SUPREME COURT OF THE STATE OF NEW YORK
COUNTY 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,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Scarpulla, J.

THE INSTITUTIONAL INVESTORS' MEMORANDUM OF LAW IN OPPOSITION TO THE PENDING MOTIONS FOR REARGUMENT

WARNER PARTNERS, P.C.
Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS, LLP
Kathy D. Patrick (*pro hac vice)*
Robert J. Madden (*pro hac vice)*
David Sheeren (*pro hac vice)*
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for Intervenor-Petitioners, the Institutional Investors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Intervenor-Petitioners, the Institutional Investors,[1] respond in opposition to the motions of AIG (Doc. No. 1060) and the Scott + Scott objectors[2] (Doc. No. 1084) to reargue Justice Kapnick's January 31, 2014 Decision, Order and Judgment (Doc. No. 1036) (the "Judgment").

I. INTRODUCTION

AIG and the Scott + Scott objectors' "motions to reargue" urge this Court to set aside Justice Kapnick's judgment, entered after a nine-week evidentiary hearing. Both motions misapply CPLR §2221(d), a rule with a narrow and well-defined purpose:

> As we have *repeatedly* held, "a motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.*"

Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971 (1st Dep't 1984), *quoting Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979), *lv. denied* 56 N.Y.2d 507 (1982) (emphasis added).

---

[1] The Institutional Investors are 22 of the largest certificateholders in the trusts at issue in the proceeding: BlackRock Financial Management Inc., Kore Advisors, L.P., Maiden Lane, LLC, Metropolitan Life Insurance Company, Trust Company of the West and affiliated companies controlled by The TCW Group, Inc., Neuberger Berman Europe Limited, Pacific Investment Management Company LLC, Goldman Sachs Asset Management, L.P., Teachers Insurance and Annuity Association of America, Invesco Advisors, Inc., Thrivent Financial for Lutherans, Landesbank Baden-Wuerttemberg, LBBW Asset Management (Ireland) plc, Dublin, ING Bank fsb, ING Capital LLC,ING Investment Management LLC, Nationwide Mutual Insurance Company and its affiliated companies, AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company.

[2] The objectors represented by Scott + Scott are: Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, City of Grand Rapids General Retirement System, and City of Grand Rapids Police and Fire Retirement System.

Contrary to the First Department's "repeated" instruction, neither movant points out anything Justice Kapnick actually "overlooked or misapprehended." Instead, they simply "argue once again" what Justice Kapnick – after careful consideration -- rejected. AIG's motion revisits virtually *every* argument it made and that Justice Kapnick rejected, as the chart at pages 4-6 *infra* illustrates. In effect, AIG argues that any time Justice Kapnick rejected one of its arguments she "overlooked or misapprehended" it – precisely what the First Department has warned against on a motion for reargument. The remainder of AIG's motion has nothing to do with allegedly overlooked or misapprehended facts, or misapplications of controlling law; instead, it mischaracterizes the Judgment and asserts irrelevant or improper legal arguments. The Scott + Scott objectors' motion virtually ignores the Judgment, devoting itself instead to irrelevant hypotheticals about the claimed effect of the Judgment.

Neither motion establishes grounds for re-argument under CPLR §2221(d). Nor do they offer any compelling reason why this Court should disregard the well-established principle that "one judge should not modify or overrule the determination of a fellow judge of coordinate jurisdiction." *Public Serv. Mut. Ins. Co. v. McGrath*, 56 A.D.2d 812 (1st Dep't 1977). *Accord Dondi v. Jones*, 40 N.Y.2d 8, 15 (1976) ("a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction."); *Siderakis v. Choudhary*, 2006 WL 1132457, at *2 (N.Y. City Civ. Ct. 2006), *rev'd on other grounds* 2008 WL 711728 (N.Y. Supp. App. 2008) ("The longstanding rule against collateral *vacatur* holds that one Judge should not reconsider, disturb or overrule an order in the same action of another Judge of co-ordinate jurisdiction in the same case. . . . [C]ollateral *vacatur* is a breach of comity

which can only lead to unseemly conflicts of decision and to protracted litigation.").[3] For these reasons, and those described below, AIG and the Scott + Scott objectors' motions should be denied. They should make their arguments to the Appellate Division, where all of them have filed notices of appeal.

II. STANDARD OF REVIEW

"[T]he decision whether to entertain reargument is committed to the sound discretion of the court." *Rostant v. Swersky*, 79 A.D.3d 456, 457 (1st Dep't 2010). "The denial of a motion to reargue is not appealable." *Tsavaris v. Tsavaris*, 93 A.D.3d 613, 614 (1st Dep't 2012).

III. RESPONSE TO AIG MOTION

A. AIG Has Identified No Relevant Facts that Were Overlooked or Misapprehended by Justice Kapnick

All of AIG's objections, arguments, and the facts surrounding them, were considered by Justice Kapnick. The Judgment states that *"[a]ll objections to the Settlement have been considered ...."* Judgment at 53 (incorporating paragraph (t) of the PFOJ, found at p. 13). As illustrated in the table below, the Judgment *expressly* describes, discusses, or otherwise rejects virtually all of the "facts" and arguments AIG now claims Justice Kapnick misapprehended or overlooked. Given the extensive testimony from both fact and expert witnesses, as well as other on point rulings from the Court, nothing in the Judgment or "the voluminous record" Justice

---

[3] The question is not whether this Court has the power to entertain the present motions; instead, it is whether it should exercise that power in light of the strong policy against "collateral *vacatur*." *See, e.g. People v. Schneiderman*, 136 Misc.2d 396, 398-99 (Dist. Ct. Nassau Cnty 1987) (trial court considering CPLR §2221 motion to reargue decision of predecessor judge, who had moved to the bench of a different court, acknowledging that "the power may exist to hear reargument and perhaps thereby disturb, vacate or modify the prior order," but holding that "I must decline to do so since entertainment of this motion upon the grounds set forth by the People is tantamount to collateral appellate review by me of a decision and order of a colleague of this bench.").

Kapnick said she reviewed and considered, Judgment at 52, supports AIG's claim that Justice Kapnick overlooked any of the issues raised in AIG's motion:

ALLEGEDLY MISAPPREHNDED OR OVERLOOKED FACTS	CONSIDERED IN JUDGMENT	SELECTED TESTIMONY, REPORTS, AND OTHER RULINGS
BNYM's hiring of allegedly conflicted counsel AIG Memo at § I(A)(1), pp. 6-7.	Judgment at pp. 27-28 (section titled "Mayer Brown Conflict Waiver").	*See, e.g.*, Tr. (Kravitt) 1575:2-24; 1573:19-1574:8; 1901:8-22 (discussing Mayer Brown conflict waivers). Tr. (Bailey) 2404:10-11, 2407:24-26 (testifying that Mayer Brown "absolutely" provided zealous representation).
BNYM's entry into the forbearance agreement *Id.* at § I(A)(2), pp. 7-9.	*Id.* at pp. 29-30 (section titled "Forbearance Agreement").	*See, e.g.*, Tr. (Kravitt) 1333:17-24; 1335:22-1336:7; 1361:15-16; 1368:3-5, 1369:2-6; Tr. (Bailey) 2194:6-12, 2310:13-21; Tr. (Landau) 2546:2-2547:26; 2548:2-6 (discussing reasons for and effect of Forbearance Agreement).
BNYM's confirmation of its existing indemnity in connection with the forbearance agreement, and BNYM's lack of notice to certificateholders of the forbearance agreement *Id.* at § I(A)(3), pp. 9-10.	*Id.* at pp. 31-32 (section titled "Notice to Certificateholders and Forbearance").	*See* Decision/Order at pg. 16 n.3, dated May 20, 2013 (doc. no. 825) (finding that confirmation of indemnity did not raise a "colorable claim of conflict or self-dealing"). *See, e.g.*, Tr. (Kravitt) 1374:7-13;1430:7-23; 1776:2-23; 2155:4-19; Tr. (Landau) 2554:23-2557:7; Tr. (Bailey) 2246:5-6 (explaining indemnity agreements).

ALLEGEDLY MISAPPREHNDED OR OVERLOOKED FACTS	CONSIDERED IN JUDGMENT	SELECTED TESTIMONY, REPORTS, AND OTHER RULINGS
BNYM's agreement to the further assurances clause in the settlement agreement *Id.* at § I(A)(4), p. 11.	*Id.* at pp. 32-33 (section titled "Further Assurances Clause").	Tr. (Kravitt) 1538:6-14; 1554:21-26; 1778:9-13 (explaining reasons for clause).
BNYM's alleged delegation of settlement negotiations to the Institutional Investors *Id.* at § I(A)(5), p. 12.	*Id.* at pp. 18 and 37 n. 17 (discussing Institutional Investors' involvement in settlement negotiations).	*See, e.g.* Tr. (Smith) 318:21-25; 411:6-412:3; Tr. (Laughlin) 809:22-26; (Kravitt) 1388:12-1390:19; 1399:9-1400:25; 1421:3-9; (Stanley) 1862; 3173:2-15 (describing active role of Trustee in settlement discussions).
The BNYM Trust Committee's alleged "cursory" evaluation of the settlement. *Id.* at § I(A)(6), p. 12-13.	*Id.* at pg. 53 (adopting finding (i) of the PFOJ, except as to loan modification claims, that the "Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled"); *see also id.* at pg. 50 (discussing trust committee meeting).	*See* Decision/Order at 2-4, dated May 20, 2013 (doc. no. 825) (section titled "Communications at the Trust Committee Meeting"). *See, e.g.*, Tr. (Bailey) 2192:6-2193:11; 2219:24-2225:25; 2409-2409; 2492:3-6; 2227:19-23 9 (describing Trust Committee process and evaluation). *See also* Tr. (Landau) 2538-2539; 2660-2663 (explaining custom and practice of trust committees).
BNYM's use of GSE experience, and decision not to conduct a loan file review *Id.* at § II(B)(2)(a), pp. 14-15.	*Id.* at pp. 38-43 (discussing BNYM's use of GSE data, and decision not to conduct loan file review).	*See, e.g.*, Tr. (Lin) 4004:23-26; Tr. (Scrivener) 1005:17-23; Tr. (Kravitt) 1414-1416 (discussing comparability of GSE and private label loans). *See also* Tr. (Fischel) 3522:16-17; Tr. (Smith)

ALLEGEDLY MISAPPREHNDED OR OVERLOOKED FACTS	CONSIDERED IN JUDGMENT	SELECTED TESTIMONY, REPORTS, AND OTHER RULINGS
		554:13-555:4; Tr. (Kravitt) 1445:7-18; 1446:24-1447:24; Tr. (Lin) 3974:4-12, 3975:9-14; 3978:12-13; Tr. (Burnaman) 2762:4-6 (discussing reasons for using GSE experience and foregoing loan file review).
BNYM's use of the Brian Lin expert report *Id.* at § II(B)(2)(b), pp. 15-16.	*Id.* at pp. 36-43 (discussing Lin report).	*See, e.g.*, PTX 14 (RRMS Report); Tr. (Kravitt) 1443:22-26;1444:4-12; Tr. (Burnaman) 2737:23-2738:5; 2741:15-26 (validating Lin methodology) .
BNYM's use of other experts *Id.* at § II(B)(2)(c), pp. 16-18.	*Id.* at pp. 35-36, 43-44 (discussing BNYM's other experts, Daines, Capstone, and Adler).	*See, e.g.*, PTX 18 (Daines Report); Tr. (Daines) 1279-1307; 3216-3441; PTX 17 (Capstone Report); Tr. (Bingham) 4473-4562; PTX 15 (Adler Report); Tr. (Adler) 4376-4462.
BNYM's release of documentation and servicing claims *Id.* at § II(B)(2)(d), pp. 18-20.	*Id.* at pp. 44-45 (section titled "Document Exception Claims"), 46-47 (section titled "Servicing Claims").	*See, e.g.*, Tr. (Kravitt) 1450:3-1451:22; 1833:23-1834:5; 2056:22-25; 2057:18-21; 2133:14-16; Tr. (Burnaman) 2765:10-18 (trustee's evaluation of document claims and remedies). See also Tr. (Kravitt) 1437:18-23; 1450:3-1451:22; 2074:5-6, 20-22; 2101:17-20, 2103:22-24; 2129:7-15 (trustee's evaluation of servicing claims and improvements).

As this chart demonstrates, AIG's dispute with the Judgment is not that Justice Kapnick overlooked or misapprehended relevant facts; it is that she rejected AIG's views and arguments,

after considering them fully. A motion to reargue is not the proper forum for AIG to continue its disagreement with Justice Kapnick on these issues; instead, AIG should pursue the appeal it filed.

B. AIG Has Identified No Controlling Principle of Law that Was Misapplied by Justice Kapnick

1. Justice Kapnick Was Not Required to Independently Evaluate the Substantive Fairness of the Settlement

AIG claims that Justice Kapnick was required to "independently determine whether the settlement is fair, reasonable, and adequate." AIG Motion at 13. AIG misstates New York law. As explained in detail in the Judgment, New York law is clear that in reviewing a trustee's exercise of discretionary judgment, "the Court's role is limited to preventing an abuse of discretion." Judgment at 23 (citing RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959)). Thus, in reaching her decision, Justice Kapnick properly applied the rule that:

> If discretion is conferred on the trustee in the exercise of power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of power of the trustee.

Judgment at 24, (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959); citing *Matter of Stillman*, 107 Misc.2d 102, 110 (Sur. Ct. NY Co. 1980).

AIG ignores this authority. It makes no attempt to reconcile the clear, settled law respecting a trustee's exercise of discretion with its claim that Justice Kapnick was required to disregard the Trustee's judgment and substitute her own, independent review of the fairness and adequacy of the settlement itself. Instead, AIG relies for support on inapposite case law, decided under inapplicable federal procedural rules, which set the standard for approval of settlements in the context of bankruptcies and shareholder derivative suits. AIG motion at 13, citing: *Geltzer v.*

Andersen Worldwide, S.C., 2007 WL 273526 (S.D.N.Y. 2007) (approval of settlement by bankruptcy trustee in a Chapter 7 bankruptcy under Fed. R. Bankr. P. 9019); *Goldsholl v. Shapiro*, 417 F.Supp. 1291, 1295-96 (S.D.N.Y. 1976) (approval of settlement of shareholder derivative suit under Fed. R. Civ. P. 23.1). These cases have no application here, in this equitable Article 77 proceeding, and they in no way supplant the plain authority cited, and appropriately followed, by Justice Kapnick in the Judgment.

2. Justice Kapnick Did Not Grant Summary Judgment

AIG's claim that Justice Kapnick granted summary judgment in favor of BNYM, rather than making factual determinations after an evidentiary hearing, is also baseless. In a special proceeding (as in a plenary proceeding), summary judgment is rendered solely on the basis of the "pleadings, papers, and admissions," where <u>no</u> triable issue of fact is raised. CPLR § 409(b). Justice Kapnick's reference to the "summary judgment standard," Judgment at 25, meant only and simply this: As CPLR §409 states, BNYMellon bears the burden of proof as petitioner to demonstrate there are no material issues of fact. If, after reviewing the pleadings and proof submitted, Justice Kapnick determines there are disputed fact issues, then CPLR §410 requires that she hold a bench trial to resolve them.

That is precisely what happened here. From June 3, 2013 to November 21, 2013, Justice Kapnick presided over an evidentiary hearing lasting 36 days, many of them consecutive. These proceedings included opening and closing arguments, sworn testimony from 22 fact and expert witnesses, hundreds of documents admitted in evidence, and rulings on countless evidentiary objections. It was only after this intensive fact-finding process that Justice Kapnick issued a Judgment making clear that the task before the Court was "to *decide* whether the Trustee abused its discretion" in entering into the settlement agreement. Judgment at 26. The Judgment includes over fifty citations to testimony and exhibits, and concludes with express factual

determinations ("the Court *finds* ..."), arrived at *"[a]fter reviewing the voluminous record."* *Id.* at 52. Those findings resolved disputed facts, and addressed the reasonableness of BNYM's process and its good faith in entering into the Settlement Agreement. *Id.* at 52-53 (finding that "the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment.").[4]

For AIG to suggest that the nine-week bench trial Justice Kapnick held was simply a summary judgment hearing – one in which she, inexplicably, heard *testimony* from 22 witnesses and received *in evidence* hundreds of exhibits – is the height of absurdity.[5] AIG Memo at 1. AIG had 36 days in court to make its case and it lost. Its remedy now is to appeal. It is not entitled to a second, nine-week long bench trial.

3. Justice Kapnick Did Not Place the Burden of Proof on the Objectors

AIG's claim that Justice Kapnick improperly placed the burden of proof on the objectors is also false. Nowhere in the Judgment does Justice Kapnick state that the objectors bear the burden of proof, or state that the objectors failed to carry the burden of proof on any issue.

AIG attempts to support this claim by asserting, wrongly, that Justice Kapnick improperly limited her review to determining whether the objectors' assertions of bad faith, unreasonableness, etc. were meritorious, and failed to consider whether BNYM had otherwise

---

[4] Justice Kapnick made these fact findings because there is no right to a jury trial in an equitable, Article 77 proceeding. *Jamaica Sav. Bank v. M.S. Invest. Co.*, 274 N.Y. 215, 221 (1937) ("In an action in equity there is no right of a trial by jury."); *Matter of Palma*, 17 A.D.3d 817, 818 (3d Dep't 2005) (no right to jury trial in action by executor of estate seeking judicial approval of settlement of estate claim because the proceeding was "essentially equitable in nature.").

[5] It is also disingenuous. AIG made an eleventh hour (and meritless) demand for a jury trial, arguing that "CPLR § 410 allows for a jury trial in special proceedings." Doc. No. 799 at 1. AIG thus acknowledged what it now disclaims; namely, that the proceeding before Justice Kapnick: (i) was conducted pursuant to CPLR §410, and (ii) was one in which all issues—including disputed issues of fact—would be considered and resolved.

carried its burden of proof. AIG Motion at 21-22. This claim is rebutted on the face of the Judgment. It makes clear that the issue presented by BNYM's petition, and decided by Justice Kapnick, was "whether the Trustee abused its discretion," Judgment at 26, not simply whether the objectors' arguments had merit. The Judgment also includes express findings – that "the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of a reasonable judgment," *id.* at 52-53 – that are not limited to addressing the objectors' specific contentions.

AIG's remaining argument is that Justice Kapnick "drew inferences in favor of Petitioners, accepting their arguments as true or at least disregarding Respondents' contrary arguments, despite substantial support in the record." AIG Motion at 22. None of AIG's citations to the Judgment remotely supports its assertion that Justice Kapnick placed the burden on AIG or the other objectors, or drew improper inferences in favor of BNYM. Instead, what these citations show is that Justice Kapnick considered the evidence and the arguments of *both* sides, and then made the fact findings she included in the Judgment. Once again, AIG's real complaint here is not that Justice Kapnick shifted the burden to the objectors; it is that she considered their arguments and rejected them.

4. The Judgment Includes Sufficient Analysis and Explanation

AIG's claim that the Judgment omits sufficient analysis or explanation is also wrong. Nothing in New York law requires a court to enumerate *ad nauseam* every argument of the losing side and every bit of evidence that informs the final judgment. A trial judge need only set forth in a judgment "the essential facts upon which it based its decision." *Kaywood Prop., Ltd. v. Glover*, 34 A.D.3d 645, 645-46 (2nd Dep't 2006).[6] The 53-page Judgment rendered by Justice

[6] *Accord* 8A Carmody-Wait 2d New York Practice § 60:17 (2014) ("A formal statement of a court's findings of fact is not required under the rule requiring a statement of the essential facts

Kapnick plainly meets this standard: it is replete with references to the essential facts upon which the decision is based.[7]

Even if AIG were correct that sufficient explanation is omitted (and it is not), granting reargument would still be unwarranted. "Even if a trial court sitting without a jury has failed to satisfy its obligation to state findings of fact it deems essential to its decision, an appellate court will refrain from remitting a case to that trial court if the appellate court's examination of the record in the action permits effective review as is the case if the record is complete and the

---

upon which a court relied to reach its decision. The trial court is required only to state the essential facts upon which it based its decision and is not required to state the evidentiary facts contained in the record or the basis for its credibility determinations. A memorandum decision of a trial court, although brief, may fully comply with the requirement that the court make findings of facts it deems essential to its decision if the decision sets forth all the ultimate determinative facts necessary for the relief sought. Also, the absence of express findings of fact does not invalidate a decision if the decision itself is the equivalent of express findings of fact on each and every material issue of fact.").

[7] Among the essential facts identified in the Judgment, which formed the basis of Justice Kapnick's decision, are: (i) the role of BNYM and the other parties in the securitization transaction at issue, Judgment at 14-15; (ii) the relevant terms of the agreements underlying the claims subject to the settlement, *id.* at 15-16; (iii) the claims at issue in the settlement and the manner in which they were brought to the attention of BNYM , i*d.* at 16-18; (iv) the negotiations conducted between BNYM, Bank of America, and the Institutional Investors that led to the settlement, *id.* at 18, 37 n. 17; (v) the details of the settlement agreement, *id.* at 18, 32-34; (vi) BNYM's specific rationales for entering into the settlement agreement, *id.* at 26-27, 34-35, (vii) the circumstances surrounding BNYM's retention of counsel and attention to conflict issues, *id.* at 27-28; (viii) the circumstances surrounding BNYM's entry into the forbearance agreement, *id.* at 29-30; (ix) BNYM's reasoning behind agreeing to include the further assurances clause in the settlement agreement, *id.* at 32-33; (x) the specifics of BNYM's analysis of the mortgage repurchase and successor liability claims, including the work of the experts retained by BNYM to assist in its analysis of these claims, *id.* at 33-44; (xi) the specifics of BNYM's analysis of the document exception claims, *id.* at 44-45; (xii) the specifics of BNYM's analysis of the servicing claims, *id.* at 46-47; and (xiii) the specifics of BNYM's analysis of the loan modification claims, *id.* at 47-52. In addition, the Judgment also sets out the conclusions of law on which it rests, including: (i) BNYM's ownership of the claims at issue in the settlement, and its authority to prosecute and settle them, *id.* at 22-23; and (ii) the proper scope of judicial review of a trustee's discretionary decision making in an Article 77 proceeding is limited to determining whether the trustee abused its discretionary authority by acting beyond the bounds of reasonable judgment, *id.* at 23-26.

essential facts can be established by a review of the evidence." 8A Carmody-Wait 2d New York Practice § 60:23 (2014).[8] Thus, the only appropriate court to review the adequacy of the record and decision in this matter is the First Department; this Court, one of coordinate jurisdiction to then-Supreme Court Justice Kapnick, should decline to do so. *Public Serv. Mut.*, 56 A.D.2d at 812; *Schneiderman*, 136 Misc.2d at 398-99 (declining to exercise discretion to grant reargument of decision of a fellow trial judge because it would be "tantamount to collateral appellate review by me of a decision and order of a colleague of this bench.").

5. The Judgment Does Not Leave Issues Unresolved

When it ruled on AIG's motion to stay entry of judgment, this Court heard and rejected AIG's claim that the Judgment leaves important issues unresolved. AIG's claim on this point is not merely false, it does not raise "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR §2221(d)(2). As explained in the briefing on AIG's motion to stay entry, the issues AIG claims were "left open" were not left open and the arguments AIG asserts require further proceedings in this Court do not require any proceedings at all. Rather, each concerns the mechanical implementation of the settlement *after* Final Court Approval. Each one is expressly addressed in the settlement agreement, which states that these issues (such as the final allocation of the settlement payment) will be

[8] *Accord Marks v. Macchiarola*, 250 A.D.2d 499 (1st Dep't 1998) ("Brief though the trial court's decision is, it set forth sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 2413(b), and, in any event, the record of the entire trial transcript with exhibits allows this Court to make the requisite findings."); *Bonner v. Nash*, 70 Misc.2d 752, 753 (N.Y. App. Term 1st Dept. 1972) ("Appellant argues that the judgment is improper because of the absence of findings of fact and the rendering of a decision which omits to state the facts essential to the court's determination. Where the record appears complete, as is the record herein, this court may make the requisite findings in the exercise of its discretion.")

implemented when the settlement becomes final.[9] Thus, nothing is "left open" by the Judgment. To the contrary, the Judgment approves BNYM's exercise of discretion in entering into a settlement agreement specifying that these terms will be implemented once the settlement is final, following appeal.

6. Justice Kapnick Did Not Give "Undue Deference to the Trustee" in Light of the Loan Modification Ruling

AIG is again wrong when it claims that Justice Kapnick's finding regarding BNYM's evaluation of the loan modification issue somehow invalidates, or requires a reexamination of, her other findings. In entering the Judgment, Justice Kapnick separately evaluated the trustee's conduct in a number of areas, including: its negotiation of the settlement and its decision about which arguments it would emphasize in the negotiations, its retention of counsel, its evaluation of the settled claims, the process it employed to decide whether to enter into the settlement, its conduct with regard to certificateholders, and its motivations in carrying out each of these various acts. In each instance, save one, Justice Kapnick found that BNYM acted reasonably, in good faith, and within its discretion. On the narrow issue of BNYM's evaluation of the loan modification claim included in the settlement, Justice Kapnick found that BNYM had not evaluated the claim, and therefore had acted unreasonably solely with respect to this issue.[10]

---

[9] Section 3(c) of the Settlement Agreement provides that the settlement proceeds will be allocated among the trusts based on their relative share of losses as determined *at the time the settlement is finalized following appeal*. PTX 1.11 (Doc. No. 1066). Section 3(d)(iv) provides that Bank of America can exclude trusts with financial-guaranty providers if, *at the time the settlement is finalized following appeal*, it has not reached certain agreements with such financial guaranty parties. *Id.* at 1.13-14. Section 4(b) provides that Bank of America shall retain the portion of the settlement proceeds allocated to any trusts that are so excluded *at the time the settlement is finalized following appeal*. *Id.* at 1.15.

[10] Specifically, Justice Kapnick found that "there is no evidence to suggest that the Trustee evaluated Bank of America's legal argument that the language in the PSAs do not require repurchase of modified loans." Judgment at 52. The Institutional Investors take issue with this finding – there is in fact abundant evidence in the record that BNYM evaluated this issue – but

Nothing about this finding affects or calls into question the soundness and evidentiary support for Justice Kapnick's *other* findings.

The authorities cited by AIG in support of this claim have no bearing on the issue. Each deals with the inapposite issue of a conflicted trustee, and the difficulty in distinguishing conflicted decisions from un-conflicted decisions.[11] Here, Justice Kapnick rejected each and every allegation of conflict asserted against BNYM. *See* Doc. No. 825 at 16 n.3 (December 10, 2010 indemnification letter did not raise a "colorable claim of conflict or self-dealing."); Judgment at pp. 28 (rejecting claim that Mayer Brown conflict waiver presented conflict); *id.* at pp. 29-30 (rejecting claim that forbearance agreement presented conflict); *id.* at pp. 31-32 (rejecting claim that Trustee's failure to provide notice to certificateholders of settlement negotiations presented conflict). AIG has cited no authority, because there is none, to support its nonsensical assertion that a conflict-free trustee, acting in good faith, who acts reasonably in every respect (save one), is *ipso facto* transformed into a *conflicted* trustee simply because it *errs* in its consideration of a single issue. This cannot be the law: if it were, every trustee who simply makes a *mistake* would be transformed into a conflicted trustee who should be presumed to have acted unreasonably with respect to all other actions it has taken.

IV. RESPONSE TO THE SCOTT + SCOTT OBJECTORS' MOTION

The Scott + Scott objectors' motion should be denied because it makes no attempt to address issues properly before the Court on a motion to reargue – i.e., "matters of fact or law

---

the existence and sufficiency of that record evidence is a matter to be resolved by the First Department, on appeal, not by this Court.

[11] AIG Motion at 21 citing Bogert, THE LAW OF TRUSTS AND TRUSTEES § 543, at 228 (rev'd 2d ed. 1993) (addressing "disloyal acts" by a trustee with a "representation of two interests"); *Meinhard v. Salmon*, 249 N.Y. 458, 466-67 (1928) (addressing the situation of a trustee in a self-interested conflict).

allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR §2221(d)(2).

The motion is also deficient because it re-argues this Court's decision to enter the Judgment. Judgment, however, *has* been entered. There is nothing further for the Court to do on that front. Equally deficient are the implausible and irrelevant hypotheticals the motion posits about the potential effect of the Judgment on the settlement, none of which require a ruling from this Court.

The Judgment does not approve parts of the settlement and reject others. The issue presented in the Article 77 proceeding was not whether the settlement or its parts should be approved. It was whether BNYM's *exercise of discretion in deciding to enter into the settlement* would be approved. The Judgment approves that exercise of discretion in virtually every respect, save one (which is the subject of BNYM's pending appeal). None of that undermines the binding nature of the Settlement Agreement.

The Judgment, as currently formulated, was a starting point, but it is not the end point, in the process of obtaining the "Final Court Approval" required to implement the Settlement Agreement. The presence or absence of Final Court Approval – as clearly explained in Sections 2(a) and (b) of the Settlement Agreement -- (i) can only be determined after all appeals are final; and (ii) can only be treated as absent if such approval is refused "by a court with no possibility of further appeal or proceedings that could result in Final Court Approval," and the parties do not otherwise agree that the final order, following all appeals, is sufficient. PTX 1.6-7 (Doc. No. 1066). Both sides have appealed portions of the Judgment. *See, e.g.* Doc No. 1090 (BNYM Notice of Appeal); Doc. No. 1103 (AIG Notice of Appeal). On appeal, the Appellate Division will have the power to affirm, reverse, modify, or reform any of the findings in the Judgment, in

light of its review of the record. *Baba-Ali v. State*, 19 N.Y.3d 627, 640 (2012) ("[W]here, as here, the Appellate Division reviews a judgment after a nonjury trial it has virtual plenary power to render the judgment it finds warranted by the facts."). Thus, any determination of whether Final Court Approval has been, or can be, obtained is entirely premature at this stage.

For the same reasons, the Judgment does not give any party, or Bank of America or Countrywide, the right to "withdraw from the Settlement and treat it as a nullity," Scott + Scott Motion at 1, nor does it constitute an advisory opinion. The Settlement Agreement remains binding and enforceable, and the parties are now in the same position they would have been in if the Judgment had granted or denied all of the relief BNYM sought: they are—and remain—parties to a binding agreement, implementation of which will depend upon the outcome of the appellate process. Thus, Scott + Scott's speculations about implementation issues are not ripe for decision at this time.

V. CONCLUSION

For all the forgoing reasons, the Institutional Investors respectfully request that the Court deny the AIG and Scott + Scott objectors' motions to reargue.

Dated: New York, New York
April 1, 2014

WARNER PARTNERS, P.C.

By: /s/ Kenneth E. Warner
Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS LLP
Kathy D. Patrick (*pro hac vice*)
Robert J. Madden (*pro hac vice*)
David Sheeren (*pro hac vice*)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for the Intervenor-Petitioners, the Institutional Investors