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June 13, 2012

Via E-Filing and Hand Delivery

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 Application of The Bank of New York Mellon*
(Index No. 651786/2011)**

Dear Justice Kapnick:

In anticipation of Thursday's hearing, the members of the Respondents' Steering Committee submit this letter to provide Your Honor with a status update and a list of the proposed agenda items.

Since the last hearing, the parties have agreed on a discovery schedule and a proposed protective order. Both have been jointly submitted to the Court. The parties have not been able to reach agreement on the following questions, however, and Respondents respectfully request that the Court consider these questions on Thursday:¹

¹ In addition to the pending disputes set forth in this letter, two core issues with respect to settlement communications remain outstanding: (1) the Institutional Investors' refusal to produce their communications with BofA/Countrywide on "relevance" grounds; and (2) the Trustee's and the Institutional Investors' continued assertion of a "common interest" privilege against other certificate holders. Since the last hearing, the Institutional Investors produced a purported common interest privilege log which identifies hundreds of communications between the Institutional Investors and the Trustee between November, 2010 and June, 2011. It is now abundantly clear that the Institutional Investors were significantly involved in the settlement negotiations and that their conduct and communications are relevant to this proceeding. Additionally, there is no "common interest privilege" because, among other reasons, the Trustee cannot assert a "common interest" with only some certificate holders while seeking approval of a settlement that binds all certificate holders. We intend to pursue discovery of those communications, but in light of Your Honor's instructions on this matter we will wait for the Trustee's production of settlement communications and update Your Honor once we have had an opportunity to review them. As of this date, we still have not received the Trustee's production. While a ruling by the Court may ultimately be necessary, we do not seek to address the settlement communications at Thursday's hearing.



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1. Loan Files

As set forth in more detail in the letter previously submitted to the Court by Owen Cyrulnik, the parties have reached an impasse with respect to the production of loan files. BofA's proposal would have resulted in the Respondents having to wait until the end of discovery to petition the Court for a statistically significant sampling of loan files. Their proposal would only delay the inevitable question of whether a statistically significant sampling of loan files is relevant and therefore discoverable.

A review of a small and entirely reasonable subset of actual loan files will not, as BofA suggests, result in litigation of the underlying claims, but rather go to the very heart of this Article 77 proceeding. If, as the Trustee suggests, this proceeding is solely about whether it acted reasonably in entering into the proposed settlement (which as evidenced by the settlement proponents' proposed final order and judgment, it is not), the certificate holders whose rights are being extinguished by the settlement are entitled to an estimate of the actual value of the trusts' repurchase claims. Accordingly, the Steering Committee requests that the Court rule on this matter at the upcoming hearing.

2. The Fiduciary Exception

As Your Honor is aware, the Steering Committee has argued that the fiduciary exception defeats the settlement proponents' claims of privilege.² In a continued effort to assess the applicability of the fiduciary exception, the Steering Committee has made specific requests to the settlement proponents concerning their fiduciary obligations to certificate holders. The Trustee continues to withhold a response to each of the Steering Committee's requests.

A. BNYM's Non-Privileged Documents Concerning its Duties

The Trustee has taken contrary positions with respect to its fiduciary duties, at times arguing that it has none and at other times arguing its decisions should be afforded the judicial deference ordinarily reserved for fiduciaries.

The Respondents have issued discovery requests aimed at obtaining non-privileged documents and materials concerning the Trustee's duties and obligations to certificate holders. (See Respondents' RFP 23, 24, 25, attached as Exhibit A.) However, the Trustee continues to withhold production of such documents, claiming they are "not relevant." It is difficult to imagine how internal documents referring to or identifying the Trustee's duties are "not relevant" to the question of whether the Trustee has fiduciary duties to certificate holders and thus whether the fiduciary exception does or does not apply. If, for example, the Trustee's

² The fiduciary exception applies where 1) a person or entity has fiduciary obligations to another, 2) the fiduciary seeks legal advice for the benefit of the party seeking disclosure, and 3) there is good cause for disclosure. See *Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep't 1988); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 112 (Sup. Ct. N.Y. Cnty. 2003).



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internal business records recognize the Trustee's fiduciary obligations, those records will certainly assist the Court in determining whether the fiduciary exception should apply.

Accordingly, the Steering Committee respectfully requests that the Court compel the production of all non-privileged documents responsive to Respondents' RFP 23, 24, and 25.

B. BNYM's Privilege Log Supplementation

The Steering Committee asked the settlement proponents to indicate which of their logged communications reflect legal advice sought on behalf of certificate holders, and which communications reflect legal advice sought on behalf of the settlement proponents. The Institutional Investors responded that all of their communications reflect legal advice sought on their own behalf. Accordingly, the Steering Committee has agreed to withdraw its fiduciary exception claim with respect to the Institutional Investors' attorney-client communications.

The Trustee however, has refused to identify which—if any—of its logged communications reflect advice sought on its own behalf. This information is critical to an analysis of the fiduciary exception which would apply only if the Trustee sought legal advice for the benefit of certificate holders. Further, if none of the advice sought by the Trustee was for the benefit of certificate holders, that fact would greatly benefit the Court's analysis of whether the Trustee acted reasonably and in good faith when purporting to settle its beneficiaries' claims.

The Steering Committee respectfully requests that the Court compel the Trustee to identify which communications reflect legal advice sought for its own benefit. That information will allow the Respondents and the Court to determine whether the fiduciary exception will apply to some or all of the Trustee's logged communications.

The Institutional Investors' Premature Discovery Request

Unlike the discovery disputes set forth above, the issue presented in Mr. Warner's June 6th letter to the Court is an issue that does not require resolution at this stage in the proceeding.

The Institutional Investors have asked the Court to compel discovery *from* the Respondents before any formal objection has been filed in accordance with the Scheduling Order objections deadline. The Institutional Investors' discovery request is improper and in any event, premature. The questions before this Court are whether the terms of the proposed settlement agreement are fair and reasonable and whether the conduct of the settlement proponents was proper. Discovery into the Respondents' actions and/or communications has no bearing on the Court's analysis of the settlement terms or the conduct of the parties who negotiated the settlement.



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Even assuming discovery from the Respondents is relevant, such discovery is premature. By express agreement, the parties selected an objections deadline of January 7, 2013. (See Proposed Scheduling Order.) If and when any Respondent files a formal objection to the settlement, the Court can then determine whether the settlement proponents are entitled to discovery concerning those objections.³

In short, the settlement proponents' discovery request is improper, but the dispute does not require resolution at this time. Whether the settlement proponents are entitled to discovery concerning the Respondents' objections, is a question that can and should be addressed after the formal objections deadline.

We look forward to re-convening before Your Honor on June 14, 2012.

Respectfully Submitted,

A blue ink signature of Daniel M. Reilly.

Daniel M. Reilly
On Behalf of the Steering Committee

cc: All counsel of record (by electronic filing)

³ The Institutional Investors and the Trustee have stated that they believe several Respondents, including AIG and Walnut Place, already objected to the settlement. Their presumption is incorrect and contrary to various pleadings in intervention. By way of example, and as was made clear to the Trustee and the Institutional Investors, AIG filed a request for relief seeking to intervene only to preserve its rights and to obtain additional information about the proposed settlement. AIG's arguments questioning the conduct of the Trustee were made in support of intervention to protect its own interests and were not an objection. Thus, contrary to the Institutional Investors' and the Trustee's assertions, AIG and others have never objected to the settlement and instead, continue to evaluate their position to determine whether they will object to the settlement at the final objections deadline.

EXHIBIT A

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), *et al.*,
Petitioners,
-against-
WALNUT PLACE LLC, *et al.*,
Intervenor-Respondents.

Case No. 11-cv-5988 (WHP)

**INTERVENOR-RESPONDENTS'
FIRST REQUESTS FOR PRODUCTION TO
THE BANK OF NEW YORK MELLON**

Intervenor-Respondents, by their undersigned counsel, hereby request that The Bank of New York Mellon respond to the following requests for production within 30 days of service.

DEFINITIONS

1. The definitions and rules of construction provided in Local Civil Rule 26.3 are incorporated by reference.
2. “Bank of America” means Bank of America Corporation and BAC Home Loans Servicing, LP and their successors and assigns, including their officers, employees, agents, and any person or entity acting on their behalf.
3. “BNY Mellon” means The Bank of New York Mellon, and its successors and assigns, including its officers, employees, agents, and any person or entity acting on its behalf.
4. “Countrywide” means Countrywide Financial Corporation and Countrywide Home Loans, Inc. and its successors and assigns, including their officers, employees, agents, and any person or entity acting on its behalf.
5. “Covered Trusts” means the 530 residential mortgage-backed securitization trusts listed on Exhibit A to the Settlement Agreement.

6. "Institutional Investors" means the entities listed under Roman numeral "(ii)" in the first paragraph of the Institutional Investor Agreement (defined herein).

7. "Institutional Investor Agreement" means the Institutional Investor Agreement between BNY Mellon, Bank of America, Countrywide, and the Institutional Investors, executed on June 28, 2011.

8. "Master Servicer" means the same as "master servicer," as defined in the third Whereas clause in the Settlement Agreement (defined herein).

9. "Proposed Final Order and Judgment" means the Proposed Final Order and Judgment attached as Exhibit F to BNY Mellon's Verified Petition filed in the Supreme Court of the State of New York on June 29, 2011.

10. "Proposed Settlement" means all terms, provisions, and proposals suggested or considered in the negotiations, discussions, communications, and deliberations that culminated in the Settlement Agreement (defined herein), the Institutional Investor Agreement (defined herein), and the Proposed Final Order and Judgment (defined herein), whether or not incorporated into the Settlement Agreement, the Institutional Investor Agreement, or the Proposed Final Order and Judgment.

11. "Settlement Agreement" means the Settlement Agreement between BNY Mellon, Bank of America, and Countrywide, executed on June 28, 2011, and all exhibits to the Settlement Agreement.

12. "Trustee" means BNY Mellon.

13. "You" means BNY Mellon.

INSTRUCTIONS

1. In responding to these requests for production, set forth the language of each request immediately prior to Your response to that request and identify by Bates number documents responsive to each request.

2. Documents shall be produced as they are kept in the usual course of business or

the documents shall be organized and labeled to correspond to the categories in these requests. In the case of documents that were already produced pursuant to federal, state, local government, or administrative requests, investigations, or subpoenas, those documents should be produced in the same manner as they were previously produced by You.

3. Documents shall be produced in such fashion as to identify the department, branch or office in whose possession it was located and, where applicable, the natural person in whose possession it was found and the business address of each document's custodian(s).

4. You are required to produce the original of each document requested together with all non-identical copies and drafts of each document. If the original of any document cannot be located and/or produced, provide a copy in lieu thereof, which shall be legible and bound or stapled in the same manner as the original, and produce all other non-identical copies that differ from the original and from the other copies produced for any reason, including without limitation, the making of notes thereon.

5. Documents attached to each other in their original form should not be separated when produced. Any attachments to email messages should be produced with, and linked to, the attaching email.

6. If You are unable to respond fully to any document request, respond to the extent possible, and specify the reasons for Your inability to respond in full and describe to the best of Your knowledge, information and belief, and with as much particularity as possible, those portions of the document that are not being produced.

7. When an objection is made to any request, the objection shall state with specificity all corresponding grounds.

8. If any document is withheld, in whole or in part, for any reason, including, but not limited to, any claim of privilege, whether work-product or attorney-client, common interest, confidentiality, or trade secret, You shall provide a privilege log setting forth separately with respect to each document: (a) the nature of the privilege or the ground of confidentiality claimed; (b) the type of document; (c) the authors of the document, including title and affiliation; (d) the

addressees of the document, including title and affiliation; (e) all persons who received copies of the document, including titles and affiliations; (f) the date of the document; (g) the subject matter of the document; and (h) the Bates and/or control number(s) assigned to the document.

9. If a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, You must clearly indicate the portions as to which the privilege is claimed in accordance with the procedure outlined above.

10. All documents shall be Bates stamped and include the following metadata (to the extent applicable):

- a. Document Date:
- b. Document Created Date:
- c. Document Modified Dates:
- d. Time Sent:
- e. To:
- f. From:
- g. Cc:
- h. Bcc:
- i. Subject
- j. Filename
- k. Doctype
- l. Beg Bates
- m. End Bates

11. All spreadsheets, including, without limitation, documents produced using Microsoft Excel, shall be produced in native format.

12. Documents not otherwise responsive to these requests shall be produced if such

documents mention, discuss, refer to, or explain the documents that are called for by these requests, or if such documents are attached to documents called for by the requests and constitute routing slips, transmittal memoranda or letters, comments, evaluations or similar materials.

REQUESTS FOR PRODUCTION

You are requested to produce the following:

1. All documents BNY Mellon considered when evaluating the Proposed Settlement and deciding to sign the Settlement Agreement. For clarification, this request is broader than documents BNY Mellon *relied upon*.
2. All requests for information made by BNY Mellon or its experts in connection with the Proposed Settlement, and all responses to such requests.
3. All documents describing or discussing the Proposed Settlement or the Settlement Agreement including but not limited to all drafts of the Settlement Agreement, including drafts of text of any provisions considered by the Trustee, the Institutional Investors, or Bank of America, whether adopted or omitted in the final version Settlement Agreement.
4. All documents concerning the decision by BNY Mellon to seek approval of the Proposed Settlement and Settlement Agreement through a proceeding under Article 77 of the New York Civil Practice Law and Rules, including, without limitation, all documents concerning the Proposed Final Order and Judgment.
5. All documents concerning the Proposed Settlement or the Settlement Agreement or the claims to be resolved by the Proposed Settlement that were provided to You by the Institutional Investors, Bank of America, Countrywide, or any other third party including, without limitation, experts retained by You.
6. All documents concerning the Proposed Settlement or the Settlement Agreement or the claims to be resolved by the Proposed Settlement that were provided by You to the Institutional Investors, Bank of America, Countrywide, or any other third party including, without limitation, experts retained by You.

7. All “factual information provided to the Trustee, its counsel, and its experts in connection with the negotiation of the Settlement Agreement” described in Section 13(b) of the Settlement Agreement, including the CD-ROM provided to the Trustee’s counsel and experts on June 3, 2011.

8. All communications concerning the Proposed Settlement or Settlement Agreement exchanged internally at BNY Mellon and between You and any of (a) Countrywide, (b) Bank of America, (c) any Institutional Investor, (d) any expert witness (and their agents and staff), including without limitation the experts whose reports accompany the BNY Mellon’s court filings in Article 77 proceeding, and/or (e) any other third party including, without limitation, any rating agency or government entity.

9. All communications between and among BNY Mellon and any certificateholder in the Covered Trusts, including, but not limited to, demands by certificateholders that the Trustee take action on their behalf or on behalf of a Covered Trust and the Trustee’s response to such demands.

10. All of the “confidential materials” exchanged between You, Bank of America, Countrywide, and the Institutional Investors that are referred to in the ninth “Whereas” clause on page 2 of the Settlement Agreement and in the sixth “Whereas” clause on page 2 of the Institutional Investor Agreement, and all other documents You consider confidential under paragraph 17 of the Institutional Investor Agreement.

11. All analyses performed by You (or any third party on Your behalf, including experts and servicers), documents received by You, documents You provided to another, or communications of which You are aware regarding the loans within each Trust that have or will have deficiencies, were the subject of repurchase or substitution requests, or are or will be subject to repurchase by Countrywide or Bank of America, including but not limited to:

- a. all documents concerning actual and/or potential damages from (i) breaches of representations and warranties, (ii) document exceptions, and/or (iii) servicing-related liability, including any Event of Default in each and all of the Covered Trusts, and (iv) loan defects identified in foreclosure proceedings and

- correspondence with mortgage insurers; and
- b. the loan level exception reports for the Covered Trusts provided by the Trustee to the Master Servicer including, without limitation, those provided on April 14, 2011, April 27, 2011, and April 28, 2011 that are described in Section 6(a)(iv) of the Settlement Agreement, and all documents reflecting whether the loans on the exception reports were cured, substituted or repurchased.

Please segregate the foregoing requested documents into agency loans and non-agency loans.

12. All certificates and opinions provided to You or which You provided with respect to compliance with the requirements of the pooling and servicing agreements (“PSAs”) and sale and servicing agreements (“SSAs”) for each Covered Trust.

13. All documents concerning or analyzing Bank of America’s successor liability for any Countrywide entity, including, without limitation, (a) deal documents and government or regulatory filings in connection with Bank of America’s acquisition of Countrywide, and (b) all documents produced or transcripts of depositions taken in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.*, Index No. 08/602825 (N.Y. Sup. Ct.) regarding Bank of America’s successor liability.

14. Any documents assessing or valuing claims against Bank of America for misconduct occurring after its acquisition of Countrywide, including for breaches of representations and warranties, document exceptions, and servicing errors.

15. All documents concerning how the Settlement Payment, as that term is defined in Section 3 of the Settlement Agreement, will or may be allocated among the Covered Trusts and among certificateholders in the Covered Trusts.

16. All documents concerning potential or actual liability of BNY Mellon for which it will be released or indemnified by the Proposed Settlement and Settlement Agreement, including all communications about and drafts of the Proposed Final Order and Judgment.

17. Documents sufficient to show the earliest date on which BNY Mellon and Bank of America agreed to the \$8.5 billion settlement amount.

18. Documents sufficient to show the earliest date on which BNY Mellon and Bank of

America agreed to the servicing improvements set forth in the Settlement Agreement.

19. Documents sufficient to show the earliest date on which BNY Mellon and Bank of America agreed on the document cure provisions set forth in the Settlement Agreement.

20. Documents sufficient to show the earliest date on which BNY Mellon and Bank of America agreed upon a settlement agreement substantially in the form of the final Settlement Agreement.

21. Documents sufficient to show the earliest date on which the Institutional Investors or their counsel were made aware of the final settlement terms memorialized in the Settlement Agreement, including (a) the settlement amount, (b) the servicing improvements, and/or (c) the document cure provisions.

22. All documents concerning known, potential, or anticipated objections to the Proposed Settlement or Settlement Agreement by certificateholders, government entities, or any third party.

23. All documents concerning Your acceptance of, and commencement of Your position as Trustee for the Covered Trusts, including, but not limited to, business acceptance forms and evaluations concerning the acceptance of the position of Trustee in the Covered Trusts.

24. All minutes of any internal BNY Mellon committee, group, or department responsible for overseeing BNY Mellon's trusteeship of the Covered Trusts.

25. All documents concerning whether You have any fiduciary duties to the Covered Trusts or to the beneficiaries of the Covered Trusts.

26. A random sample of 500 loan files for performing loans and 500 loan files for non-performing loans in each of the Covered Trusts. For purposes of this request, the term "loan files" means (i) the complete loan originator, servicer, and master servicer file, including but not limited to origination credit reports, underwriting work sheets, underwriting exceptions granted, appraisal or valuation results, title commitment and policy, AUS findings, loan approval, loan application (Form 1008 and all supporting documents), mortgage note, mortgage or deed of trust,

mortgage insurance certificate, HUD1, etc.; (ii) applicable underwriting guidelines; (iii) closing loan tapes and mortgage loan schedules; (iv) evidence of all conveyances and assignments; (v) all loan servicing records, including without limitation, call notes, foreclosure files and communications, loss mitigation files; (vi) all mortgage insurance rescission-related documents; (vii) all records concerning repurchase analysis, demands, investigations, communications; and (viii) servicing guidelines and procedures. For the purposes of this request, a “performing loan” is a mortgage loan where the borrower is less than 60 days delinquent in his or her payments, or not delinquent at all; a “non-performing loan” is a mortgage loan where the borrower is at least 60 days delinquent in his or her payments.

27. All policies and procedures of the Master Servicer and subservicers on the covered pools concerning delinquent or defaulted loans, loss mitigation procedures, modifications under HAMP or otherwise and including processing of loan modifications for loans at imminent risk of default and the foreclosure of defaulted loans’ mortgages and the transfer of title of foreclosed properties, and REO handling.

28. All Final Certifications (as that term is defined in the PSAs and SSAs) with respect to Initial Mortgage Loans and Supplemental Mortgage Loans for each of the Covered Trusts.

29. All documents and communications concerning the Final Certifications (as that term is defined in the PSAs and SSAs) with respect to Initial Mortgage Loans and Supplemental Mortgage Loans for each of the Covered Trusts, including, but not limited to, documents and communications concerning exceptions noted on the Final Certifications.

30. All documents concerning the certificate holdings of the Institutional Investors, Bank of America, or Countrywide in the Covered Trusts, including, but not limited to, documents concerning the voting rights held by the Institutional Investors, Bank of America, or Countrywide.

31. All documents which discuss the treatment of investors holding REMIC residual interests.

32. All documents discussing whether to provide consideration to any investor who sold his position but sustained damages.

33. All documents concerning and disclosing settlements of breach of representation and warranty claims, including the amount of such settlements, the loans to which the settlement pertained, who received settlement payments and in what amounts, whether the settlement involved the repurchase of certificates or compensation for the loss in value of certificates, and whether the settlement was paid to a trust and distributed through the waterfall.

34. All documents concerning Bank of America's ability to withdraw from the Settlement Agreement.

35. All documents concerning the circumstances under which a Covered Trust would become an Excluded Covered Trust.

36. All documents concerning the exclusion of MERS-registered loans from the document cure provisions of the Settlement Agreement.

37. All documents concerning all efforts by You to enforce Trust or certificateholder rights or Bank of America or Countrywide repurchase obligations with respect to one or more of the Covered Trusts or the loans within the Covered Trusts or otherwise preserve the assets or value of one or more of the Covered Trusts.

Dated: November 17, 2011

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CERTIFICATE OF SERVICE

This is to certify that on this 17TH day of November, 2011, a true and correct copy of the **INTERVENOR-RESPONDENTS' FIRST REQUEST FOR PRODUCTION TO THE BANK OF NEW YORK MELLON** was served on the following counsel of record via E-Mail and U.S. MAIL.

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*BY MAIL ON COUNSEL FOR ALL
PETITIONERS, INTERVENORS AND
OBJECTORS

Dated: November 17, 2011

s/ Ann Romanelli