MAYER·BROWN

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

Main Tel +1 212 506 2500
Main Fax +1 212 262 1910
www.mayerbrown.com

Matthew D. Ingber
Direct Tel +1 212 506 2373
Direct Fax +1 212 849 5973
mingber@mayerbrown.com

March 12, 2012

The Honorable Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, New York 10007

Re: *In re The Bank of New York Mellon* (Index No. 651786-2011)

Dear Justice Kapnick:

We represent Petitioner The Bank of New York Mellon (the "Trustee") in the above-referenced matter. Pursuant to Rules 14 and 24(a) of the Commercial Division of the Supreme Court, we write to inform the Court of the progress of discovery and to seek rulings on two issues, the resolution of which is necessary to determine the course of further proceedings: (1) that the single issue to be reviewed in this proceeding is whether the Settlement is within the scope of the Trustee's reasonable discretion; and (2) that the scope of any further discovery should be limited to that single issue. We also propose, for the Court's consideration, a pre-hearing schedule and respectfully request that the Court enter a revised scheduling order to govern this proceeding following its remand back to this Court.

Avoidance of further delay is a critical concern here. Article 77 proceedings are intended to be resolved with "expedition and efficiency."[1] Prompt rulings on these threshold matters are needed to avoid far-reaching and time-consuming discovery that is irrelevant to any issue before the Court. A ruling now on the appropriate standard of review, and the scope of the discovery that follows from it, will streamline the case, avoid piecemeal resolution of discovery disputes, and allow the Court to enter an expedited schedule that will vindicate the interest of trust beneficiaries in a prompt resolution. We respectfully request that the Court schedule a conference to address these issues at its earliest convenience.

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[1] *See Gregory v. Wilkes*, 26 Misc. 2d 641, 642 (Sup. Ct. N.Y. Cnty. 1960) ("The reason for the enactment of article 79 [the predecessor of Article 77] was to provide a special proceeding in trust accountings and administrations with incidental construction and enforcement relief in the interests of expedition and economy."). *Accord In re Bucherer's Trust*, 21 Misc. 2d 566, 567 (Sup. Ct. N.Y. Cnty. 1959) ("The summary proceeding relating to express trusts made by living persons or by last will and testament was intended to dispense with the cumbersome details of a plenary action in regard to settlement of accounts and construction of the trust."); CPLR § 401, Practice Commentaries (McKinney 2010) (noting that "[s]peed, economy, and efficiency are the hallmarks of" a special proceeding.").

PROCEDURAL BACKGROUND

The procedural history demonstrates that clear rulings on the timing and limitations on discovery are needed if this case is to be managed in conformity with Article 77.

This Article 77 special proceeding was filed in this Court on June 29, 2011. On August 8, 2011, the Court reaffirmed its June 29, 2011 order that all potential Settlement objectors were required to file their objections by August 30, 2011, directed the parties to meet and confer about a discovery schedule, and denied the motion of the Walnut Place LLC objectors ("Walnut Place") to recognize a right for individual investors to opt-out of the Settlement. Following that ruling, Walnut Place removed the proceeding to the Southern District of New York, asserting for the first time that it was removable under the federal Class Action Fairness Act. That effort has now been rejected and the proceeding remanded to this Court. *See BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp.*, 2012 WL 611401, at *3, *7 (2d Cir. Feb. 27, 2012). The Second Circuit confirmed the propriety of Article 77 in this context and stated that the issues in this proceeding are the Trustee's "authority to assert and settle claims on behalf of the trusts" and whether it "acted in good faith, within its discretion, and within the bounds of reasonableness" in entering into the Settlement. *Id.* at *2, *5.

While the proceeding was in federal court, the Trustee—consistent with its goal of seeking an expedited resolution—*voluntarily* produced approximately 120,000 pages of documents on November 1, 2011. This production consisted of documents that it considered in evaluating the Settlement Agreement and documents that it provided to its expert advisors in connection with their reports.

On November 4, 2011, the federal court issued a scheduling order, providing that formal discovery should commence on November 17. Beginning on that date and continuing over the next several months, the parties served document requests and interrogatories, responses and objections to those demands, and (as to most of the parties) initial disclosures, and also held several meet-and-confers. During that process, it became clear that there were fundamental disputes regarding the standard of review that would apply to the Trustee's decision to enter into the Settlement and, relatedly, the scope of discovery. (As discussed below, now that the case is back before a court with subject matter jurisdiction, such issues can and should be decided.) In February, subject to an agreed-upon (but not yet so-ordered) protective order, the Trustee produced approximately 130,000 more pages of documents in response to the objectors' requests, including the Trustee's internal email, documents referred to in the Settlement Agreement (including those concerning the Trustee's receipt of mortgage files), and the agreements governing the 530 trusts.

Finally, as noted above, on February 27, 2012, the Second Circuit ordered that the case be remanded. In its decision, the Second Circuit recognized that Article 77 is "'broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning a trust.'" *See BlackRock*, 2012 WL 611401, at *2 (quoting *Greene v. Greene*, 88 A.D.2d 547, 548 (1st Dep't 1982)). "Such proceedings are used by trustees to obtain instruction

as to whether a future course of conduct is proper." *Id.* After reviewing BNY Mellon's Article 77 Petition, the Second Circuit also concluded that BNY Mellon's request "for a construction of the PSA and an instruction that its planned course of action complies with its obligations under that document and the law of trusts—[is] consistent with other proceedings brought under Article 77." *Id.* at *5.

I. The Only Issue to Be Decided in This Case Is Whether the Settlement Is Within the Scope of the Trustee's Reasonable Discretion.

Under New York law, the only issue before the Court is whether the Trustee's decision to settle was within the bounds of a reasonable exercise of discretion by the Trustee. This is a deferential standard: unless the Trustee acted dishonestly or beyond the bounds of its reasonable discretion, the Court may not substitute its judgment for that of the Trustee. A ruling on that threshold issue is essential, as it will shape the scope of discovery, guide the parties' preparation for the hearing, and allow an appropriate schedule to be set.

New York law is clear as to the standard of judicial review of a trustee's conduct. "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." *In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. Cnty. 1980) (citation and internal quotation marks omitted); *see also In re Hagymas Estate*, 46 Misc. 2d 492, 495 (Sur. Ct. Rensselaer Cnty. 1965) ("Under the terms of the trust the trustee is free to exercise its discretion in determining if any of the son's debts meet the test of an emergency. All that I could possibly review would be an issue of any abuse of that discretion."); RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.").[2]

That standard applies, in particular, to the settlement of litigation claims: "The trustee can properly compromise, submit to arbitration or abandon claims affecting the trust property, provided that in so doing he exercises reasonable prudence." RESTATEMENT (SECOND) OF

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[2] *See also* BOGERT ON TRUSTS § 560 ("If a settlor has given his trustee a discretionary power (without qualification [such as 'full' or 'absolute']), the court is reluctant to interfere with the trustee's use of the power. . . . Hence, in the absence of one or more of the special circumstances mentioned hereafter, the court will not upset the decision of the trustee"); *id.* ("It is not necessarily an 'abuse of discretion' to make decisions under a discretionary power which the court believes that an ordinarily prudent trustee would not have made, or to fail to use the power as the court would have used it if the discretion had been granted to the court. . . . However, if the action of the trustee is extraordinarily imprudent or extremely unreasonable, the court is likely to find that there has been an abuse of discretion").

TRUSTS § 192; *see also id.* cmt. a ("The trustee has discretion whether to sue or to compromise claims or submit them to arbitration, if he acts within the bounds of a reasonable judgment.").

This Court has previously recognized that the Countrywide PSAs at issue in this proceeding impose a requirement of action in the collective best interests of all Certificateholders. All Certificateholders "bind themselves" to a contract that vests this discretion in a trustee. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v. Countrywide Fin. Corp.*, No. 650474/2008, slip. op. at 7 (Sup. Ct. N.Y. Cnty. Oct. 7, 2010) (certificateholders "agree[] to" the restrictions of a no-action clause "when they purchase[] the certificates"). These provisions ensure that decisions about how and when to enforce the Trusts' rights lie solely with the Trustee, not with individual Certificateholders pursuing potentially divergent goals.

This Court's decision in *In re Application of IBJ Schroder Bank & Trust Co.* is instructive. In that Article 77 proceeding, the court emphasized that the securitization trustee's decision to compromise claims "was entitled to judicial deference" and that "the trustee's view must prevail" because of "the trustee's showing of [its] reasonableness." No. 101580/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug 16, 2000); *id.* ("the trustee's decision to compromise the . . . action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference"). The court specifically refused to "invalidate the proposed settlement merely because certain beneficiaries believe a greater recovery might be obtained if the . . . action is submitted to an expensive and unpredictable litigation."

Here, the objectors do not—and cannot—dispute that the claims being settled belong to the Trustee. *See, e.g., Walnut Place LLC v. Countrywide Home Loans, Inc.*, Sup. Ct. N.Y. Cnty. Index No. 650497/11 (Kapnick, J.), 12/8/2011 Hr'g Tr. at 14 (Walnut Place's counsel: "the plaintiffs acknowledge that the repurchase right does not belong to the certificate holders. It belongs to the Trustee."); PSA §§ 2.01(b), 2.04 (specifying that the right to require the Seller to repurchase non-conforming loans belongs to the Trustee). Contractual language like that in the PSAs conveys to a securitization trustee "the power to bring suit to protect and maximize the value of the interest thereby granted." *LaSalle Nat'l Bank Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001); *see also Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 215 (1st Dep't 2004) ("Th[e] authority [to sue on behalf of the trust] is committed solely to the trustee of the pooled loans . . . ."). As noted above, that power to litigate includes the power to settle—and the PSAs do not circumscribe the Trustee's discretion in that regard. *See Suffolk Cnty. Nat'l Bank v. Licht*, 256 A.D. 1080, 1080 (2d Dep't 1939) ("The stipulation [settling trust claims] was within the power of the trustee and was therefore valid, in the absence of any contrary provision in the declaration of trust.").

II. The Scope of Discovery Should Be Defined in Accordance With the Standard of Review.

Because the only issue before the Court is whether the settlement is within the scope of the Trustee's reasonable discretion, only discovery that bears *on that issue* is permissible. The only *relevant* evidence is what the Trustee actually considered and the reason the Trustee

believed this evidence was sufficient to make its decision. Discovery into the underlying claims the Trustee settled is not appropriate. *See BlackRock*, 2012 WL 611401, at *7 (holding that "the underlying claim . . . by [the Trustee] against Countrywide and Bank of America to enforce the buy-back provisions of the PSA . . . is not the claim" in this proceeding).

CPLR 3101(a) permits disclosure of "all matter material and necessary in the prosecution or defense" of the action. The Court of Appeals has defined the standard of materiality as being 'one of usefulness and reason,' with the focus to be placed on 'sharpening the issues and reducing delay and prolixity.'" *NBT Bancorp, Inc. v. Fleet/Norstar Fin. Group, Inc.*, 192 A.D.2d 1032, 1033 (3d Dep't 1993) (quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)). It has also held that discovery that will "hardly aid in the resolution of the question" before the court or will "unnecessarily broaden the scope of the litigation and invite extraneous inquiries" is properly denied. *Andon ex rel. Andon* v. *302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 745 (2000) (emphasis added and citations omitted).

Article 77 in no way expands the scope of permissible discovery. To the contrary, the *only* discovery that Article 77 itself expressly provides for, given the deferential standard of review, is "the right to examine the trustees . . . as to any matter relating to their administration of the trust, in accordance with the provisions of article thirty-one." CPLR § 7701. Indeed, courts evaluating the scope of discovery in Article 77 proceedings have consistently focused on the trustee's acts in connection with the particular issue before the Court. In *In re Beeman*, the court affirmed an order limiting discovery to the "petitioner's acts as trustee insofar as they relate to the validity of the intermediate accounts" and denied discovery relating to the "trust corpus" because that discovery "extended beyond the scope of this proceeding." 108 A.D.2d 1010, 1012 (3d Dep't 1985). Likewise in *Andrews v. Trustco Bank, N.A.*, the court affirmed an order denying discovery demands that were "either patently too broad, or irrelevant to the issues, or both," such as a demand for "all memorandum, correspondence, and work papers related to the administration of the trust." 289 A.D.2d 910, 913 (3d Dep't 2001) (internal quotations omitted). These limitations follow from the fact that CPLR 3101 allows only *relevant* discovery, and such extraneous matters are not relevant.

The Trustee already has produced all of the documents that are relevant to the question of whether it reasonably exercised its discretion in entering into the Settlement and a total of approximately 250,000 pages. The Settlement Agreement was attached to the Trustee's Verified Petition, filed on June 29, 2011, along with each of the governing agreements and the proposed methodology, developed by an independent expert (NERA Economic Consulting), for distributing Settlement proceeds. The five reports of the Trustee's expert advisors have been available on the settlement website (www. cwrmbssettlement.com) since July of 2011. In October of last year, in accordance with this Court's previous scheduling order, the Trustee filed a lengthy statement responding to the objections that had been made and providing additional support for the Settlement. In November, the Trustee voluntarily produced documents that it considered in entering into the Settlement Agreement and documents that it sent to its expert

advisors. And now, the Trustee is in the final stages of producing all remaining non-privileged internal documents concerning its decision to enter into the Settlement.[3]

Armed with this information and the Trustee's extensive disclosures, the objectors have everything they need to assess—and if they wish, challenge—whether the Trustee's exercise of discretion in settling the trust-based claims was within the scope of its reasonable judgment. The objectors nonetheless have requested documents that go far beyond that universe, including documents that could bear only on the claims being settled and that do not bear on the Trustee's decision-making process. For example, objectors have demanded millions of pages of loan files, documents that they know that the Trustee—in the exercise of its discretion—concluded it did not need to consider. They also seek documents dating back to the formation of the trusts, including business intake forms and records of receipt of mortgage files, which also have nothing to do with the Trustee's decision to settle. Such efforts would improperly transform this case from an Article 77 proceeding properly focused solely on the reasonableness of the Trustee's exercise of discretion into a plenary litigation of the settled claims, cause extensive delay measured in many months if not years, and do nothing to advance the Court's ability to resolve the single issue in this matter . It is well established that discovery for these purposes is improper—even in the context of class action settlements, which are subject to a *higher* standard of review.[4]

Accordingly, the Court should rule that the only appropriate topic for discovery is the Trustee's process in evaluating the Settlement Agreement—specifically, information the Trustee considered (and the reasons the Trustee believed it had reviewed enough information to enable it to reach a settlement), and non-privileged internal communications concerning the Settlement.

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[3] These documents include everything (and then some) that objectors would receive in a case involving decisions made by a board of directors' special litigation committee in the analogous derivative lawsuit context. *See Sutherland v. Sutherland*, 2007 WL 1954444, at *3 (Del. Ch. July 2, 2007) (plaintiffs entitled only to information reviewed by or concerning the selection of special committee and its advisors); *In re Take-Two Interactive Software, Inc. Deriv. Litig.*, 2008 WL 681456, at *3 (S.D.N.Y. Mar. 10, 2008) (rejecting discovery request because plaintiffs had "seen all the documents that were seen by the Committee"). Far-reaching requests for documents not reviewed by the committee "under the guise of making a record in opposition" exceed the proper scope of discovery. *Strougo* v. *Bassini*, 1999 WL 249719, at *6-7 (S.D.N.Y. May 4, 1999) (internal quotation omitted).

[4] *See Robertson* v. *Nat'l Basketball Ass'n*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976) (discovery into the merits of settled claims is routinely denied because the "settlement hearing is not a trial or a rehearsal of the trial. . . . [I]t does not attempt to decide the merits of the controversy."); *see also In re Amsted Indus., Inc. Litig.*, 521 A.2d 1104, 1107 (Del. Ch. 1986) ("the purpose of a hearing on the fairness of a proposed settlement . . . is not the final determination of the merits of claims or defenses asserted in such litigation"). As the federal courts have observed, "since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial." *Newman* v. *Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972) (internal quotation marks omitted).

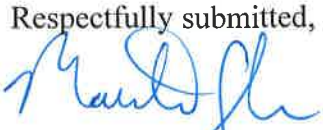
III. The Court Should Issue a Revised Discovery Schedule.

This Court's original schedule obviously needs to be revised in light of the delay caused by removal. The Trustee proposes the following schedule, which is reasonable in light of the discovery that already has occurred, and which balances the streamlined and expedited nature of a special proceeding with the need to provide any remaining objectors with all discovery required to litigate the matter. Because objectors have taken the position that they cannot disclose the basis for their objections until disclosure from the Trustee is complete, this proposal provides for a two-stage process, in which the Trustee completes its disclosure, then the objectors file substantive objections, then the Trustee and intervenor-petitioners receive disclosure from objectors concerning the factual basis for those objections.

Following ruling on items I. and II.:	Complete document discovery, if any, based on Court's ruling.
30 days after completion of document discovery:	End all discovery regarding the Trustee's decision to enter into the Settlement
15 days later:	Deadline to present objections and the basis for them; begin discovery from objectors on the basis of their objections
30 days later:	End of discovery from objectors on the basis of their objections
15 days later:	Responses to objections to the Settlement
30 days later:	Final hearing

We thank the Court for its attention to this matter.

Respectfully submitted,



Matthew D. Ingber

cc: All counsel of record (by email)