something  
9 on July 7th if I needed to, but if you think that is too  
10 early, I can do it at the end of June. June, not July.  
11 June 7th but if you think that might be -- might not be  
12 anything to talk about them.

13 MR. REILLY: I think there will always be  
14 something to talk about.

15 THE COURT: That is nice.

16 MR. REILLY: We move forward when we come here,  
17 Judge. We do. This entire process, the most progress was  
18 made in a conversation with Kathy Patrick and Matt Ingber  
19 and Bank of America and Mr. Cyrulnik and I out in the  
20 hallway as the pressure builds. Give us some pressure, keep  
21 it honest, and make us move forward and we --

22 THE COURT: Can I put June 7th as the control date  
23 and if there is nothing that -- if there is nothing to talk  
24 about, I mean of substance or whatever, you can call me on a  
25 conference call and we can put it over it a few weeks if I  
26 am still on my proceeding. They told me how many times I

## Proceedings

1  
2 said the word trial and I didn't mean it, so my proceeding,  
3 then you know --

4 MR. INGBER: June 7th is perfect.

5 MS. PATRICK: June 7th is fine. I don't think I  
6 will be here because I have trashed my Christmas and Spring  
7 Breaks the last two years, so I am in Costa Rica, but Mr.  
8 Madden will be here and he is fully up to speed. So I will  
9 probably not be here, but Mr. Madden will be here and I  
10 think we should keep the date.

11 THE COURT: Put it on for the 7th. Afternoon  
12 seems to work.

13 MR. REILLY: Two o'clock?

14 THE COURT: And again, with all of the other  
15 caveats and I am going to be looking forward to getting a  
16 fax that deals with the first set of issues that we talked  
17 about that we, I think we got to the point and maybe Mr.  
18 Mirvis and Mr. Cyrulnik with the input of the other people  
19 will figure out what. I sort of threw out 150. It is a  
20 little bit more than he asked for. You threw out 500. So  
21 maybe somewhere in that number you can get a small number so  
22 just if you can get some and see -- make a stronger or less  
23 strong point to the Court as the case may be.

24 So, thank you all very much.

25 (Continued on next page.)

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Proceedings

MS. PATRICK: Thank you, your Honor.

THE COURT: And we will see you on the 7th.

\* \* \*

Certified that the foregoing is a true and accurate transcript of the original stenographic minutes of this case.

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Claudette Gumbs  
Senior Court Reporter

# **EXHIBIT 2**

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**From:** Golin, Elaine P.  
**Sent:** Friday, May 11, 2012 5:15 PM  
**To:** Cyrulnik, Owen L. (Grais & Ellsworth LLP)  
**Cc:** Mirvis, Theodore N.; Reilly, Carrie M.  
**Subject:** Loan files

Owen,

I spoke to the client. 150 is as high as we can go, unless you can provide a reason that some higher number serves a purpose that 150 does not. Otherwise, the added burden, delay and complexity is not warranted.

Our suggestion is that we put together a stipulation governing the production of loan files -- we should have a draft for you early next week, and then, when we have agreement on that, you can provide us with a list of 150 loan file numbers.

We will begin producing on a rolling basis, once a protective order is in place as well as, if necessary, any additional protections required to address the privacy issues raised by loan file production (as discussed, by that I mean whatever CW normally does in such cases, which we are looking into even as I type).

Such an agreement could be without prejudice to your later arguing to the Court that 150 was insufficient for your purposes.

Please forward this email to your fellow meet and conferrers. I do not have their emails in my system.

Best,

Elaine

ELAINE GOLIN  
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[EPGOLIN@WLRK.COM](mailto:EPGOLIN@WLRK.COM)

# **EXHIBIT 3**

---

**From:** Reilly, Carrie M.  
**Sent:** Friday, May 18, 2012 1:26 PM  
**To:** Cyrulnik, Owen L. (Graiss & Ellsworth LLP)  
**Cc:** Mirvis, Theodore N.; Golin, Elaine P.; Patrick, Kathy D. (Gibbs & Bruns, L.L.P.); Madden, Robert J. (Gibbs & Bruns, L.L.P.); Ingber, Matthew D. (Mayer Brown); Houpt, Christopher J. (Mayer Brown)  
**Subject:** For discussion purposes only - draft loan materials stipulation and order  
**Attachments:** Draft loan materials stipulation and order (2).DOC

Owen-

As discussed, I am attaching a draft stipulation and order relating to loan materials for discussion purposes only. This draft is provided on a "without prejudice" basis for discussion, and is subject to review both here and at the client regardless of whether a particular item is bracketed. For certain bracketed items, we are still exploring feasibility issues.

Thanks

Carrie M. Reilly  
[cmreilly@wlrk.com](mailto:cmreilly@wlrk.com)  
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New York, NY 10019  
Direct Dial: 212-403-1399  
Fax: 212-403-2399

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]<sup>1</sup> 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]<sup>2</sup>. 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

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<sup>1</sup> Under review

<sup>2</sup> 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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*Attorneys for Federal Home Loan  
Banks of Boston, Chicago, and  
Indianapolis*

So Ordered:

\_\_\_\_\_  
Hon. Barbara R. Kapnick

[May] \_\_, 2012

# **EXHIBIT 4**

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**From:** Golin, Elaine P.  
**Sent:** Monday, June 04, 2012 6:58 PM  
**To:** Cyrulnik, Owen L. (Grais & Ellsworth LLP)  
**Cc:** Reilly, Carrie M.; Mirvis, Theodore N.  
**Subject:** Loan Files

Owen,

Given where we left things in our May 31 meet and confer, we were very surprised to get your letter to the Court of this morning. As you know, we sent you our draft of the proposed loan file stipulation on May 18, the day after our prior meet and confer on May 17. To date, we have not received any comments or counterproposals from you on our proposed stipulation governing production.

As we told you in our meet and confer last Thursday, we are prepared to discuss any of the provisions in our proposed stipulation, and as we specifically discussed with you, the time periods for file review that we included in the draft order are placeholders, subject to negotiation. We specifically asked you how long you thought you needed for file review, offering to do ours in a matter of weeks, if you would commit to doing the same. And, while we told you that it was not possible to complete production in 30 days, given the unprecedented breadth of how you are defining "loan files," we told you that production would be rolling, that you would receive a substantial number of documents within 30 days, and that, if you got us the loan file numbers now, we would immediately begin collecting documents so that this time is not lost.

Both those offers – to discuss any aspect of the proposed stipulation, including time periods, and to begin collection of the 150 loan files – still stand. Please let us know if you are interested in pursuing either of them.

Best,

Elaine

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