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June 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* (651786-2011)

Dear Justice Kapnick:

On behalf of The Bank of New York Mellon ("Trustee"), we submit this brief response to Owen Cyrulnik's letter of June 4, 2012 regarding the production of loan files.

During the May 8 conference, Your Honor could not have been clearer: the Article 77 proceeding will not be a litigation of the underlying claims against Countrywide and Bank of America. The Objectors' about-face request for *thousands* of loan files—purportedly because they need to "estimate the actual value of the trusts' repurchase claims"—ignores this Court's admonition. Allowing a full loan file review that could take years and not months (after briefing and expert submissions on appropriate sampling methodologies); an inevitable battle of the experts about the conclusions to be drawn from the loan file review (after a multi-million dollar reunderwriting process); testimony about whether an estimate based on *actual* repurchase experience relating to more than 100,000 Countrywide loans, or the Objectors' estimate based on a subjective loan file review is more precise and whether that even matters; and unavoidable decisions by the Court on questions ranging from whether a breach occurred to whether it caused harm to the Certificateholders, is nothing less than a full-scale litigation of the underlying claims. Avoiding the risks and costs of an uncertain litigation of this magnitude, complexity, and duration is precisely the reason that parties settle, and it was one of the essential factors that guided the Trustee's decision here. To allow a full loan file review by this small minority of Certificateholders would undermine a fundamental purpose of the Settlement.

Notwithstanding the Objectors' protests that they wish only to "assess the Trustee's proffered *assumptions*," there is no question that this demand is only a prelude to litigation of the merits of the claims. And to what end? Loan file review will serve no purpose unless, among other things, the Court is ultimately forced to make findings regarding the breach rate in the sample and then to compare that rate to the estimates that the Trustee considered. Any conclusions about the sample will be disputed by (at least) the Objectors, the Institutional Investors, and Countrywide/Bank of America, and will require an evidentiary hearing covering literally every file. And even if it was possible to determine the "actual value of the repurchase claims," there is hardly a dispute that reasonable minds can disagree about that number. That is why the Trustee took into account, among other things, an expert opinion that Countrywide

could pay an eventual judgment of, at most, $4.8 billion; an expert opinion that any claim against Bank of America, as parent or successor, presented significant challenges; that, without the Settlement, there was no path to recovery for thousands of Certificateholders; and that litigation of the underlying claims could well take many years to conclude with no certain outcome. In other words, the objectors seek compulsory discovery from a settling party, to obtain information about the value of the settled claims, which the Trustee did not consider when deciding to settle, so that a court can determine the "actual value" of the claims. That is the definition of "litigation on the merits," and courts have held—without exception—that "[t]he trial judge should not attempt to decide the merits of the controversy where the parties have reached a settlement. Any virtue which may reside in a compromise is based upon doing away with the effect of such a decision." *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). If that rule holds for class actions, in which class counsel owes its very authority to the court, it is even more true for trustees, in whom Certificateholders have contractually vested the discretionary authority to litigate or settle claims.[1]

The Objectors' demand is also based on a false distinction between an "estimate of the actual value" of the claims and what they call the Trustee's "assumptions." The only way to determine the value of the claims with certainty is to litigate them through judgment and appeal. Anything short of that is an estimate. But the issue in this case is not whose estimate is correct. Nor is it what the Objectors would have done if they were the Trustee, or even what the Court would have done in that position. The question is whether the business judgment of the contractually-appointed Trustee was reasonable. Even the Objectors have not disputed that if the Trustee made a decision that was within the bounds of its reasonable discretion, and it was not negligent in ascertaining the facts, then the Settlement must be approved.

As we have said repeatedly, the Objectors are free to argue that the method that the Trustee employed was unreasonable, but that objection does not require reviewing loan files. Indeed, the Objectors have already asserted, without receiving any loan files, that the settlement

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[1] *See also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) ("The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it ***must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case***."; "***It is not necessary*** in order to determine whether an agreement of settlement and compromise shall be approved ***that the court try the case which is before it*** for settlement . . . . Such procedure would emasculate the very purpose for which settlements are made.) (emphasis added); *In re Riggi Bros. Co.*, 42 F.2d 174, 176 (2d Cir. 1930) ("Coupled with the certainty of litigation was the uncertainty of its result and the soundness of the exercise of discretion in approving it largely depends upon how substantial was this element of uncertainty. . . . Consequently, ***we shall make no attempt to decide with exactness what would have been the outcome had no settlement been made and approved***. Any virtue which may reside in a compromise is based on doing away with the effect of such a decision.") (citation omitted).

amount is too small.[2] Holding that the reasonableness of the Trustee's method can be evaluated only by comparing it to the results of a particular loan file sample presupposes that the sampling methodology is the *only* reasonable method for valuing repurchase claims. The Objectors have not made, and cannot make, any such showing.

We respectfully request that the Court deny the Objectors' motion to compel and, at most, order the compromise offered by Countrywide/Bank of America.

Respectfully submitted,

s/Matthew D. Ingber

Matthew D. Ingber

cc: All counsel (by electronic filing)

[2] *See, e.g.*, AIG Verified Pet. (doc. 130) at 2 ("The settlement terms and proffered justifications also show that Bank of America is drastically underpaying on its liability.").