

# **EXHIBIT 1**

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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 THE BANK OF NEW YORK MELLON,  
4  
5 Petitioner,

5 v. 11 Civ. 5988 (WHP)

6 WALNUT PLACE LLC, et al.,  
7  
8 Respondents.

8 -----x

9 RETIREMENT BOARD OF THE  
10 POLICEMEN'S ANNUITY AND BENEFIT  
11 FUND OF THE CITY OF CHICAGO,  
12 et al.,

11 Plaintiffs,

12 v. 11 Civ. 5459 (WHP)

13 THE BANK OF NEW YORK MELLON,  
14  
15 Defendant.

16 -----x Argument  
17 New York, N.Y.  
18 September 21, 2011  
19 10:30 a.m.

18 Before:

19 HON. WILLIAM H. PAULEY III  
20 District Judge

21 APPEARANCES

22  
23 MAYER BROWN LLP  
24 Attorneys for Petitioner  
25 BY: MATTHEW D. INGBER  
CHRISTOPHER J. HOUP

191rbynm

1 to whether this settlement is in the best interests of each of  
2 those trusts.

3 THE COURT: Didn't it owe a fiduciary duty to each  
4 trust independently.

5 MR. INGBER: The Bank of New York Mellon didn't owe --

6 THE COURT: Did or did not?

7 MR. INGBER: -- did not owe a fiduciary duty to each  
8 of the trusts. The Bank of New York Mellon's duties are  
9 defined by the pooling and servicing agreements, and they don't  
10 include fiduciary duties.

11 THE COURT: What is a trustee then?

12 MR. INGBER: A trustee in this case is administering  
13 the trusts. Its duties are defined by contract. There is a  
14 pooling and servicing agreement that defines the rights,  
15 duties, and obligations of the parties to that contract. The  
16 parties to that contract are in this case Bank of America and  
17 Countrywide, Bank of New York Mellon, and the depositor. The  
18 certificate holders are not parties to that contract. And all  
19 of the trustee's rights are defined specifically by that  
20 contract.

21 THE COURT: What authority does Bank of New York  
22 Mellon cite for the proposition that the trustee does not owe  
23 any duties outside of those expressed in the PSA?

24 MR. INGBER: We looked first to the PSA's themselves,  
25 and the PSA's themselves say the trustee has no duties unless

191rbynm

1 they are expressly set forth in the contract.

2 THE COURT: What about, for instance, the duty to  
3 avoid conflicts of interest?

4 MR. INGBER: Those are duties, your Honor, that arise  
5 as a result of the trustee's role that is defined by the PSA's.

6 THE COURT: The PSA doesn't say anything about  
7 conflicts of interest, does it?

8 MR. INGBER: There is no specific reference to  
9 conflicts of interest, but there is certainly a reference to  
10 the trustee acting in good faith, which could encompass no  
11 self-dealing or avoiding conflicts of interest. But that is  
12 still a duty that goes back to the PSA's.

13 THE COURT: Isn't that a duty that is grounded in  
14 common law in New York?

15 MR. INGBER: There certainly is a duty of loyalty  
16 under New York common law. The PSA's are the documents that  
17 define what the trustee's duties are. The trustee in this case  
18 is a trustee that is administering trusts that are created,  
19 that are formed as a result of a securitization process, and  
20 all of the rights and obligations of the duties and parties are  
21 reflected in that document.

22 THE COURT: If the PSA was silent about the duty to  
23 avoid conflicts, could the trustee self-deal?

24 MR. INGBER: It is silent about the duty to avoid  
25 conflicts, but it is not silent as to the trustee's duty --

191rbynm

1 THE COURT: Can BONY self-deal, since it is not in the  
2 PSA?

3 MR. INGBER: I would argue that it would fall within  
4 the good faith standard that is outlined in the PSA.

5 THE COURT: That is a duty that arises out of New York  
6 law, isn't it?

7 MR. INGBER: Which duty, your Honor?

8 THE COURT: The duty of good faith and not to self-  
9 deal.

10 MR. INGBER: The duty not to self-deal, the duty to  
11 act in good faith, and the duty of loyalty is common law duty  
12 of a trustee. But it is a duty in this case that is defined  
13 specifically in the pooling and servicing agreements, and it is  
14 in accordance with those duties that the trustee --

15 THE COURT: Where is good faith defined in the PSA?

16 MR. INGBER: It is not defined in the PSA. The good  
17 faith duty is set forth in the PSA.

18 THE COURT: Where is that duty defined?

19 MR. INGBER: The duty of good faith, your Honor, its  
20 set forth in the PSA.

21 THE COURT: Where?

22 MR. INGBER: It can be defined --

23 THE COURT: Just show me where.

24 MR. INGBER: The definition of good faith is not in  
25 the PSA.

191rbynm

1 THE COURT: You have to look to New York law, don't  
2 you?

3 MR. INGBER: You can look to New York law.

4 THE COURT: Where else would you look, Mr. Ingber?

5 MR. INGBER: That's where you would look, your Honor.

6 THE COURT: All right. You can continue.

7 MR. INGBER: Thank you.

8 Your Honor, on the issue of monetary relief, claims  
9 for monetary relief, CAFA doesn't apply to cases seeking  
10 equitable or declaratory relief. We submit, your Honor, that  
11 that is the relief that we are seeking here. It's true that  
12 the effect of the entry of the final order and judgment in this  
13 case could be or should be that a condition of the settlement  
14 agreement is satisfied, that as a result of that condition  
15 being satisfied the settlement agreement is effective and the  
16 parties are obligated to perform under the settlement  
17 agreement, and as a result of that, Bank of America and  
18 Countrywide will have to make a settlement payment. But that  
19 doesn't mean that this proceeding that was initiated by the  
20 trustee asserts a claim for monetary relief.

21 THE COURT: Isn't that exalting form over substance?

22 MR. INGBER: No. Declaratory judgment actions always  
23 have concrete implications, sometimes financial and monetary  
24 implications, on the parties. In fact, the Kitazato court that  
25 we cited in our papers, the District of Hawaii court, really

191rbynm

1 the institutional investors, how did they organize themselves?

2 MR. MADDEN: Your Honor, it started with a small group  
3 of investors that were facing a problem. That problem was that  
4 these repurchase claims were lying fallow. No one was doing  
5 anything. None of these people were doing anything. And, I'm  
6 sorry to say, the trustee wasn't doing anything. Limitations  
7 was running on those claims, and nothing was happening.

8 They weren't willing to sit around and allow their  
9 claims against Bank of America to expire. What they did is  
10 they formed a group. They pooled their holdings, and they went  
11 to the trustee and said you've got to sue Bank of America.  
12 This was no effort to help Bank of America, your Honor. This  
13 was an effort to bring Bank of America to justice. They went  
14 to the trustee and said you have to sue the trustee.

15 The trustee wouldn't act. What my clients did was  
16 they went through the hoops that have been talked about here.  
17 We started the process of going through those hoops when no one  
18 else did. We gathered together. We demonstrated to the  
19 trustee that we had 25 percent with respect to a subset of the  
20 trusts that are at issue here. We demanded that the trustee  
21 take action.

22 THE COURT: How big was that subset?

23 MR. MADDEN: At that time I believe it was less than  
24 100 trusts, your Honor.

25 THE COURT: Has it changed?

191rbynm

1           MR. MADDEN: Yes, it has. What happened, your Honor,  
2 was that we served on trustee and on Bank of America what is  
3 known as a notice of nonperformance. It's one of those hoops  
4 under the agreement that started the process of triggering our  
5 ability to prosecute these claims, not for ourselves and not  
6 solely for our benefit but derivatively on behalf of the  
7 trusts.

8           When that happened, when we sent that notice of  
9 nonperformance, two things happened, your Honor. First, it was  
10 public. We made it public because we believed that it was  
11 important that it be known. Two things happened. One, Bank of  
12 America's share price dropped 5 percent because the market  
13 began to realize that all of a sudden these claims that were  
14 going nowhere and nobody was doing anything, somebody was  
15 actually taking some action on them.

16           Two, it began to attract additional investors.  
17 Investors began to contact us, saying we hear that you are  
18 doing this, we'd like to be involved also. We said fine, come  
19 join the group. Because those people joined the group, the  
20 holdings got larger. We eventually got up to a group that  
21 had -- we have holdings in all but one or two of all 530  
22 trusts. We have 25 percent in over 200 of the trusts.

23           What we did is we went to Bank of New York and said  
24 we're going forward with this, either you're going to bring  
25 these claims or we're going to bring these claims derivatively.