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Via E-Filing and Facsimile

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

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

Dear Justice Kapnick:

In an October 25 letter to the Court, Ms. Patrick took it upon herself to attempt to report the securities lawsuits pending against Bank of America by intervenors on the Steering Committee.[1] In a now-familiar pattern, Ms. Patrick uses the securities lawsuits as an excuse to launch *ad hominem* attacks against the Steering Committee. Ms. Patrick's attacks and her conduct with respect to discovery are a transparent effort to avoid the merits of genuine issues, such as the findings her clients, Bank of America and BNYM seek from this Court in the Proposed Final Order and Judgment, including that: (a) all Certificateholders had "a full and fair opportunity . . . to object to the Settlement and to the approval of the actions of [BNYM] in entering into the settlement agreement;" (b) the settlement "is the result of factual and legal investigation by [BNYM];" (c) BNYM "appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled;" (d) the negotiations were "arm's-length;" (e) BNYM acted in "good faith;" and (f) BNYM determined that the settlement "was in the best interests" of all the Trusts. These are the true issues before the Court, and whether any of the parties to this action are separately engaged in other disputes with Bank of America is irrelevant to them. For numerous reasons, the Court should disregard Ms. Patrick's distraction tactics and the October 25 letter.[2]

First, the proposed settlement amount—achieved without a lawsuit, or apparently even the threat of a lawsuit—appears exceedingly low and the $85 million proposed attorney's fees for Gibbs & Bruns (to be paid by Bank of America) appear disproportionately high.

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[1] The securities lawsuits brought by Steering Committee members are listed in Exhibit A to this letter. The Steering Committee members are hardly alone in suing Bank of America for securities fraud, as some of Ms. Patrick's clients are as well (*see infra* page 4), and in addition the United States has recently sued Bank of America for fraud arising out of Countrywide's mortgage practices.

[2] Ms. Patrick's assertion--that AIG's refusal to produce privileged and irrelevant mediation materials between AIG and Bank of America in an entirely separate proceeding somehow shows an improper motive--is contrary to the Court's ruling that such materials are plainly privileged. Further, AIG may have the largest holdings in the Covered Trusts of any entity in the intervenor group; it is hardly surprising that AIG is actively interested in this proceeding.

Second, this is not a case where a single holdout seeks to extract an individual concession. There are over 100 intervenors and non-party objectors with concerns about the proposed settlement, including among others insurance companies, pension funds, and government regulators.[3] Further, Ms. Patrick's likening of the Steering Committee to a single holdout objector to a proposed class action settlement should be rejected because this proceeding is not a class action. The absent Certificateholders have not had the benefit of the procedural protections inherent in class actions, such as an opt-out or judicial approval of class representatives and their counsel.

Ms. Patrick's disparagement of the Steering Committee members is also belied by the fact that one such member, Triaxx, has not brought a securities fraud action against Bank of America. (Oct. 25 Letter at 1.) Ms. Patrick seeks to downplay this fact by claiming that AIG is the "most active member of the Steering Committee." (*Id.*) As usual, Ms. Patrick has absolutely no basis for this assertion, as she has no knowledge of how "active" the members of the Steering Committee are. The entire purpose of the Steering Committee is to coordinate the intervenor group, and the fact that counsel for one member of the Steering Committee most frequently (but not exclusively) makes written submissions or addresses the Court during hearings in no way suggests that the Court should disregard the other Steering Committee members, much less the broader group of intervenors on whose behalf the Steering Committee acts.

Third, the terms of the settlement agreement, the purported "expert" reports submitted by BNYM to justify the settlement, and the extraordinary accompanying 12-page Proposed Final Order and Judgment (the "Proposed Order") on which the proposed settlement is conditioned, all raise obvious red flags. Among other things:

- This is not a proceeding in which a trustee seeks judicial approval of a settlement that *it* negotiated. Instead, the Inside Institutional Investors negotiated the proposed settlement, which appears to settle the Trusts' representation and warranty claims ("R&W Claims") for far less than a reasonable amount, provides no compensation for the Trusts' servicing and loan modification claims (which would also be released by the settlement), and would richly reward their counsel.
- BNYM appears to have played a decidedly placid role in the negotiations and to have agreed to the proposed settlement only on the strict condition that the Court sign the extraordinarily broad Proposed Order.

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[3] Unsurprisingly, Ms. Patrick claims that the settlement is "highly beneficial" to "thousands" of investors. The Steering Committee has previously responded to Ms. Patrick's baseless presumption that other Certificateholders who have not intervened necessarily support the settlement. In light of the large number of existing intervenors seeking transparency and the presence of the Attorneys General of New York and Delaware, there is no need for other Certificateholders with concerns about the settlement to separately incur attorneys' fees and costs to intervene themselves.

- The settlement is to be allocated among the Trusts based only on "losses," without taking into account the significant differences among the types of mortgage loans held by the Trusts and the strength of each Trust's R&W Claims.
- As noted above and as counsel for Triaxx informed the Court at the October 12 hearing, the Inside Institutional Investors are presently refusing to provide disclosure as to the nature of their economic interest in the settlement they negotiated, including the extent to which they are distressed debt investors (particularly in Trusts with the greatest losses) who may receive a windfall. Ms. Patrick responded to this legitimate issue by again immediately launching into irrelevant attacks on Triaxx's asset manager, a non-party to this proceeding.
- The report prepared by BNYM's purported "expert," Brian Lin, on the settlement amount is fundamentally flawed for a number of reasons, including that Mr. Lin based his analysis on a wholly separate category of loans—Government-sponsored enterprise ("GSE") loans—which have a significantly lower default rate because of more stringent underwriting guidelines.
- The actual amount which will be paid to the Trusts under the settlement is unknown, as the Settlement Agreement makes clear that some of the $8.5 billion can be returned to Bank of America.

Fourth, the Steering Committee has not sought to "delay" this proceeding. The Steering Committee has sought production of documents that are plainly discoverable, but at every turn has been met with "relevance" and other objections. Only in late October did Bank of America finally produce its settlement communications with the Inside Institutional Investors which, as the Court pointedly stated at the October 12 hearing, appear necessary for BNYM to even make a *prima facie* case in support of the findings in the proposed order.[4] This was only the latest example of the settlement proponents constructing roadblocks to discovery, thus necessitating extensive briefing and argument to the Court, only to then "voluntarily" produce the information.[5]

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[4] Unfortunately, Bank of America's production of its settlement communications with the Inside Institutional Investors does not wholly resolve the parties' dispute as to such communications. The Inside Institutional Investors continue to refuse the Steering Committee's request that: (1) they certify the completeness of Bank of America's production and (2) they represent that they do not have possession of any non-duplicative settlement communications.

[5] Ms. Patrick has also just recently reversed course on whether she will voluntarily sit for a deposition in this case. In contrast, Bank of America's and BNYM's lead negotiators have appeared or soon will appear for their depositions. Now, at the last minute, the lawyer who has repeatedly and publicly taken credit for this purportedly "highly beneficial" settlement, refuses to answer questions under oath. The Steering Committee will continue to encourage Ms. Patrick to agree to be deposed without a fight. If we cannot do so, we will seek the Court's order.

Fifth, separate securities lawsuits have nothing to do with this proceeding. The proposed settlement expressly does not release Certificateholders' securities fraud claims against Bank of America and/or its affiliates. Ms. Patrick has even publicly touted the importance of the settlement's preservation of securities fraud claims to her clients. *See* Alison Frankel, Gibbs & Bruns comes to NY to sell investors on $8.5 bl BofA deal, July 16, 2011 (*available at* http://blogs.reuters.com/alison-frankel/2011/07/16/gibbs-bruns-comes-to-ny-to-sell-investors-on-8-5bl-bofa-deal/) (last viewed October 31, 2012) ("Patrick said that she was so determined to preserve her own clients' securities law claims that Gibbs & Bruns very nearly walked away from late-stage negotiations when Bank of America's lawyers . . . demanded a release [of such claims]. 'We not only said no, but hell no," Patrick said."). Indeed, the Steering Committee is aware of at least the following recent cases in which one or more of the Inside Institutional Investors have themselves brought securities claims against Bank of America (among others):

- *The Government of Guam Retirement Fund, et al. v. Countrywide Financial Corp., et al.*, 2:11-cv-06239 (C.D. Cal.) (TIAA, Thrivent, and BlackRock, Inside Institutional Investors in this case, are plaintiffs);
- *Dexia Holdings, Inc. et al. v. Countrywide Financial Corp., et al.*, 2:11-cv-07165 (C.D. Cal.) (TIAA and New York Life, Inside Institutional Investors in this case, are plaintiffs); and
- *Bayerische Landesbank v. Countrywide Financial Corp., et al.*, 2:12-cv-05236 (C.D. *Cal.*) (Bayersische Landesbank, an Inside Institutional Investor in this case, is a plaintiff).

Collectively, the members of the Steering Committee have billions of dollars at stake in the Covered Trusts. The Steering Committee, and all other intervenors and objectors, have legitimate concerns about the proposed settlement and the process by which it was reached. For all these reasons, we ask the Court to ignore the unwarranted attacks on the members of the Steering Committee and attempts to distract from the issues at hand.

Respectfully submitted,

Daniel M. Reilly

Enclosures
cc: All counsel (via ECF)