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.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES (CONT'D)

OTHER AUTHORITIES

BACKGROUND

Petitioner The Bank of New York Mellon submits this memorandum of law in support of its motion seeking a ruling that (a) the standard of review applicable to the Trustee's decision to enter into the Settlement Agreement is whether that decision was within the bounds of the Trustee's reasonable discretion, and (b) consistent with that standard of review, discovery shall be limited to documents, information, and testimony concerning the basis for the Trustee's decision to enter into the Settlement Agreement (including the documents and information considered by the Trustee in making its decision).

Contrary to the suggestions of the objectors, the Trustee's choice of an Article 77 proceeding to seek judicial approval of its decision to enter into the Settlement is neither novel nor suspect. New York law has long recognized that equity "[h]istorically . . . permitted a trustee to voluntarily petition the Chancellor to review his record and approve or disapprove his actions in furtherance of his trust. Sound policy has always dictated that this practice be encouraged." *In re Salkin*, 9 Misc. 2d 708, 710 (Sup. Ct. N.Y. Cnty. 1957), *aff'd*, 6 A.D.2d 1011 (1st Dep't 1958). The United States Supreme Court has likewise recognized that "whatever the technical definition of its chosen procedure," a State's interest in resolving questions of trust administration "is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." *Mullane* v. *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

This traditional equitable procedure for resolving questions of trust administration has been codified in New York since 1943—first as Article 79 of the Civil Practice Act and now as Article 77 of the CPLR, which provides that "[a] special proceeding may be brought to

determine a matter relating to any express trust." The propriety of this type of proceeding is recognized by the *Restatement of Trusts* and other trust-law authorities.[1] In fact, an Article 77 proceeding has previously been used in New York specifically to approve a securitization trustee's decision to settle claims—the same guidance that the Trustee seeks here. *See In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000).

In its order directing remand, the Second Circuit recognized the propriety of the Trustee's decision to proceed under Article 77: "Permissible uses of Article 77 are 'broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust.'" *BlackRock Fin. Mgmt., Inc. v. The Segregated Account of Ambac Assurance Corp.*, No. 11-5309, 2012 WL 611401, at *2 (2d Cir. Feb. 27, 2012) (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 the Trustee's Article 77 Petition, the Second Circuit also stressed that the Trustee'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. And it rejected the Walnut Place objectors' efforts to "recast the . . . proceeding (which

[1] *See* RESTATEMENT (THIRD) OF TRUSTS § 71 (2007) (a trustee may "apply to an appropriate court for instructions regarding the administration or distribution of the trust…."); 3 SCOTT ON TRUSTS § 16.8; 4 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1064 (5th ed. 1941). This type of proceeding is codified in the Uniform Trust Code (adopted in 23 States and the District of Columbia) and many other state statutes that encourage trustees to seek judicial instructions regarding the settlement of trust claims. The Uniform Trust Code provides that "[t]he court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law" and that "[a] judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." § 201(a), (c). Many States that have not adopted the Uniform Trust Code nevertheless have similar statutes. *E.g.*, Cal. Prob. Code § 17200; Ind. Code § 30-4-3-18; Minn. Stat. § 501B.16; Tex. Property Code § 115.001.

concerns a trustee's rights, duties, and obligations) into the underlying claim resolved in the Settlement Agreement." *Id.* at *7.

ARGUMENT

I. THE ONLY ISSUE BEFORE THE COURT IS WHETHER THE DECISION TO SETTLE WAS WITHIN THE SCOPE OF THE TRUSTEE'S REASONABLE DISCRETION.

Under New York law, the sole 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: the Court may not substitute its judgment for that of the Trustee and must grant the petition unless the Trustee acted dishonestly or outside of the discretion conferred by the PSAs. In this regard, the role of the Court in the instant proceeding differs materially from that of a judge reviewing a class action settlement, entered into by a self-selected named plaintiff rather than a contractually-appointed trustee, where the court has primary responsibility for assuring the fairness to absent class members of any proposed settlement. A ruling on the standard of review 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.

A. The Trustee Has the Power to Settle Claims

The Trustee's decision to enter into the Settlement Agreement was a discretionary one that is assessed under the deferential standard described above. All agree that the claims settled here belong to the Trustee, not the individual certificateholders, and that it is the Trustee that has the power to enforce the Pooling and Servicing Agreements ("PSAs")[2] against the Countrywide

[2] A representative PSA is attached as Exhibit A to the Affirmation of Matthew D, Ingber, filed herewith. Certain of the trusts are governed by Indentures rather than PSAs, but the terms of the Indentures are substantially similar in the respects relevant here.

parties. The power to litigate inherently includes the power to settle claims, and the PSAs impose no contractual limits on the Trustee's decision-making in that regard.

1. The Trustee has the power to enforce the PSAs against Countrywide.

The PSAs are clear: the Trustee holds all rights, title and interest in the mortgage loans for the benefit of the certificateholders and concomitantly possesses the right to enforce breaches of the PSAs against the Seller, Depositor, or Master Servicer:

> Immediately upon the conveyance of the Initial Mortgage Loans [from the Seller to the Depositor], the Depositor sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, ***all the right, title and interest of the Depositor in and to the Trust Fund*** together with ***the Depositor's right to require each Seller to cure any breach of a representation or warranty*** made herein by such Seller, ***or to repurchase or substitute*** for any affected Mortgage Loan in accordance herewith.

PSA § 2.01(b) (emphases added); *see also id.* at Preliminary Statement ("The Depositor is the owner of the Trust Fund that is hereby conveyed to the Trustee in return for the Certificates."). This contractual language 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. . ."); *LaSalle Nat'l Bank Assoc. v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 633 (D. Md. 2002) ("Section 2.01 of the PSA in this case, when read together with other provisions of the PSA, grants [the trustee] the authority to institute this action as the real party in interest.").

In fact, as this Court recently recognized, absent an "allegation of misconduct or breach by the Trustee in the administration of the trusts," only the Trustee may bring suit to enforce representation and warranty claims against the Seller. *See Walnut Place LLC v. Countrywide*

Home Loans, Inc., Index No. 650497/2011, slip op. at 14 (Sup. Ct. N.Y. Cnty. Mar. 28, 2012). In *Walnut Place*, this Court rejected an attempt by the Walnut Place objectors to advance claims for alleged breaches of representations and warranties by Countrywide under two of the PSAs at issue here. *Id.* at 11-16; *see also Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v. Countrywide Fin. Corp.*, Index No. 650474/2008, 2010 BL 316853, at *6-*7 (Sup. Ct. N.Y. Cnty. Oct. 7, 2010) ("this Court is not persuaded that plaintiffs can escape the procedural requirements of § 10.08 by purporting to sue for the benefit of all certificateholders where the broad language of that clause . . . expressly prevents certificateholders from bringing '<u>any suit, action or proceeding</u> in equity or at law upon or under or with respect to this Agreement . . ."). And as counsel for Walnut Place put it, "the plaintiffs acknowledge that the repurchase right does not belong to the certificate holders. It belongs to the Trustee." *Walnut Place LLC v. Countrywide Home Loans, Inc.*, Sup. Ct. N.Y. Cnty. No. 650497/11, 12/8/2011 Hr'g Tr. at 14.

With the power to litigate comes the power to settle. "Implicit in the authority to commence proceedings to remedy defaults is the power to negotiate and agree upon settlements." *In re Delta Air Lines, Inc.*, 370 B.R. 537, 548 (Bankr. S.D.N.Y. 2007) (overruling bondholder objections to bankruptcy trustee's settlement and collecting authority from numerous jurisdictions that the power to sue includes the power to settle), *aff'd sub nom. Ad Hoc Comm. of Kenton Cnty. Bondholders Comm. v. Delta Air Lines, Inc.*, 374 B.R. 516, 527 (S.D.N.Y. 2007), *aff'd*, 309 F. App'x 455 (2d Cir. 2009); *see also Levine v. Behn*, 169 Misc. 601, 606 (Sup. Ct. N.Y. Cnty. 1938) ("incident to the right to sue or be sued is the power to compromise or settle suits"), *aff'd*, 257 A.D. 156 (1st Dep't 1939), *rev'd on other grounds*, 282 N.Y. 129 (1940); *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."); RESTATEMENT (SECOND) OF TRUSTS § 192 & cmt. a.

That is exactly what happened in *IBJ Schroder*, in which the First Department squarely addressed the question of the trustee's authority to settle:

> the same provision of the trust agreement which, the parties do not dispute, gave the trustee the power to commence the underlying action, also vests the trustee with the power to "take such action as shall be necessary" with respect to the subject matter of the underlying action. We now find that this provision includes the power to settle that action.

271 A.D.2d 322, 322 (1st Dep't 2000).

2. The Trustee possesses broad discretion in deciding to settle.

The Trustee's power to settle claims is discretionary. "The [trustee's] exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees." RESTATEMENT (SECOND) OF TRUSTS § 187 cmt. a. That is, if the conferral of a power is not accompanied by provisions dictating that the power be exercised or withheld in specified circumstances, the decision whether and how to exercise the power is discretionary.

Here, "[a]pplicable law" does not mandate any particular course of conduct with respect to settlements. Nor do the PSAs, which provide that the Trustee may, but is not required to, "exercise any of the trusts, rights or powers vested in it by this Agreement, including "institut[ing], conduct[ing] or defend[ing] any litigation." PSA § 8.02(ix); *id.* § 8.01 (Trustee's *duties* are limited to "such duties as are specifically set forth in this Agreement"). Having granted the Trustee the power to enforce Countrywide's obligations, the PSAs contain nothing restricting the Trustee's course of action in that regard and thereby must be understood to confer broad discretion to act as the Trustee sees fit, free from judicial second-guessing. Indeed, as

shown below, specific provisions of the PSAs make clear that the Trustee has broad discretion to act as it determines appropriate provided only that it act in good faith and on a reasonable basis.

In sum, it is indisputable that the Trustee has the power to enter into the Settlement Agreement and that such power is not restricted by the PSAs or otherwise. Therefore, according to Articles 2 and 8 of the PSAs, as confirmed by New York case law and the *Restatement*, the exercise of that power is a matter of the Trustee's discretion.

B. A Court May Override a Trustee's Exercise of Discretion Only If the Trustee Acted Outside of the Bounds of its Reasonable Discretion.

New York law is clear as to the standard of judicial review of a trustee's discretionary action. "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) (quoting *Restatement (Second) of Trusts* § 187, cmt. e (1959)); *In re First Deposit & Trust Co.*, 280 N.Y. 155, 163 (1939) ("We find no abuse of discretion and no evidence of bad faith or that the trustee administered the trust in a careless or negligent manner.").[3] This is consistent with the standard of review adopted by *Restatement (Second) of Trusts* § 187 (1959) ("Where

[3] *See also In re Hagymas*, 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."); *In re Shiel's Will*, 120 N.Y.S.2d 632, 636 (Sur. Ct. Westchester Cnty. 1953) ("It is well settled that the exercise of a discretionary power in trustees to invade principal is not subject to the control of the courts except that their acts in such respect may be reviewed to prevent an abuse of discretion, bad faith, arbitrary action or fraud.")

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.").[4]

That standard applies to all of a trustee's actions, including 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 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 principle makes perfect sense. Under the PSAs, the Trustee is vested with discretion to make decisions on behalf of *all* certificateholders. In order to encourage trustees to exercise that discretion, their decisions cannot be subject to intrusive review by a court each time an individual certificateholder disagrees with a trustee's decision. The same compelling policy considerations are at the core of the well-established business judgment rule applicable to litigation (and other) decisions by corporate directors. As Justice Brandeis recognized long ago:

> Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management, and is left to the discretion of the directors . . . . Courts interfere seldom to control such discretion intra vires the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment . . . .

United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263-64 (1917); *see also Republic Nat. Life Ins. Co. v. Beasley*, 73 F.R.D. 658 (S.D.N.Y. 1977) ("The business judgment of an independent, disinterested board of directors that settlement, or even dismissal

[4] *See also* BOGERT ON TRUSTS § 560 ("If a settlor has given his trustee a discretionary power (without qualification), 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.").

without consideration, of a derivative action is in the best interests of the company and its shareholders is respected by the Courts."); *Byers v. Baxter*, 69 A.D.2d 343, 346 (1st Dep't 1979) (shareholder may bring derivative suit only "where the decision of the corporation not to sue is itself a breach of the directors' duty to the corporation, either because the decision is not an honest exercise of discretion or is so flagrant an abuse of that discretion as itself to constitute a wrong to the corporation").

The decision in *IBJ Schroder* is instructive regarding the application of the reasonable discretion standard. In that Article 77 proceeding, a securitization trustee sought approval of a settlement of trust claims, over the objections of 186 beneficiaries, including that the trustee had settled the claims too cheaply and that it had settled "despite having failed to take any discovery" in the litigation subject to the settlement. No. 101580/98, slip op. at 5-6 (Sup. Ct. N.Y. Cnty. Aug 16, 2000). In granting approval, the court emphasized that the 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." *Id.* at 6 ("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." *Id.*

The contracts at issue here confirm that the Trustee's judgment is subject only to a narrow scope of review. These specific provisions—agreed to by all certificateholders when they chose to invest in trust certificates—repeatedly underscore the Trustee's discretion, the deference owed to its decisions, and the limited nature of the Court's review of the Trustee's exercise of its discretion:

- Section 8.02(iii) provides that the Trustee is not liable for any action taken "in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Agreement."
- Section 8.02(ii) allows the Trustee broad discretion to rely on experts and counsel in making any decisions affecting the trusts: "The Trustee may consult with counsel, financial advisers or accountants of its selection and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel."
- Most fundamentally, the PSAs provide that the Trustee is free to exercise its discretion in any manner so long as it does not act in bad faith and is not negligent in ascertaining the facts: "The Trustee shall not be liable for an error of judgment made in *good faith* by a Responsible Officer or Responsible Officers of the Trustee, unless it shall be finally proven that the Trustee was *negligent in ascertaining the pertinent facts*." § 8.01(ii) (emphases added).

Accordingly, the Court's role here is to apply the PSA and the fundamental principles of trust law described above in determining the relevant standard of review. The Court's proper role is not to conduct an independent evaluation to determine whether, if it were the Trustee, it would have agreed to the Settlement. It is not to independently evaluate the claims asserted or proposed to be settled. It is not to conduct an independent analysis of the terms of the Settlement. We respectfully submit that the Court instead must focus on whether the Trustee acted negligently in

ascertaining the pertinent facts and whether its decision based on those facts was in bad faith or outside the bounds of the broad discretion conferred upon it by the PSAs.

II. THE SCOPE OF PERMISSIBLE DISCOVERY IS DETERMINED BY THE STANDARD OF REVIEW.

As in any litigation, the scope of discovery is determined by the issues to be adjudicated. Because, under the governing substantive law, the Court's inquiry is limited to whether the Trustee's decision to enter into the Settlement Agreement was a reasonable exercise of discretion, the Court should not indulge requests for discovery and rulings that go beyond matters relevant to that inquiry.

The general discovery statute, CPLR 3101(a), applies in Article 77 proceedings (*see* CPLR 408). It permits discovery of "all matter *material and necessary* in the prosecution or defense" of the action. "[T]he 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'g Co.*, 21 N.Y.2d 403, 406 (1968)). 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 v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 745 (2000) (citations omitted).

Article 77 in no way expands the scope of permissible discovery. To the contrary, the only discovery that Article 77 itself fittingly provides for is "the right to examine the trustee . . . 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 appropriate scope of discovery in Article 77 proceedings have consistently focused on a trustee's acts in connection with the issue

before the Court. In *In re Beeman*, the court affirmed an order limiting the scope of 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 (3rd 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," because they "plainly are overbroad, seek irrelevant information and impose an undue burden." 289 A.D.2d 910, 913 (3rd Dep't 2001) (internal quotations omitted). These limitations follow from the fact that Article 77 proceedings are intended to be summary proceedings that allow resolution with "expedition and economy." *Gregory v. Wilkes*, 26 Misc. 2d 641, 642 (Sup. Ct. N.Y. Cnty. 1960). Thus, this Court should insure that attempts to broaden discovery do not needlessly delay the resolution of this case.

The Trustee has already produced almost 250,000 pages of documents. *See* Ingber Aff. ¶¶ 3, 5. The Settlement Agreement was attached to the Trustee's Verified Petition, filed on June 29, 2011, along with 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 Trustee's settlement website (www.-cwrmbssettlement.com) since July of 2011. *Id.* ¶ 4. In October of last year, in accordance with this Court's previously entered scheduling order, BNYM filed a lengthy statement responding to the objections that had been made and providing additional support for the Settlement. And now, the Trustee is in the final stages of producing all remaining non-privileged internal BNYM documents concerning the Trustee's decision to enter into the Settlement. *Id.* ¶ 6. These

documents include everything (and then some) that objectors would receive in analogous proceedings with even less deferential standards of review, such as cases involving decisions made by a board of directors' special litigation committee with respect to derivative lawsuits.[5] In short, all documents necessary for the parties and the Court to consider the question presented here either have already been or soon will be made available to all parties.

Certain objectors seek documents that go far beyond what is relevant. Production of the documents improperly requested by these few objectors would derail this proceeding, cause untold delay, and do nothing at all to advance the Court's consideration of the Petition under the settled and deferential standard of review. These objectors have requested that the Trustee obtain and produce hundreds of thousands of loan underwriting files—amounting to millions of pages—from Countrywide, which are relevant only to one excruciatingly complex way of assessing the strengths and weaknesses of one set of the underlying potential claims against Countrywide, not to the Trustee's decision to enter into the Settlement Agreement—a decision justified in part by the reasonable desire to avoid that quagmire. They have requested BNYM documents dating back to the formation of the trusts, including business intake forms, records of receipt of mortgage files, and other documents that are many years old. These documents are irrelevant to the Trustee's decision to enter into the Settlement and would take many months (at least) to produce. The consequence of permitting this discovery is alarming: it would transform

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[5] *See Sutherland* v. *Sutherland*, No. Civ. A. 2399-VCL, 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.*, No. 06 Civ. 5279 (LTS) (DFE), 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"); *St. Clair Shore Gen. Emps. Ret. Sys. v. Eibeler*, No. 06 Civ. 688 (SWK), 007 WL 3071837, at *3*-5 (S.D.N.Y. Oct. 17, 2007). 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*, No. 97 Civ. 3579 (RWS), 1999 WL 249719, at *6-*7 (S.D.N.Y. May 4, 1999) (internal quotation omitted).

this proceeding from a summary proceeding on the Trustee's decision to enter into the Settlement into a litigation of the underlying claims being settled, which would take years to resolve and undermine one of the central benefits of the Settlement—prompt recovery for certificateholders without years of costly and uncertain litigation. *See BlackRock*, 2012 WL 611401, at *7 (rejecting attempt by Walnut Place objectors to "recast the . . . proceeding (which concerns a trustee's rights, duties, and obligations) into the underlying claim resolved in the Settlement Agreement"). That is precisely why there is *no* precedent for the type of discovery sought here in the context of any type of settlement proceeding.[6]

In any event, for the reasons discussed above, such expansive discovery would be pointless because the standard of review is not whether $8.5 billion is the actual value of the Trustee's claims, or whether the industry-leading loan servicing improvements (which have substantial independent value) could be strengthened, or even whether the settlement is "fair." The Trustee seeks approval of its decision to settle, and the Court's task is simply to decide whether the Trustee acted within the bounds of its reasonable discretion in agreeing to this settlement. The expansive discovery sought by the objectors is not relevant to that question.

Two specific issues warrant particular attention. The first is the sole issue that the objectors raised with Judge Pauley, namely, whether discovery is limited to the final Settlement

[6] In fact, requests for such discovery are routinely denied on the very basis that a settlement hearing is not a trial of the underlying claims. *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 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.") (internal quotation marks omitted); *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 a 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).

Agreement that the Trustee accepted, or extends to communications among the Trustee, the Institutional Investors, and Countrywide during settlement negotiations. Courts considering the approval of settlement agreements have consistently held that "discovery of settlement negotiations is proper only where the party seeking it lays a foundation by adducing from other sources evidence that the settlement may be collusive." *Lobatz v. U.S. West Cellular of Calif.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (internal quotation marks omitted); *see also* 2 MCLAUGHLIN ON CLASS ACTIONS § 6:11 (7th ed.) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion") (citing over a dozen cases); *Grant Thornton v. Syracuse Sav. Bank.*, 961 F.2d 1042, 1046 (2d Cir. 1992); *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*¸ 834 F.2d 677, 684 (7th Cir. 1987). This limitation on discovery is applicable even in the context of class action settlements, where the court has far more power and responsibility to assess the reasonableness of the settlement for itself, rather than, as here, deferring to the Trustee unless there has been an abuse of discretion. In finding objector requests for discovery on the merits of a settlement "misplaced," the Southern District aptly observed:

> There is no requirement that every objector be allowed to have discovery concerning the settlement itself so that he can personally assure its reasonableness. Such a course would mean that few settlements would be approved, since each member of the class would have the right to keep it open until satisfied as to its bona fides. In this connection, a quote from Judge Moore's opinion in *City of Detroit v. Grinnel Corp.* . . . is particularly apposite:
>
> 'To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory, no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much.'

Robertson, 72 F.R.D. at 70-71 (S.D.N.Y. July 30, 1976) (quoting *City of Detroit v. Grinnel Corp.*, 495 F.2d 448, 464 (2d Cir. 1974), *abrogated on other grounds by Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)).

The other specific issue concerns discovery of loan files. Objectors have requested that BNYM obtain and produce hundreds of thousands of loan-underwriting files from Countrywide. Demands for those documents miss the point of this proceeding. There is no dispute that the Trustee did not review loan files in reaching its decision to enter into the Settlement. Instead, the Trustee's expert derived an estimated defect rate for loans in the trusts covered by the Settlement by utilizing a robust set of data produced by Countrywide concerning Countrywide's prior repurchase experience with Fannie Mae and Freddie Mac, and also considered information provided by the Institutional Investors. All the materials that informed the Trustee's analysis now have been produced to the objectors. Thus, the only question regarding loan files is whether it was reasonable for the Trustee to enter into the Settlement *without* reviewing them. The actual content of the loan files—one file or thousands—has no bearing on that determination.

In addition, production of the loan files would dramatically expand the scope and length of the litigation. It would entail the production of millions of pages of documents. Once the documents were produced (a process that would likely require many months at a minimum), in order to make use of the loan files, the parties would have to engage in a highly complex, lengthy and ultimately highly subjective "reunderwriting" process, with each party's experts making their own determinations about whether individual loan files show specific breaches of representations and warranties under the guidelines and procedures applicable to that loan. That reunderwriting process would take, at a minimum, many additional months. All of this would ultimately lead to nothing but a battle of the experts and a trial-within-a-trial of the underlying

claims, *e.g.*, whether (and to what extent) each file showed breaches of representations and warranties, whether those breaches were material, and whether those breaches actually caused investor loss, all of which would have to be resolved by the Court on a loan-by-loan basis. This is exactly the sort of "extraneous inquiry" and "series of mini-trials" that the Court of Appeals has cautioned against. *Andon*, 94 N.Y.2d at 747 ("While open discovery is crucial to the search for the truth, equally important is the need to avoid undue delay created by battling experts."); *see also Stephen-Leedom Carpet Co. v. Arkwright-Boston Mfr. Mut. Ins. Co.*, 101 A.D. 2d 574, 577 (1st Dep't 1984) (discovery that "will, instead of 'sharpening the issues' blunt them, and add to the 'delay and prolixity' which normally inheres in trials" should be denied). And although we are confident that such a process would serve only to illustrate the wisdom of the Trustee's decision to settle rather than litigate a lengthy, complex case with no certain outcome, it is not an exercise that is in the best interests of the Trusts and the thousands of Certificateholders who do not object to the Settlement. The precedent that this small group of objectors would have this Court set would condemn these and other securitization trusts (not to mention New York courts) to years of costly litigation, with no assurance of any recovery at all.

Accordingly, the Court should rule that the only appropriate topic for discovery is the Trustee's decision to enter into the Settlement Agreement—specifically, information that the Trustee considered in reaching that decision and non-privileged internal communications concerning that decision.

CONCLUSION

For all of the foregoing reasons, the Court should rule (a) that the standard of review applicable to the Trustee's decision to enter into the Settlement Agreement is whether the Trustee acted within the bounds of its reasonable discretion, and (b) consistent with that standard, discovery should be limited to documents, information and testimony concerning the basis for the Trustee's decision to enter into the Settlement Agreement (including the documents and information considered by the Trustee in making its decision).

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Respectfully submitted,

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