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 Assigned to: Hon. Saliann Scarpulla.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR LEAVE TO REARGUE PURSUANT TO CPLR § 2221(d)

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Respondent American International Group, Inc., on behalf of itself and its entities, ("AIG" or "Respondents"), respectfully submits this reply memorandum of law in further support of its Motion for Leave to Reargue pursuant to CPLR § 2221(d).

INTRODUCTION

In their oppositions, both The Bank of New York Mellon ("BNYM") and the Institutional Investors (with BNYM, "Petitioners") strain to establish that the Court's January 31, 2014 Order (the "Order") means something other than what it says. But the Order speaks for itself: the Court did not purport to conduct a trial; instead, it expressly concluded—wrongly in AIG's view—that the Settlement Agreement could be approved in substantial part on summary judgment pursuant to CPLR § 409. In so ruling, the Court overlooked significant issues of material fact that should be addressed following reargument.

But even if one were to disregard the plain language of the Order and conclude that the Court resolved disputed issues of fact following trial, reargument is nonetheless warranted because the Order's recitation of the parties' submissions and testimony, followed by a single-sentence conclusion approving the Trustee's conduct in substantial part, does not provide the analysis or factual findings following a bench trial that the CPLR requires. While Petitioners would have the Court place on the Appellate Division the burden of gleaning the basis for the Order's conclusion, it would further the interests of judicial economy and efficiency for this Court to conduct further proceedings now so that the Appellate Division may have the benefit of a developed decision.

Petitioners, moreover, provide no authorities to support a mere "abuse-of-discretion" review of a Trustee's action that seeks to bind *absent* and *unrepresented* trust beneficiaries. This omission is particularly salient given the Court's ruling that the Trustee abandoned its duties and obligations by failing to conduct *any* investigation into significant claims before settling them for

zero value. Indeed, Petitioners offer no persuasive explanation why that failure did not infect other portions of the unitary settlement—something the Order does not take into account. And Petitioners do not meaningfully dispute AIG's showing that the Order wrongly placed the burden on AIG, again overlooking settled law that the burden rests solely with the settlement proponents.

Finally, Petitioners are unable to overcome AIG's showing that reargument is warranted so that the Court may address the numerous unresolved issues related to the settlement prior to any appeal. These outstanding issues, which the Order does not address, are critical to the certificateholders' rights. Nothing in the Settlement Agreement permits Petitioners to defer resolution of these issues until a point when Petitioners will be free from judicial oversight.

AIG recognizes the challenges that a reargument motion poses for a newly-assigned judge, and it has not brought this motion lightly. But given the magnitude of the issues that the Order either overlooked or misapprehended, AIG respectfully requests that the Court give its application due consideration and grant reargument.

ARGUMENT

I. PETITIONERS ARE UNABLE TO JUSTIFY THE COURT'S RESOLUTION OF THIS ARTICLE 77 PROCEEDING ON A SUMMARY JUDGMENT STANDARD PURSUANT TO CPLR § 409(B)

BNYM and the Institutional Investors do not dispute that the Court has the authority to grant reargument with respect to the Order; instead they ask the Court to deny reargument as a matter of discretion.[1] But to do so would require the Court to disregard the plain language of the

[1] The Institutional Investors urge (II at 2-3) the Court to deny AIG's motion to reargue on the ground that one judge should not disturb the decision of a fellow judge of coordinate jurisdiction. But the fortuity of Justice Kapnick's elevation to the Appellate Division, First Department, and the ministerial reassignment of this case provide no grounds to deprive AIG of its right to seek reargument and to receive full consideration of this motion. Indeed, CPLR § 2221(a), by its plain terms, authorizes the currently assigned judge to review and modify the Order, given that Justice Kapnick is now "unable to hear" AIG's motion by virtue of her elevation. CPLR § 2221(a) ("A motion for leave to renew or to reargue a prior motion . . . shall

Order granting *summary judgment* to Petitioners pursuant to CPLR § 409, the Court's repeated statements that it conducted a hearing pursuant to that provision, and Petitioners' own *concessions* that there are triable issues of fact. Under these circumstances, the Court should, in the sound exercise of its discretion, grant reargument so that it may resolve these disputed issues of fact as to the Trustee's conduct throughout the settlement process and, in addition, the reasonableness of the settlement itself.

A. The Court Held A Hearing And Explicitly Granted Summary Judgment Under CPLR § 409

Petitioners are simply wrong to contend that the Court did not grant summary judgment following a hearing under CPLR § 409. While the Institutional Investors label AIG's characterization of the proceedings "absurd[]" (II at 9) and BNYM says they rest on a "tortured misreading" of the Order (BNYM at 4), such rhetoric is no match for the text of the Order itself. The Order could not have more clearly stated that the Court held a "hearing" pursuant to CPLR § 409—not the equivalent of a trial pursuant to CPLR § 410: "**The Court notes that this hearing was held in accordance with CPLR § 409(a), which allows the Court to 'require the submission of additional proof,' *i.e.* a hearing on a petition in a special proceeding.**" Order at 22. Nor could the Order have been any clearer in stating that the Court—having held a hearing to receive "additional proof"—applied a summary judgment standard in evaluating the proof received:

> CPLR § 409 "makes clear that the special proceeding is to be adjudicated in the same manner as a motion for summary judgment." Vincent C. Alexander, Practice Commentaries, CPLR

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be made, on notice, to the judge who signed the order, *unless he or she is for any reason unable to hear it*") (emphasis added); *see also Friends of Keuka Lake, Inc. v. DeMay*, 206 A.D.2d 850, 850 (4th Dep't 1994) (motion to reargue properly decided by different judge where judge who signed original order had recused himself and, thus, was "unable to hear it"); *People v. Acevedo*, 140 A.D.2d 846, 847 (3d Dep't 1988) (same).

> § 409 (McKinney 2013) ("Thus, if the papers fail to raise a triable issue of fact, the court is to grant judgment as a matter of law in favor of the appropriate party. If a triable issue of fact is raised, reference must be made to CPLR 410.") Therefore, **the Court will apply the summary judgment standard in making its determination on the papers and proof submitted.** *See Matter of Friends World College v. Nicklin*, 249 AD2d 393, 394 (2d Dep't 1998).

Order at 25 (emphasis added). And the Order could not have been clearer in declining to render factual findings (which, of course, would be inappropriate on summary judgment): "**[T]he factual findings that the Petitioners ask this Court to adopt are just that, factual findings, not appropriate to be included in the body of an Order and Judgment.**" Order at 13.[2] Petitioners' selective quotations and creative interpretation of this language (BNYM at 2-5 and II at 8-9) cannot be reconciled with the Order itself.

BNYM likewise overreaches (BNYM at 3) in contending that, prior to the Order, Justice Kapnick viewed the hearing as a trial of disputed facts conducted under CPLR § 410. For instance, BNYM's citations (BNYM at 3 n.1) to isolated uses of the word "trial" during the hearing are taken out of context and are contradicted by Justice Kapnick's contemporaneous statements advising the parties that the proceeding was a hearing, not a trial. In fact, BNYM identifies only two instances in which Justice Kapnick even used the word "trial"—a reference to the "standard procedure at trial" and a directive to "move the trial along"—neither of which reflects any analysis of the nature of the proceedings or an intention to characterize them as a trial.

On the other hand, as AIG has shown, Justice Kapnick addressed this specific issue during the proceedings, emphasizing on the record that "this really isn't a trial. It's really a

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[2] In the same footnote, the Court noted that it "adopts some of the factual findings, in whole or in part, in the context of discussing particular issues, but will not ultimately convert these findings into a Final Order and Judgment." *Id.* at 13-14.

hearing, an evidentiary hearing on the - - on whether or not I should approve the settlement." Tr. 5186:23-5187:12. Petitioners cannot avoid this unambiguous statement, particularly in conjunction with the language in the Order itself.

In sum, the Order did exactly what it said it did: It granted summary judgment in substantial part to Petitioners. Nothing in the Order or Justice Kapnick's prior statements suggests otherwise.

B. Numerous Disputed Issues Of Material Fact Required A Trial And Factual Findings Pursuant To CPLR § 410

Petitioners concede (BNYM at 4-5; II at 8) that there were triable issues of fact that the Court was required to resolve under CPLR § 410. The Institutional Investors even provide a table (II at 4-6) indicating where the Order recites some of the disputed factual issues, including: BNYM's decision to hire conflicted counsel; BNYM's entry into the Forbearance Agreement; BNYM's receipt of indemnity in exchange for not giving notice of the Forbearance Agreement; BNYM's agreement to the Further Assurances clause; BNYM's delegation of settlement negotiations to the Institutional Investors; BNYM Trust Committee's cursory evaluation of the settlement; BNYM's use of the GSE Experience as a proxy for loan file review; BNYM's reliance on the Brian Lin report to support the settlement amount; BNYM's reliance on the other expert reports during settlement negotiations; and BNYM's release of documentation and servicing claims. *See also* Mem. 6-20 (identifying these issues as triable issues).[3] Neither Petitioner, however, addresses AIG's showing (*id.*) that the Order omitted still other disputed issues of fact.

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[3] In their chart, the Institutional Investors are unable to show where the Order contains any specific findings on these issues, instead pointing only to the general "finding" at the very end of the Order that "paragraphs (h), (i), (j), (k) and (t) of the PFOJ are approved to the extent that they do not apply to the loan modification claims."

Given Petitioners' concession of disputed issues of material fact and the Order's unambiguous resolution of this proceeding on summary judgment, reargument is warranted so that the Court may conduct the additional proceedings necessary to resolve those factual disputes.

C. Even If The Court Resolved The Proceeding Under CPLR § 410, Reargument Is Necessary Because The Order Omits Analysis, Explanation, And Factual Findings

Even if the hearing were deemed a trial under CPLR § 410 (which it was not) and the Order were deemed to have resolved disputed factual issues (which it does not purport to do), reargument would still be warranted, because the Order does not contain the requisite factual findings under CPLR § 4213 or provide any analysis or explanation of its result, as is necessary for informed appellate review.

First, Petitioners overstate the Order's explanation of its one-sentence conclusion 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." Order at 52-3. The Order offers no explanation as to how the Court reached that conclusion and provides virtually no analysis or examination of the related submissions and testimony. And, although the Order contains a lengthy section entitled "Analysis," that section only recites a number of the parties' submissions and testimony. *Id.* at 26-52. Petitioners thus rely (II at 3 and BNYM at 4) on the Order's general statement that the Court ruled "[a]fter reviewing the voluminous record and carefully considering the arguments presented by all counsel," (*id.* at 52), and the Order's approval of paragraph (t) of the PFOJ, which states that "[a]ll objections to the Settlement have been considered and are overruled and denied in all respects." *Id.* at 53. But those statements provide no explanation as to how the Court weighed the evidence in reaching its result.

Second, the Order's mere *recitation* of some of the parties' submissions and arguments is no substitute for factual findings that resolve the identified issues, as required by CPLR § 4213. *See, e.g.*, *People Theatres of N.Y. Inc. v. City of New York*, 84 A.D.3d 48, 59 (1st Dep't 2011) (remitting case to trial court to issue findings of fact where court had "failed to state the particular facts on which it based its judgment; rather, it simply detailed the municipality's evidence and arrived at legal conclusions"); *Bowie v. St. Cabrini Home, Inc.* 906 N.Y.S.2d 778 (App. Term 2009) (twice holding appeal in abeyance pending trial court's issuance of a decision conforming with the specificity requirements of CPLR 4213(b) because of trial court's conclusory determinations that were stated in an "elliptical fashion" and the failure to explain the applicable method of calculation of the ad damnum). Indeed, BNYM overreaches when it relies on the Order's use of the term "findings," and fails to acknowledge that the term is used almost exclusively in the Order to describe the *proposed* findings in the PFOJ that BNYM and the Institutional Investors asked the Court to adopt (but which the Court declined to do).[4] Thus, while the Institutional Investors list in a footnote a number of facts in the Order they contend are "essential" to the result (II at 11 n.7), they conspicuously fail to identify any discussion, or analysis, in the Order connecting those facts to the ultimate conclusion. And while they contend (II at 10) that the "Judgment also includes express findings" in support of the one-sentence conclusion, they never identify any such findings.

Reargument is thus warranted so that the Court may provide the analysis and render the findings necessary to resolve the disputed issues of fact that all parties acknowledge exist.

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[4] *Compare* BNYM's selective citation at 4 *with* Order at 13 n.5 ("The Court thus, throughout this decision, adopts some of the factual findings, in whole or in part, in the context of discussing particular issues, but will not ultimately convert these findings into a Final Order and Judgment. This Court believes it has made the appropriate determinations required of it by this Article 77 proceeding."). BNYM's selective citation at 4 also neglects to acknowledge that its second reference to "findings" concerns only the standard of review.

II. PETITIONERS ARE UNABLE TO DEFEND THE ORDER'S DEFERENTIAL STANDARD OF REVIEW AND PLACEMENT OF THE BURDEN ON RESPONDENTS

A. The Court Was Required To Review The Reasonableness Of The Settlement Agreement, Particularly In Light Of Its Ruling On The Loan Modification Claims

AIG has also demonstrated that reargument is warranted because the Order misapprehends New York law by not evaluating the *reasonableness* of the Proposed Settlement, and instead considers only whether BNYM *abused its discretion* by entering into the Proposed Settlement. *See* Mem. 13-20. In response, Petitioners seek to distinguish AIG's authorities in which courts reviewed the substantive reasonableness of the settlement, arguing that (1) the Restatement (Second) of Trusts § 187, cmt. e (1959) does not permit the Court to evaluate the substantive fairness of the settlement; and (2) the cases upon which AIG relies involve settlements governed by Federal Rule of Civil Procedure 23.1 and Federal Bankruptcy Rule 9019. *See e.g., Geltzer v. Andersen Worldwide, S.C.*, No. 05 Civ. 3339 (GEL), 2007 WL 273526, at *1 (S.D.N.Y. Jan 30, 2007); *Goldsholl v. Shapiro*, 417 F. Supp. 1291, 1295-96 (S.D.N.Y. 1976).

Both of these arguments miss the important point: courts should evaluate the reasonableness of a settlement agreement that seeks to bind *absent* parties that were *not* represented in the settlement negotiations. In fact, it is through such review that courts ensure that a trustee does not "act[] beyond the bounds of [] reasonable judgment" (part of the standard in the Restatement (Second) of Trusts cited by the Court and BNYM) by treating parties excluded from settlement negotiations unfairly or by permitting a settlement to further the represented parties' interests at the expense of the unrepresented parties. Order at 24. Having chosen to seek judicial approval of a proposed settlement agreement that was negotiated in an environment in which some parties were not only excluded, but actively blocked from settlement

negotiations, BNYM has triggered the Court's responsibility to independently determine whether the settlement is reasonable. The Court's independent assessment of the settlement is particularly important here, where the Trustee shed all semblance of neutrality by pledging unconditional allegiance to the settlement *before* certificateholders had an adequate opportunity to be heard.

Petitioners likewise fail to rebut AIG's showing (Mem. 20-23) that the Court applied the wrong standard once it ruled that BNYM abused its discretion by settling the loan modification claims for zero value without conducting the slightest investigation. *First*, Petitioners concede (BNYM at 6, 8-10; II at 13-14) that when a trustee acts outside of its discretion, a more stringent standard of review applies. But they do not explain why the Court, having concluded that BNYM acted outside of its discretion with respect to the loan modification claims, was permitted to apply multiple standards of review to conduct of the same trustee with respect to a single settlement. If BNYM abused its discretion as to any part of the settlement process, deference is not warranted.

Second, the Institutional Investors (II at 14) suggest dire consequences for every trustee (where one "*mistake*" might transform a trustee into a conflicted trustee for all other actions); but they ignore that the facts here are distinguishable from that hypothetical situation, because BNYM's actions and decisions were part of a single, global settlement of interrelated claims. The circumstances here instead are analogous to the cases in which all actions by a conflicted trustee were deemed suspect (and this is particularly so since there are unresolved disputed issues of fact concerning whether the Trustee was in fact conflicted, *see* Mem. 6-8, 20-23).

Third, BNYM argues that interpreting the standard in this way would force trustees "to spend uneconomic amounts of money to 'expertize' every decision – no matter how small – to

ensure that decisions on other matters, however unrelated, would be upheld." BNYM at 8. Yet, BNYM ignores that, covered by many indemnities from Bank of America, it did seek expert advice on many subjects, albeit *after* it had entered into the $8.5 billion settlement, in an attempt to insulate the settlement from challenge.

Thus, reargument is warranted so that the Court may apply the proper standard of review to the Trustee's approval of the Proposed Settlement, which the Order either overlooked or misapprehended.

B. The Court Wrongly Placed The Burden On Respondents To Show That The Trustee Abused Its Discretion

Even if abuse of discretion were the applicable standard, Petitioners provide little rebuttal to AIG's showing that the Court misapprehended New York law by considering whether there was *any* evidence to support BNYM's actions instead of requiring the settlement proponents to prove that BNYM did not abuse its discretion. The exercise of discretion "reasonably and in good faith" does not mean that a Trustee will be protected only so long as the record contains *de minimis* evidence of prudence. Yet, the one-sentence conclusion in the Order demonstrates that the Court deferred to BNYM *in every instance* except where BNYM performed absolutely no analysis, valuation, or other investigation prior to settling the loan modification claims for *no* value. This level of deference to BNYM is not justified by New York law, especially in the summary judgment context, in which movants (like BNYM) must demonstrate the clear absence of any material issues of fact and all reasonable inferences must be drawn in favor of the non-moving parties.

BNYM asserts that AIG "mischaracterize[s] the Judgment" (BNYM at 4), yet it cites the *exact* same language from the Order that demonstrates that the Court relied on a presumption of good faith and placed the burden on the Respondents to provide evidence that BNYM's

unreasonableness and bad faith amounted to an abuse of discretion. The Institutional Investors simply ignore this part of the Order. And it is highly misleading for BNYM to assert that "in no way does the Judgment suggest that the evidence was in equipoise, such that the burden of proof would have affected the outcome" (BNYM at 12), when the vast majority of the Order provides only an agnostic recitation of some of the parties' submissions and testimony without weighing any of those arguments or evidence. Where there is evidence that a Trustee abused its discretion, as there is here, the burden falls on the Trustee to rebut that evidence conclusively, and the Trustee is not entitled to rely on a good faith presumption.

As noted above, in contrast to BNYM and the Institutional Investors' assertions, there is no indication in the Order that the Court considered whether BNYM's abuse of discretion with regard to the loan modification claims infected the entire settlement process. The other interrelated claims all involve the same global settlement that BNYM seeks to have approved by the Court. Thus, once the Court identified one instance where BNYM had abdicated its discretionary power to act reasonably and in good faith, the burden should have been placed on Petitioners to prove why that abuse of discretion did not taint the entire settlement.

Unlike the Institutional Investors, BNYM attempts to hedge its position (BNYM at 12) by arguing that, had it done so, the Court would have been justified in relying on a presumption of good faith and expecting the Objectors to present evidence to the contrary. This argument, however, ignores that such a presumption cannot survive where there is clear evidence that the Trustee acted unreasonably with regard to one part of an interrelated global settlement. *See supra*, at 8-9.

Reargument is thus warranted so that the Court may apply the correct burden of proof, as well as a more rigorous standard of review to the Trustee's actions.

III. PETITIONERS ARE UNABLE TO DEFEND THE ORDER'S FAILURE TO DISPOSE OF NUMEROUS ISSUES RELATING TO THE SETTLEMENT

Petitioners cannot overcome AIG's showing (Mem. 24-25) that the Order overlooked many issues that should have been resolved prior to entry of final judgment.[5] *First*, Petitioners misleadingly assert that "this Court heard and rejected AIG's claim that judgment leaves important issues unresolved." II at 12; *see also* BNYM at 1. In fact, while the Court declined to delay entry of judgment, it explicitly acknowledged that AIG's pending motion for reargument was the proper procedural vehicle in which to raise this issue. *See*, February 19, 2014 Tr. 33:2-5, 33:18-25, and 34:5-18.

Second, BNYM's concession (BNYM at 17-18) that there will be no settlement if the final judgment is not modified by the Appellate Division to include a release of the loan modification claims, undermines Petitioners' argument (II at 15-16) that the final judgment sufficiently determines the rights of the parties.[6] Approval of a settlement in which the final settlement amount or the recipients of settlement proceeds is unknown—and the settlement itself is conditioned on events not in the final judgment—does not determine the rights of the parties and is tantamount to an improper advisory opinion.

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[5] As AIG explained, the Order overlooks critical issues relating to the effectuation of the settlement, which remain outstanding, including: a full accounting of the method by which losses will be calculated; the amount of money that will be distributed to each trust; the number of trusts that will be excluded from the settlement; the amount of money that will be retained by Bank of America; the method and amount of distributions within each trust; and the relationship between the amount each trust will be paid and the amount of damage suffered by each trust as a consequence of the claims being released. *See* Mem. 24-25.

[6] The Institutional Investors have a different view, maintaining that the Settlement Agreement will survive no matter what, and asserting, in stark contrast to the Court's conclusion, that "[t]he Judgment does not approve parts of the settlement and reject others." II at 15. The Institutional Investors likewise maintain that "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,'" even though the Trustee expressly disagrees with this position and has stated in open Court that it can elect to treat the Settlement as a nullity. *Compare* II at 16 *with* Feb. 19, 2014 Tr. 32:7-10.

Third, Petitioners have no meaningful response to AIG's argument (Mem. 24-25) that the outstanding issues should be subject to judicial supervision prior to entry of final judgment—with a single omnibus appeal following resolution of all issues. Indeed, BNYM's and the Institutional Investors' conflicting views (*see supra*, at 12 n.5) reinforce the inefficiencies and unfairness of postponing resolution of these issues to a point at which judicial supervision is unavailable, and AIG and the other Respondents may not be able to obtain a remedy for any future misconduct or secret negotiations that BNYM elects to engage in with Bank of America and/or the Institutional Investors.

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We recognize the difficulty that attends the effort of a newly-assigned judge to review the work of a predecessor. Yet, as the case law makes clear, in those circumstances, a party has the right to seek reargument, and the Court has the responsibility to consider that application on the merits. Of course, we want to assist the Court as much as possible. Were the Court to grant AIG's motion for reargument, and upon reargument, vacate the Order to the extent it approved the Settlement Agreement, AIG does not ask the Court to preside over a lengthy proceeding at which all of the evidence that was presented to Justice Kapnick would again be introduced. Rather, AIG proposes that the Court receive such limited additional testimony and evidence as may be necessary, as well as briefing directing the Court to the portions of the record that are relevant to the issues that the Court must decide under the correct legal standards. AIG commits to working with the Court and the other parties to develop a fair and streamlined procedure so that the disputed issues can be resolved pursuant to CPLR § 410.[7]

[7] It remains AIG's position that a jury trial should be held to resolve the disputed issues of fact. *See* Mem. 4 n.4 (citing Doc. No. 826). The denial of AIG's jury trial demand is part of AIG's pending cross-appeal of the final judgment. *See* Doc. No. 1103.

CONCLUSION

The Court should grant reargument and, on reargument, vacate the Order to the extent it approved the Settlement Agreement and decline to approve the Settlement Agreement in whole or in part. Alternatively, the Court should grant reargument and, on reargument, resolve the outstanding issues identified in the opening memorandum.

Dated: New York, New York
April 23, 2014

Respectfully submitted,

/s/ Mark C. Zauderer
FLEMMING ZULACK
WILLIAMSON ZAUDERER LLP
Mark C. Zauderer
Megan P. Davis
One Liberty Plaza
New York, New York
Telephone: (212) 412-9500
Fax: (212) 964-9200
mzauderer@fzwz.com

REILLY POZNER LLP
Daniel M. Reilly
1900 Sixteenth St., Suite 1700
Denver, Colorado 80202
Telephone: (303) 893-6100
Fax: (303) 893-1500
dreilly@rplaw.com

JONES & KELLER, P.C.
Michael A. Rollin
1999 Broadway, Suite 3150
Denver, Colorado 90202
Telephone (303) 573-1600
Fax: (303) 573-8133
mrollin@joneskeller.com

Attorneys for the AIG Entities