

**Exhibit 3**  
**to**  
**Affidavit of Michael A. Rollin**  
**in Support of Jury Demand**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 39  
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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),

PETITIONER,

For an Order, pursuant to CPLR Section 7701,  
seeking judicial instructions and approval of  
a proposed settlement.

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INDEX NO: 651786/11           60 Centre Street  
                                  New York, New York  
                                  August 2, 2012

BEFORE:       HONORABLE BARBARA R. KAPNICK, Justice

APPEARANCES:

MAYER BROWN  
Attorneys for Bank of NY Mellon (Trustee)  
1675 Broadway  
New York, New York  
BY: MATTHEW D. INGBER, ESQ.

GIBBS & BRUNS, LLP  
Attorneys for Institutional Investors  
1100 Louisiana  
Suite 5300  
Houston, Texas  
BY: KATHY PATRICK, ESQ.  
      ROBERT J. MADDEN, ESQ.

WARNER PARTNERS, P.C.  
Attorneys for Institutional Investors  
950 Third Avenue  
New York, New York  
BY: KENNETH E. WARNER, ESQ.

## PROCEEDINGS

1  
2 DECHERT, LLP  
3 Attorneys for Bank of New York  
4 1095 Avenue of the Americas  
5 New York, New York  
6 BY: HECTOR GONZALES, ESQ.

7 REILLY POZNER, LLP  
8 Attorneys for AIG  
9 1900 Sixteenth Street  
10 Denver, Colorado  
11 BY: DANIEL M. REILLY, ESQ.

12 KELLER ROHRBACK, LLP  
13 Attorneys for Federal Home Loan Banks  
14 1201 Third Avenue  
15 Suite 3200  
16 Seattle, Washington  
17 BY: DEREK W. LOESER, ESQ.

18 QUINN EMANUEL URQUHART & SULLIVAN, LLP  
19 Attorneys for AIG  
20 51 Madison Avenue  
21 New York, New York  
22 BY: MICHAEL B. CARLINSKY, ESQ.

23 DEPARTMENT OF JUSTICE  
24 Attorneys for Delaware Intervenor  
25 820 N. French Street  
26 Wilmington, Delaware  
BY: GREGORY C. STRONG, ESQ.

OFFICE OF THE ATTORNEY GENERAL  
State of New York  
Investor Protection Bureau  
120 Broadway  
New York, New York  
BY: THOMAS TEIGE CARROLL, ESQ.

WACHTELL, LIPTON, ROSEN & KATZ  
Attorneys for Bank of America  
51 West 52nd Street  
New York, New York  
BY: THEODORE N. MIRVIS, ESQ.

NINA J. KOSS, C.S.R., C.M.  
Official Court Reporter

## PROCEEDINGS

1  
2 reasons that they cannot articulate.

3 Your Honor, good cause has not been satisfied here.

4 They cannot check any of these boxes. If they  
5 couldn't check one, that would be enough, but they can't  
6 check any of them.

7 Now, we could end there, and I am happy to sit down  
8 if your Honor would like me to. There is more that I could  
9 say about the fiduciary issue, there is more that I could  
10 say about the Event of Default issue. And, I am happy to  
11 do that if your Honor would like me to. We think the issue  
12 ends at good cause.

13 THE COURT: Well, the case that counsel referred to  
14 in his discussion, the case that Judge Baer wrote, I guess  
15 when he was still a Judge in this Court before he went next  
16 door, Federal Court, and it seemed that he found that an  
17 Indenture Trustee -- we know that you are not an Indenture  
18 Trustee -- on all of these you have different roles with  
19 PSAs and SSAs and something else, and I know that the PSAs  
20 say that you don't have, your obligations may be limited  
21 very strictly by what's in there, but Judge Baer went on to  
22 find that notwithstanding that, there was still some  
23 obligation to act, so to, to refrain from engaging in any  
24 conflicts of interest and act with a singleness of purpose  
25 and a duty of loyalty.

26 Those were the things that are talked about, and it

## PROCEEDINGS

1  
2 seems hard to conceive that a Trustee doesn't have that  
3 responsibility, even if you call yourself -- whatever you  
4 call yourself. It may not end up changing the result,  
5 which is why you went through the other part first, but I am  
6 really hard pressed to accept your view of the legal  
7 standard of fiduciary, when I thought that case was very  
8 important on that issue and seemed to go through it very  
9 well.

10 MR. INGBER: There is a few points to make there.  
11 Number one, this is what then Justice Baer also said. I am  
12 not persuaded that Judge Hand intended to stay -- referring  
13 to the learned Hand decision -- that the Indenture Trustee  
14 is an ordinary Trustee with broad fiduciary duties.

15 THE COURT: I agree.

16 MR. INGBER: He also acknowledged that there are no  
17 fiduciary duties but, but, the Trustee has a duty to avoid  
18 conflicts, and this has been developed in the case. There  
19 is no dispute, two implied duties; one, to avoid conflicts  
20 and number two, to carry out its ministerial functions with  
21 due care.

22 So, the question is, are those two duties fiduciary  
23 duties? Well, that question has been presented to several  
24 Courts, most recently Judge Sullivan in the Ellington case  
25 and the answer was no. There is just one very simple  
26 quote. "The two implied pre-default obligations are not

## PROCEEDINGS

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2 It's a little bit of splitting the words here.

3 It's clear that the type of Trustee we have in this  
4 case is not a full fledged fiduciary. Everybody agrees  
5 with that. But, I think that these cases make it clear  
6 that there is a fiduciary obligation outside, that extends  
7 beyond the terms of the PSA contract or whatever it is, that  
8 allows me to find that there are some fiduciary obligations,  
9 and like Judge Baer found, that would rise to the level of  
10 finding there could be a fiduciary exception to this very  
11 important attorney client privilege.

12 I know Judge Sullivan, a Federal Judge colleague  
13 friend of mine, you probably read that I actually sat on the  
14 bench with him and did a whole day's hearing together with  
15 him, but he was dealing, he was making reference to AG  
16 Capital, and I think he was talking about a more ministerial  
17 situation, and didn't really reach, didn't really mention  
18 Ambec and this development of the law that Judge Baer went  
19 through, and that was sort of adopted by the Appellate  
20 Division, First Department -- the Courts that I am loyal to,  
21 not that I am not loyal to my friend Judge Sullivan, but  
22 it's a different situation. I think these are more  
23 controlling on me.

24 So, I am going to find, in the first instance, that  
25 there is, that we can at least reach the fiduciary  
26 exception. The problem, this is the same thing that Judge

## PROCEEDINGS

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2 late, in case there is something else we are doing that  
3 evening. Make sure we have them a week in advance, and have  
4 time to read them, and think them through before you come  
5 and visit us, which is what we had a chance to do today, so  
6 we could sort of get through as much as we did.

7 Have a great rest of the summer everybody.

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17 THE FOREGOING IS CERTIFIED TO BE A  
18 TRUE AND ACCURATE TRANSCRIPTION OF  
19 THE ORIGINAL STENOGRAPHIC NOTES.

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23 NINA J. KOSS, C.S.R., C.M.

24 OFFICIAL COURT REPORTER  
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