UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT 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), Maiden Lane II, LLC, (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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), Western Asset Management,

Petitioners,

- against -

Civil No. 11-cv-5988

PLEADING IN INTERVENTION AND OBJECTION TO THE PROPOSED SETTLEMENT AGREEMENT

MARY ELLEN IESU, MILDRED BARRETT, CHERYL G. PHILLIPS and MICHAEL P. CARY, on behalf of themselves and all those similarly situated,

Intervenors – Respondents,

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

Proposed Intervenors Mary Ellen Iesu, Mildred Barrett, Cheryl G. Phillips and Michael P. Cary (collectively "Intervenors") submit this Pleading in Intervention and Objection to the Proposed Settlement Agreement. Intervenors, a group of homeowners whose mortgages are contained within the 530 residential mortgage securitization trusts ("Covered Trusts"), hereby object to the proposed Settlement Agreement ("Settlement Agreement"). Intervenors submit the attached Report of Diane E. Thompson and Margot Freeman Saunders of the National Consumer Law Center (hereafter "Thompson and Saunders" and their report, the "Report") in further support of these objections to the Settlement Agreement (attached hereto as Exhibit A). This Report is incorporated herein. Thompson and Saunders undertook an examination of the Settlement Agreement to determine its impact on borrowers within the Covered Trusts. The attached Report describes in detail how the Settlement Agreement completely undermines any interests of the ultimate homeowners and erodes the standards by which the mortgage loans underlying the Covered Trusts will be serviced.

Intervenors have today filed a Class Action Complaint, *Mary Ellen Iesu, et al. v. Bank of America Corporation, et al.*, for declaratory and injunctive relief in this Court (attached hereto as Exhibit B). Intervenors bring their objections to the Settlement

Agreement individually and on behalf of the Class of all other similarly situated borrowers as defined in the *Iesu* complaint.

SUMMARY OF THE OBJECTIONS TO THE SETTLEMENT AGREEMENT

1. The Thompson and Saunders Report describes the potential effect of the Settlement Agreement on all homeowners whose loans are within the Covered Trusts. Intervenors and the Class, whose mortgage loans are serviced by Bank of America, will be harmed if the Settlement Agreement is approved and fully implemented. The Settlement Agreement will accelerate foreclosures, perpetuate existing servicing abuses in the system, and undermine federal programs designed to stabilize the housing market. The Settlement Agreement will cause immediate and material damage to Intervenors and the Class for three primary reasons.

2. First, the Settlement Agreement does nothing to end existing abuses. (Report pp. 5-10). There is a "dual track" problem, where homes are foreclosed on while the homeowner is simultaneously negotiating or actually making payments under a loan modification agreement. This dual track effort, by itself, causes severe servicing problems for homeowners. Additionally, Bank of America has engaged in the placement of illegal fees, including force-placed insurance and improper accounting for payments, and failed to properly evaluate homeowners for loan modifications in a timely manner and employ other loss mitigation strategies. Nothing in the Settlement Agreement addresses any of these abuses.

3. The standards enunciated for the evaluation of loan modifications specifically and loss mitigation generally by both servicers and subservicers in paragraph

5(e) of the Settlement Agreement leave the servicers with virtually unlimited discretion – far more discretion than servicers are currently permitted to exercise under most federal loss mitigation programs. While servicers are required to consider a net present value analysis of a loan modification as compared to foreclosure (*see* ¶ 5(e)), this required consideration is virtually meaningless for the following reasons:

- No standards for the modification are offered (e.g., interest rate reduction, extended terms, principal reductions, income ratios) nor are the terms of the Net Present Value ("NPV") analysis (e.g., expected redefault rate, Real Estate Owned ("REO") discount, expected time to sale) specified. As such these standards appear to be left entirely to the discretion of the servicers (or subservicers) conducting the analysis (*see* ¶ 5(e)).

- Servicers are only required to "consider" the NPV analysis. They are not required to use its results.

- Among the other criteria servicers and subservicers are permitted to consider is their subjective belief that the homeowner is engaged in "strategic default."

- Servicers may refuse to perform a loan modification, even one that is projected to return a benefit to the investor for any factor the servicer deems "prudent" in its judgment. (Report pp. 9-10).

4. Bank of America, its affiliates, and subservicers are permitted to continue to accrue post-default fees, directly and through third-party vendors, without limitation or oversight. (*See* Settlement Agreement ¶¶ 5(a)(iv) and (a)(xi).) These fees often provide an incentive to servicers to pursue foreclosure over modification. (Report pp. 9-10). The Settlement Agreement allows Bank of America and its subservicers to continue business as usual with regard to excessive and illegal fees, improper accounting, and failure to evaluate homeowners for loss mitigation. *Id.*

5. Second, the Settlement Agreement undermines existing efforts to stabilize the housing markets. (Report pp. 10-18). The standards set forth in the Settlement Agreement are in direct conflict with the standards of the Home Affordable Modification Program ("HAMP") and Federal Housing Finance Agency ("FHFA"). The standards required by HAMP, enunciated by the government sponsored enterprises – Fannie Mae and Freddie Mac – and created by federal law in the Federal Housing Authority, Veterans Administration, and Rental Housing Support programs, all mandate that servicers follow a standard loss mitigation evaluation process and, under certain circumstances, offer a loan modification. The proposed Settlement Agreement neither mandates a standard process, nor standard modification terms, nor the offer of a loan modification where appropriate. The lack of standards guarantees that fewer modifications will be done and more homeowners will lose their homes.

6. Among the terms in the Settlement Agreement that may result in a direct conflict between existing federal programs and the Settlement Agreement are the following:

- The "simultaneous" evaluation of the homeowner for all modification programs. If this is interpreted to include loss mitigation activities such as a short sale, this is in direct conflict with existing federal guidance. Even if this merely allows evaluation for proprietary modifications at the same time as HAMP or other federal modifications, the simultaneous evaluation undermines the federal programs. Servicers routinely steer homeowners to proprietary modifications, and away from HAMP modifications or other government-sponsored modification programs, with disastrous results for homeowners. Proprietary modifications have failure rates significantly higher than HAMP, even when they reduce the payment to an affordable level. Since the Settlement Agreement does not require that the modifications offered be affordable or sustainable, one can expect that the modifications offered will fail at levels twice the rate of HAMP modification.

- The limitation on principal reductions to the current market value, measured without regard to REO sales, (¶ 5(e)), is both counter to HAMP and sound economic decision making. The potential losses incurred by investors will be based on the REO sale, not on the current market value of a home freely sold. HAMP permits and underwrites principal reductions in a greater amount; capping principal reductions at this artificially inflated rate harms homeowners.

7. Conspicuously absent from the servicer guidelines is a requirement to perform loan modifications when a standard analysis predicts that the investors will benefit more from a modified loan than a foreclosure. The Settlement Agreement will thus set a standard of loan servicing which is lower than HAMP and other guidelines. The failure to include an explicit requirement permits the servicers to continue to profit from those activities that promote foreclosure rather than home retention, or even reduction of post home-loss debt. The failure to conform the Settlement Agreement with HAMP undermines HAMP in that HAMP allows servicers not to perform modifications to the extent HAMP is in conflict with guidance from investors. The Settlement Agreement, with its broad grant of discretion to servicers, its caps on principal reduction, and its tight foreclosure timeline could be used by Bank of America to assert that investor restrictions prohibit it from participating in HAMP.

8. Third, the touted servicing "improvements" only aim to accelerate the rate and speed of foreclosures but fail to set standards to protect homeowners from wrongful or unnecessary foreclosure or abusive servicing. (Report pp. 19-23). At the heart of the servicing "improvements" are two proposals: (1) the referral of loans in default to

specialty subservicers and (2) the payment of compensatory fees should Bank of America not ensure that loans are moved to foreclosure sale quickly enough. Neither of these proposals helps homeowners; both, if left unaddressed, will exacerbate the illegal harm being done to homeowners right now.

9. The referral to subservicers will cause homeowners to suffer even worse illegal and abusive servicing than they currently endure. (Report pp. 19-23). Although the referral of loans to specialty subservicers seems designed to increase Bank of America's incentives to keep loans performing because it will reduce its ability to profit from default-related fees, nothing in the proposed Settlement Agreement actually requires the responsible servicing of loans by subservicers. Provisions for responsible servicing by subservicers are critical to protect the interests of homeowners. Transfer to subservicers will increase the risk of errors in loan accounting, abusive debt collection practices, and confusion on the part of homeowners accustomed to dealing with one entity. While subservicers, under paragraph 5(a)(iii) of the proposed Settlement Agreement, must meet certain standards such as state licensing, these standards provide no assurance that the subservicers will perform better than Bank of America has in the past. The Settlement Agreement contains no provisions requiring that subservicers successfully implement loss mitigation strategies or loan modification NPV analyses, and does not even mandate that subservicers measure the success and failure of their efforts. Furthermore, the Settlement Agreement requires no commitment by subservicers to maximize income to the investor when deciding whether to pursue foreclosure or permit home retention loss mitigation strategies.

10. The compensatory fee structure within the Settlement Agreement speeds up foreclosures without protecting homeowners from wrongful foreclosure. (Report pp. 24-25). This fee structure is for defaulted loans either retained by Bank of America or loans that have not yet been assigned to subservicers. Paragraph 5(c)(iii) of the Settlement Agreement, however, provides very significant financial incentives for Bank of America to speed up the foreclosure process. Consequently, the accelerated foreclosure process is likely to impede any meaningful review of foreclosure alternatives, and therefore will result in unnecessary foreclosures and sales of homes. Homes will be sold while homeowners await the results of their loan modification application, and the accelerated process will cause homeowners to incur unnecessary foreclosure fees, which further price modifications out of reach. Referring loans to foreclosure adds additional fees to a homeowner's account. There are many documented instances where these fees have prevented a homeowner from being able to afford a loan modification.

11. The compensatory fee structure set forth in paragraph 5(c)(iii) applies to loans retained for servicing by Bank of America. Under this structure, should Bank of America fail to refer a loan to foreclosure in a timely way, or fail to liquidate the property at a foreclosure sale quickly enough, Bank of America faces the prospect of paying to the Covered Trust an amount equivalent to the monthly interest due on that loan. There are no corresponding penalties against Bank of America for errors in servicing that harm homeowners. This lopsided incentive structure will foster foreclosures at the expense of homeowners. Moreover, these accelerations will not even permit the evaluation of loss mitigation strategies that would protect investors, let alone homeowners.

12. This system, as set forth in the Settlement Agreement, provides no exceptions for instances when a homeowner and a servicer are in the midst of negotiating a loan modification. Nor are the exceptions allowed for borrowers performing under any loan modification for the initial referral or under a proprietary loan modification or any other non-HAMP loan modification not mandated by law for a foreclosure sale. The result is that the dual track system of proceeding with foreclosures while negotiating loan modifications – a system repudiated by HAMP and by the FHFA in the recent servicing alignment – is encouraged and even mandated by the Settlement Agreement, with the predictable result of an increase in wrongful foreclosures.

13. The cumulative impact of the Settlement Agreement's acceleration of the foreclosure process is a de-emphasis on modifications or other loss mitigation strategies, with a consequent weakening of the incentives to prevent foreclosure.

THE RELEVANT PARTIES

14. The Bank of New York Mellon ("BNY Mellon") is Trustee of the 530 Covered Trusts created by Countrywide Financial Corporation and Countrywide Home Loans, Inc. between 2004 and 2008. These Covered Trusts include hundreds of thousands of Mortgage Loans (the "Mortgage Loans") that were placed within these Covered Trusts during this time period.

15. BAC Home Loans Servicing, LP is the "Master Servicer" for these Mortgage Loans. BAC Home Loans Servicing, LP and its parent, Bank of America Corporation, are collectively referred to as "Bank of America."

16. Countrywide Financial Corporation and Countrywide Home Loans, Inc. and their affiliated entities (that originated many of the Mortgage Loans) were the "Sellers" of the Mortgage Loans in each of the Covered Trusts. Countrywide Financial Corporation and Countrywide Home Loans, Inc. are collectively referred to as "Countrywide." Bank of America purchased Countrywide in on or before July 1, 2008.

17. The "Institutional Investors" are holders of certain securities and/or investment managers for holders of certain securities issued by the Covered Trusts. The investors include 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, Bayerische Landesbank, BlackRock Financial Management, Inc., Federal Home Loan Bank of Atlanta Goldman Sachs Asset Management L.P., ING Investment Management L.L.C., ING Bank fsb, ING Capital LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Landesbank Baden-Wuerttemberg and LBBW Asset Management (Ireland) PLC, Dublin, Maiden Lane, LLC, Maiden Lane II, LLC, Maiden Lane III, LLC, Metropolitan Life Insurance Company, Nationwide Mutual Insurance Company, New York Life Investment Management LLC, Neuberger Berman Europe Limited, Pacific Investment Management Company LLC, Prudential Investment Management, Inc., Teachers Insurance and Annuity Association of America, Thrivent Financial for Lutherans, Trust Company of the West and the affiliated companies

controlled by The TCW Group, Inc., and Western Asset Management Company. These Institutional Investors have intervened in this proceeding and have stated their desire to have this Court approve and allow full implementation of the Settlement Agreement.

18. Intervenor Mary Ellen Iesu ("Iesu") is a resident of Staten Island, New York. Iesu is the mortgagor on a home mortgage loan that was taken on 47 Hemlock Street, Staten Island, New York 10309. That mortgage loan originated and began to be serviced by Countrywide on April 14, 2004. Iesu's loan, according to the BNY Mellon's website, is not beneficially owned by the investors in a loan trust listed in Exhibit A to the Settlement Agreement as CWHL 2004-15, with BNY Mellon as trustee, and serviced by Bank of America following the Bank of America purchase of Countrywide. Iesu's loan is one of the thousands of Mortgage Loans included with the five hundred and thirty (530) Covered Trusts at issue before this Court.

19. Iesu had mortgage servicing problems caused by Bank of America. In 2009, a divorce and a non-paying tenant left Iesu in difficult financial condition. In an effort to correct her problems, Iesu began working with a housing counselor in the summer of 2009 in order to apply for a loan modification. In December 2009, Bank of America told her housing counselor that she had been approved for a trial loan modification. However, Bank of America, for unknown reasons, never sent Iesu a written approval. It was only after Iesu had been served with a Summons and Complaint by Bank of America that she learned that her loan modification had been purportedly denied. Iesu now faces foreclosure.

20. Intervenor Mildred Barrett ("Barrett") is a resident of Houston, Texas. Barrett is the mortgagor on a first mortgage loan that was taken on 6007 Diamond Bay Ct., Houston, Texas 77041. Barrett is the mortgagor on a home mortgage loan that originated and began to be serviced by Countrywide on July 11, 2005. Barrett's loan, according to a MERS and BNY Mellon website is now beneficially owned by the investors in one of the 530 Covered Trusts, with BNY Mellon as trustee, and serviced by Bank of America following the Bank of American purchase of Countrywide. Barrett's loan is one of the thousands of Mortgage Loans included with the Covered Trusts at issue before this Court.

21. Barrett has had numerous mortgage servicing problems caused by Bank of America. Barrett has never missed a payment on her Bank of America loan. In spite of that, in November 2009, Bank of America began automatically withdrawing more money from Barrett's bank account than was due from Barrett. For example, in January 2010, Bank of America withdrew three times the amount that Barrett owed on her mortgage. Barrett informed Bank of America of this problem but Bank of America failed to take any corrective action. Barrett was repeatedly harassed for money she did not owe, and ended up grossly overpaying Bank of America due to Bank of America's excessive withdrawals from Barrett's bank account.

22. On August 21, 2010, Barrett received a letter from Bank of America that she owed over $20,000.00 in mortgage payments and $4,128.68 in property taxes and insurance premiums. Bank of America made this last request even though Barrett had always paid her own taxes and insurance. Bank of America has never paid those bills for

Barrett. That same day, Bank of America called Barrett seven times from its collection department to inform Barrett that she was in default. On August 25, 2010, Bank of America sent a truck to Barrett's development to do a home inspection. On September 13, 2010, Barrett received an alert on her Credit Bureau Report that Bank of America has reported that Barrett was 120 days late on her mortgage payments. In the summer of 2011, Bank of America started foreclosure proceedings against Barrett even though Barrett has never missed a loan payment and has always been current on her loan obligations. A few days prior to the scheduled foreclosure sale, Barrett received a letter from Bank of America stating that Bank of America would no longer speak to Barrett through her counsel. This left Barrett without representation on the eve of foreclosure.

23. Intervenor Cheryl G. Phillips ("Phillips") is a resident of Murfreesboro, Tennessee. Phillips is the mortgagor on first and second home mortgage loans that were taken on 440 Compton Road, Murfreesboro, Tennessee 37130. The loan numbers are 136764770 and 136764762. These mortgage loans originated and began to be serviced by Countrywide on May 17, 2006. Phillips' loans, according to a BNY Mellon website, are now beneficially owned by the investors in the CWALT 2006-19CB trust, with BNY Mellon as trustee, and serviced by Bank of America following the Bank of America purchase of Countrywide. Phillips loan numbered 136764762 is one of the thousands of Mortgage Loans included with the five hundred and thirty (530) Covered Trusts at issue before this Court.

24. Phillips has had many mortgage servicing problems caused by Bank of America. Phillips engaged in the loan modification process with Bank of America while

simultaneously being threatened by Bank of America with foreclosure – in other words, Phillips was "dual tracked" by Bank of America. Ultimately, Bank of America informed Phillips that she did not qualify for a loan modification and instead faces foreclosure.

25. Throughout the loan modification process, Bank of America used several abusive servicing practices against Phillips, including refusing to properly answer Phillips' questions, demanding that Phillips repeatedly send the same paperwork over and over, sending multiple bills the same month demanding different amounts, charging Phillips unidentifiable fees, and repeatedly failing to apply her payment correctly to her account.

26. Intervenor Michael P. Cary ("Cary") is a resident of Niceville, Florida. Cary is the mortgagor on a home mortgage loan that was taken on 2428 Martin Drive, Niceville, Florida 32578. Cary's loan is now owned by a trust with BNY Mellon as trustee and serviced by Bank of America following the Bank of America purchase of Countrywide in 2008. Cary's loan is one of the thousands of Mortgage Loans included with the five hundred and thirty (530) Covered Trusts at issue before this Court. Cary's loan is contained within the trust listed as CWHL 2005-HYB10.

27. Cary had mortgage servicing problems caused by Bank of America. Cary purchased his home in August 2005. Cary and his wife started facing financial difficulties several years ago. Due to these financial problems, Cary decided to request a loan modification. Cary was subjected to repeated servicing problems caused by Bank of America. Cary has been unable to make any progress with Bank of America regarding modification of Cary's loan. For example, Cary is never able to speak to the same Bank

of America service spokesman on the telephone and even when Cary does get a person to speak with him that person inevitably tells Cary he needs to speak with someone else at Bank of America. For Cary this frustrating process has been the normal manner in which his loan is serviced.

28. Intervenors file this Objection to the Settlement Agreement on behalf of themselves and a the Class of mortgage loan borrowers defined in the *Iesu* litigation as those borrowers: (i) whose mortgage loans were originated by Countrywide between 2004 and 2008; (ii) whose loans were included in within the five hundred and thirty (530) Covered Trusts; (iii) whose loans have not been repaid in full; and (iv) whose loans are now being serviced by Bank of America.

THE CREATION AND STRUCTURE OF THE COVERED TRUSTS

29. The Covered Trusts were created by Countrywide between 2004 and 2008 through securitization. Countrywide and its affiliates, the loan sellers, sold portfolios of loans secured by mortgages on residential properties to an entity called the "Depositor." The Mortgage Loans were then conveyed to BNY Mellon, as Trustee. Ownership interests in the Trusts were then sold to investors, including the Institutional Investors.

30. Countrywide, and now Bank of America, is the Master Servicer charged with responsibility for, among other things, collecting debt service payments on the Mortgage Loans and taking any necessary enforcement action against borrowers including foreclosure. All of the Trusts are controlled by contracts known as Pooling and Servicing Agreements ("PSA") or Sale and Servicing Agreements (the "Agreements") under which BNY Mellon is the trustee or indenture trustee.

31. Although the Agreements for each of these Trusts are separate agreements the terms pertinent to this litigation are substantively similar. The Agreements each contain a series of representations and warranties made by Countrywide and/or its affiliates including representations that the collection practices of the Seller and Master Servicer have been legal, prudent and customary in the mortgage lending and servicing business.

32. The Agreements impose servicing obligations on the Master Servicer, requiring, among other things, that the Master Servicer service and administer the Mortgage Loans in accordance with the terms of the Governing Agreements and the customary and usual standards of practice of a prudent mortgage loan servicer.

HAMP – THE "HOME AFFORDABLE MODIFICATION PROGRAM"

33. The "Making Home Affordable Program" was announced by the U.S. Department of the Treasury in February 2009 in an effort to help stabilize the housing market and provide relief for struggling homeowners. This program has two main components: the Home Affordable Refinance Program and the Home Affordable Modification Program ("HAMP"). HAMP was announced on March 4, 2009, and is scheduled to end December 31, 2012.

34. Servicers, like Bank of America in this case, and not investors, participate in HAMP. Servicers' agreements with investors are contained in PSAs, but most PSAs contain no meaningful restrictions on modifying loans in default. As a result, servicers generally should not deny HAMP modifications based on the claim that investors are not

participating. If a PSA contains a modification restriction, the servicer must make "reasonable efforts" to get the investor to waive the restriction.

35. The majority of servicers have signed a Servicer Participation Agreement ("SPA") with the U.S. Department of the Treasury, agreeing to participate in HAMP. All servicers who have agreed to participate must review the eligibility of any borrower who asks to be considered for the program. This is mandatory for participating servicers.

36. Bank of America is a participating server in HAMP.

37. When a servicer transfers a mortgage modified under HAMP, the transferee servicer must assume the transferor's obligations under the SPA, including evaluating loans for HAMP, processing HAMP trial modifications, and timely converting trial modifications to permanent modifications.

38. ***Protections Against Servicers*:** Servicers are prohibited from referring a loan to foreclosure or conducting a scheduled sale until (1) the borrower has been evaluated and determined ineligible for HAMP, (2) the borrower has failed to make the required trial plan payments, (3) the borrower has failed to provide the required documents after at least two written requests, or (4) the borrower has failed to respond entirely to the servicer. Seven days before a foreclosure sale can take place the servicer must provide its foreclosure counsel with a certification that all HAMP requirements have been complied with.

39. If a borrower requests a HAMP modification at least seven business days prior to a scheduled foreclosure sale, the servicer must suspend the foreclosure sale while it completes its evaluation of the borrower for HAMP.

40. Once a borrower is in a trial plan based on verified income, the foreclosure process must be suspended.

41. To be eligible for HAMP, borrowers must (1) meet the basic program requirements and (2) pass the NPV test. The NPV is an evaluation to determine whether it is more cost effective to modify the loan or foreclose. The NPV test measures the economic benefit to the investor or owner of the mortgage.

42. The NPV test compares the net present value of money the investors in the loan would receive if the loan were modified with what would be received if no modification were made. Participating servicers are required to perform a NPV test if a borrower meets the basic eligibility test outlined above.

43. Modifications are "NPV positive" if the investors will get a greater return from modifying the mortgage than not. The servicer must modify the mortgage if it is NPV positive unless there is fraud by the homeowner or a prohibition in the securitization PSAs. If prohibited by contract, servicers are required to use reasonable efforts to obtain waivers to permit a modification.

44. Modifications are "NPV negative" if the investor is forecast to profit more from proceeding with the foreclosure than from modifying. Servicers may modify under these circumstances, if permitted by investors.

45. Servicers are also required to run an NPV test with principal reduction if the unpaid principal balance of the loan is greater than 115% of the home's current market value. HAMP modifications reduce the total mortgage payment, including

principal, interest, taxes, insurance, and association fees, to 31% of the borrowers' monthly gross income.

PAST AND CURRENT MORTGAGE LOAN SERVICING ABUSES

46. Countrywide and Bank of America have engaged in a widespread pattern of illegal and wrongful mortgage servicing practices for many years and in many different ways. The acts described herein have caused substantial damage to borrowers that make up the Covered Trusts.

47. The abuses are well known and documented. For example, in 2010, the Office of Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Reserve Board undertook a coordinated horizontal examination of foreclosure processing at the nation's 14 largest federally regulated mortgage servicers, including the Master Servicer.

48. On February 17, 2011, John Walsh, Acting Comptroller of the Currency testified before the Senate Committee on Banking, Housing, and Urban Affairs. There he testified:

> In general, the examinations found critical deficiencies and shortcomings in foreclosure governance processes, foreclosure document preparation processes, and oversight and monitoring of third party law firms and vendors. These deficiencies have resulted in violations of state and local foreclosure laws, regulations, or rules and have had an adverse affect on the functioning of the mortgage markets and the U.S. economy as a whole. By emphasizing timeliness and cost efficiency over quality and accuracy, examined institutions fostered an operational environment that is not consistent with conducting foreclosure processes in a safe and sound manner.

49. On April 13, 2011, the Office of the Comptroller of the Currency ("OCC") "announced formal enforcement actions against eight national bank mortgage servicers and two third party servicer providers for unsafe and unsound practices related to residential mortgage loan servicing and foreclosure processing." The eight servicers included the Master Servicer in this case, Bank of America.

50. Again on April 13, 2011, the OCC signed and published a consent order styled *In the Matter of Bank of America, N.A.* which found "the OCC had identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings." The OCC cited the following conduct as examples of unsound banking practices by Bank of America in servicing: (a) filing or causing to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records; (b) filing or causing to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary; (c) litigating foreclosure proceedings and initiating non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly

endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time; (d) failing to devote sufficient financial, staffing and managerial resources to ensure proper administration of its foreclosure processes; (e) failing to devote to its foreclosure processes adequate oversight, internal controls, policies, and procedures, compliance risk management, internal audit, third party management, and training; and (f) failing to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.

51. The OCC stated that due to the conduct cited above, "the Bank engaged in unsafe or unsound banking practices."

52. On June 7, 2010, the FTC filed a complaint against both Countrywide and Bank of America in the Central District of California. In that complaint, the FTC alleged, in relevant part:

> In addition, this action is brought to remedy unlawful acts and practices by Defendants in servicing loans for borrowers who are seeking to save their homes through a Chapter 13 bankruptcy. In connection with these bankruptcy cases, Defendants have made various representations to borrowers about their mortgage loans that are false or lack a reasonable basis. Defendants also have failed to disclose to borrowers during their bankruptcy case when fees and escrow shortages and deficiencies have accrued on their loan. After the bankruptcy cases have closed and borrowers no longer have the protection of the bankruptcy court, Defendants unfairly seek to collect those amounts, ***including through foreclosure actions*** (emphasis added)(*FTC v. Countrywide, et al.*, Complaint, ¶ 11)
>
> When a borrower becomes delinquent on a mortgage loan, mortgage servicers order various default-related services that are intended to protect the lender's interest in the property. For example, a mortgage servicer may order a property inspection for the purpose of verifying the occupancy status of the home. In its mortgage servicing operation, Countrywide follows a so-called

> "vertical integration strategy to generate default-related fee income. Rather than obtain default-related services directly from third-party vendors and charge borrowers for the actual cost of these services, Countrywide formed subsidiaries to act as middle-men in the default services process ("default subsidiaries"). The default subsidiaries exist solely to generate revenues for Countrywide and do not operate at arms length with Defendants. *Id*. ¶ 14.
>
> The scheme works as follows. Defendants order default-related services from the default subsidiaries, which in turn obtain the services from third-party vendors. The default subsidiaries then charge Defendants a fee significantly marked up from the third-party vendors' fee for the service, and the Defendants, in turn, assess and collect these marked-up fees from borrowers…. *Id*. ¶ 15.
>
> In addition, Defendants have charged borrowers for the performance of default services, such as property inspections and title reports, that in some instances were not reasonable and appropriate to protect the note holder's interest in the property and rights under the security instrument. *Id*. ¶ 17.
>
> In the course and conduct of their loan servicing and collection, Defendants in numerous instances have assessed and collected default-related fees that they were not legally authorized to assess and collect pursuant to the mortgage contract. *Id*. p. 26.

53. The OCC and FTC are not alone in their complaints for mortgage servicing abuses by Bank of America and Countrywide. Homeowners have an untold number of examples of servicing abuses.

SUMMARY OF THE MORTGAGE SERVICING SETTLEMENT TERMS

54. In October 2010, the Institutional Investors asserted a notice of non-performance to Bank of America for breaches of several provisions of the Agreements including, among other things failing to maintain accurate and adequate loan and

collateral files in a manner consistent with prudent mortgage servicing standards and failing to demand that the Sellers cure deficiencies in mortgage records.

55. Beginning in November 2010, the Institutional Investors have engaged in negotiations with Countrywide and Bank of America in an attempt to reach a settlement for the benefit of the Covered Trusts.

56. At no point were any Class members engaged in the negotiations.

57. According to the Settlement Agreement, Bank of America has agreed to devise, within thirty days after the execution of the Settlement Agreement, a list of 8-10 qualified "subservicers" to service loans within the Trusts deemed "high-risk loans." These High-Risk Loans are defined as:

i. Mortgage Loans that are 45 + days past due without right party contact (*i.e.*, the Master Servicer has not succeeded in speaking with the borrower about resolution of a delinquency);

ii. Mortgage Loans that are 60 + days past due and that have been delinquent more than once in any rolling twelve (12) month period;

iii. Mortgage Loans that are 90 + days past due and have not been in the foreclosure process for more than 90 days and that are not actively performing on trial modification or in the underwriting process of modification;

iv. Mortgage Loans in the foreclosure process that do not yet have a scheduled sale date; and

v. Mortgage Loans where the borrower has declared bankruptcy regardless of days past due.

58. The agreed list shall be submitted to the BNY Mellon which may within forty-five days (i) object and remove any of the selected subservicers from the list, or (ii) limit the number of loans the subservicer may service at any one time.

59. The servicing component of the Settlement Agreement also applies to loans beyond those deemed "High-Risk." For all other loans in the Covered Trusts, Bank of America has agreed to (i) compare in a monthly report its servicing performance against "specific industry standards" and send to the BNY Mellon on a monthly basis statistics comparing Bank of America's performance to these industry standards and (ii) if Bank of America fails to meet these industry standards, calculate and include in its Monthly Statement a master servicing fee adjustment payable by it to BNY Mellon.

60. The Settlement Agreement also contains "loss mitigation provisions" that apply to all mortgage loans in the Trusts. They include, among other things, factors for Bank of America and all of the newly hired subservicers to consider in deciding whether to modify a loan or to apply any other loss mitigation strategies like foreclosures.

61. The Settlement Agreement includes procedures which purport to cure certain document deficiencies in the loan files of the Class members. These procedures cannot and will not be able to cure these deficiencies in the Class members loan files.

INTERVENORS' LEGAL CLAIMS

62. Intervenors have brought four claims against BAC Home Loans Servicing, LP, BNY Mellon, Bank of America Corporation, Countrywide Financial Corporation and Countrywide Home Loans, Inc. in the *Iesu* complaint for breach of contract, negligence, gross negligence and/or intentional tort, and declaratory and injunctive relief.

63. The first claim is breach of contract. The contracts at issue are the mortgages and/or deeds of trust where the parties are the Intervenors and the Class, as mortgagors, and Defendants BAC Home Loans Servicing, LP (for itself and as the agent of Defendant BNY Mellon), BNY Mellon, Bank of America Corporation, Countrywide Financial Corporation and Countrywide Home Loans, Inc., as mortgagees. Each Intervenor/Plaintiff and Class member has a contract with the Defendants.

64. These contracts are uniform across the Covered Trust and all contain the same implied duty of good faith and fair dealing that require the Defendants to service, and to have serviced, the Mortgage Loans in the reasonable and prudent manner.

65. As part of this implied duty of good faith and fair dealing, the Defendants, as mortgagees and Trustee, are obligated to service or have serviced the Mortgage Loans in a reasonable, prudent and lawful manner and to use a level of service that a reasonably prudent mortgage loan servicer would use under similar circumstances. By entering into the Settlement Agreement, an agreement which will substantially reduce the already low level of servicing provided to the Mortgage Loans and ensure that Intervenors and the Class will face unnecessary foreclosures, excessive fees, and other servicing abuses, the Defendants have violated this duty of good faith and fair dealing.

66. The second claim is for negligence. The Defendants, as mortgagees and Trustee, have failed to abide by even the most basic and minimum standards for servicing of the Mortgage Loans. This standard is to service the Mortgage Loans in a reasonable and prudent manner and to use a level of service that a reasonably prudent mortgage loan

servicer would use under similar circumstances. The Defendants have failed in this duty to Intervenors and Class members.

67. The third claim is for gross negligence and/or intentional tort against the Defendants. The Defendants acted with gross negligence, recklessness, deliberate indifference, and/or intentionally towards Intervenors and Class members in that (1) Defendants utterly failed to properly service the Mortgage Loans and (2) the Defendants entered into this Settlement Agreement knowing full well that the quality of servicing of the Mortgage Loans would be seriously damaged and compromised by the new standards set forth in the Settlement Agreement. The Defendants systematic failure is grossly negligent, willful, wanton, in total disregard for the rights of Intervenors and Class members, and/or intentional.

68. The fourth claim is for declaratory relief and an injunction against all Defendants. Intervenors seek to enjoin Defendants from consummating this Settlement Agreement.

CONCLUSION

69. Based on the foregoing, Intervenors and the Class respectfully submit that this Settlement Agreement should not be approved.

Dated: August 30, 2011.

Respectfully submitted,

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