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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), 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 (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

AFFIRMATION OF MATTHEW D. INGBER

MATTHEW D. INGBER, an attorney admitted to practice in the courts of the State of New York, affirms under penalty of perjury as follows:

1. I am a member of the law firm of Mayer Brown LLP, attorneys for Petitioner The Bank of New York Mellon ("Trustee"). I submit this affirmation in support of the Trustee's Memorandum of Law In Opposition To Motion to Convert the Special Proceeding to a Plenary Action, filed on April 13, 2012.

2. Attached hereto as **Exhibit A** is a true and complete copy of the Petition for Construction of Trust and Approval of Settlement Agreement, exclusive of exhibits, filed in *In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, filed January 28, 1998.

3. Attached hereto as **Exhibit B** is a true and correct copy of the "side letter" to the Settlement Agreement between the Trustee and BAC Home Loans Servicing, LP, dated June 28, 2011.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Guaranty that was attached to the "side letter" as Exhibit 2, dated June 28, 2011.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Order and Judgment in *In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, filed October 3, 2000.

Dated: April 13, 2012
New York, New York

/s/ Matthew D. Ingber
Matthew D. Ingber

EXHIBIT A

VS

At IAS Part 10 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York, on the __ day of January 1998

Present: Hon. B. Shainswit, Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

98101530

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In the Matter of the Application of

IBJ SCHRODER BANK & TRUST COMPANY
(not in its individual capacity but in its capacity as Trustee under a Trust Agreement dated as of December 21, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company and the Beneficiaries thereunder),

Petitioner,

for an order, pursuant to CPLR § 7701, For a Construction of an Indenture and Approval of a Proposed Settlement.

Index No. 98/_____

IAS Part 10
(Shainswit, J.)

ORDER TO SHOW CAUSE

FILED

JAN 28 1998

COUNTY CLERK'S OFFICE
NEW YORK

----------x

Upon reading and filing the annexed Verified Petition of Petitioner IBJ SCHRODER BANK & TRUST COMPANY ("IBJ Schroder" or the "Investor Trustee"), dated January 14, 1998 and the exhibits thereto, the Affirmation of John S. Willems, Esq., sworn to January 21, 1998, and the Memorandum of Law submitted in support of the application for an order granting judgment in favor of IBJ Schroder on its Petition, let the Beneficiaries of the Trust Agreement, dated as of December 21, 1985 among Resources Satellite Corp. and J. Henry Schroder Bank & Trust Company, or their attorneys, show cause before this Court, at IAS Part 10 to be held in and for the County of New York, at the Courthouse, 60 Centre Street, room __, New York, New York, on the __ day of _____, 1998, at ____ o'clock in the ___ noon of

that day, or as soon thereafter as counsel can be heard, why an order should not be made, pursuant to CPLR § 7701, granting judgment in favor of IBJ Schroder on its Petition as follows (capitalized terms are as defined in the Petition):

(a) declaring that under the terms of the Investor Trust Agreement, the Investor Trust and Trust Estate have not terminated and that IBJ Schroder, as Investor Trustee, continues to be subject to the Investor Trust Agreement;

(b) declaring that under the terms of the Investor Trust Agreement, IBJ Schroder, as Investor Trustee, had the authority to commence the Satellite Litigation;

(c) declaring that the Investor Trust Agreement does not permit IBJ Schroder to split the Satellite Litigation and assign it to individual Beneficiaries;

(d) declaring that under the terms of the Investor Trust Agreement, IBJ Schroder may not settle the Satellite Litigation absent instructions from the Court;

(e) approving the Proposed Settlement embodied in the Settlement Agreement and directing IBJ Schroder to consummate the Settlement Agreement immediately;

(f) declaring that the Beneficiaries be bound by the Settlement Agreement and that IBJ Schroder will not, by virtue of continued service as Investor Trustee under the Investor Trust Agreement or of actions taken in seeking or pursuant to the order in this proceeding, (i) be subject to claims for damages or otherwise based on alleged breaches of the Investor Trust Agreement or its duties to the Beneficiaries thereunder or (ii) impair the rights it has under the Investor Trust Agreement to be compensated for the fees and expenses it incurs in discharging its duties as Investor Trustee;

(g) retaining the jurisdiction of the Court with respect to the Investor Trust and the final disposition of its assets;

(h) for such other and further relief as this Court deems just and proper;

Objections or answering affidavits, if any, shall be served upon Petitioner's counsel, White & Case LLP, 1155 Avenue of the Americas, New York, New York, 10036 (Attn: Hyon Kim, Esq.), on or before the __ day of _____, 1998;

Reply papers and affidavits, if any, shall be served by Petitioner upon any party submitting objections or answering affidavits on or before the __ day of _____, 1998;

Service of a copy of this order and the papers upon which it is based, be made on or before the __ day of _____, 1998 by personally serving copies thereof on the Beneficiaries, and that said service be deemed good and sufficient service thereof.

ENTER:

_____

J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

98101530

In the Matter of the Application of	Index No. 98/_____
IBJ SCHRODER BANK & TRUST COMPANY (not in its individual capacity but in its capacity as Trustee under a Trust Agreement dated as of December 21, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company and the Beneficiaries thereunder), Petitioner,	IAS Part __ (_____, J.) VERIFIED PETITION FOR CONSTRUCTION OF TRUST AND APPROVAL OF PROPOSED SETTLEMENT
for an order, pursuant to CPLR § 7701, For a Construction of an Indenture and Approval of a Proposed Settlement.	

Petitioner, IBJ SCHRODER BANK & TRUST COMPANY ("IBJ Schroder" or the "Investor Trustee"), solely in its capacity as successor trustee under a Trust Agreement dated as of December 23, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company (the predecessor-in-interest of IBJ Schroder) (the "Investor Trust"), by its attorneys White & Case LLP, for its verified petition, pursuant to CPLR § 7701, alleges as follows upon information and belief:

The Nature of this Proceeding

1. This proceeding has been commenced by IBJ Schroder for the purpose of seeking judicial instructions with respect to a Trust Agreement, dated December 23, 1985 (the "Investor Trust Agreement"), under which IBJ Schroder is the sole trustee (the "Investor Trustee") of the Investor Trust.

2. IBJ Schroder is a banking corporation incorporated under the laws of the State of New York, with offices at One State Street, New York, New York 10004. IBJ Schroder brings this proceeding solely in its capacity as a successor trustee of the Investor Trust.

3. The Investor Trust Agreement at Section 13.11 provides that the Investor Trust had been created in New York and that it and the Investor Trust Agreement

> "shall in all respects be governed by and construed in accordance with, the internal law of the State of New York including all matters of construction, validity and performance, without giving effect to the principles of conflict of laws thereof."

A copy of the Investor Trust Agreement is attached hereto as Exhibit A.

4. As set forth below, the Investor Trust was created to allow the beneficiaries of the Investor Trust to invest in tax shelters associated with a communications satellite that operated from 1985 through 1994. As a result of a dispute over claimed liquidated damages relating to the satellite's operation, IBJ Schroder requires instructions from the Court concerning how it should discharge its duties to the holders of beneficial interests in the Investor Trust.

5. In this proceeding IBJ Schroder seeks, among other things, construction of the Investor Trust Agreement as to its right to consummate, on behalf of the beneficiaries of the Investor Trust, a proposed settlement of an action pending in this Court, captioned IBJ Schroder Bank & Trust Company, et al. v. GE Capital Spacenet Services, Inc., et al.,Index No. 601228/96 (Shainswit, J.) (the "Satellite Litigation"), which action involves the assets of the Investor Trust.

6. IBJ Schroder believes that the proposed settlement is reasonable and prudent in light of the substantial defenses and uncertainties associated with the Satellite Litigation, including serious issues of New York law relating to the enforceability of liquidated

damage clauses and complex fact issues relating to the mechanical operation and fuel usage of an aging communications satellite. Absent the proposed settlement, the Satellite Litigation would likely continue for several years and require the Investor Trust to expend substantial assets with no reasonable assurance of a substantial recovery in the Satellite Litigation.

7. IBJ Schroder has received communications from one beneficiary of the Investor Trust who purports to speak for other beneficiaries and who has asserted various objections to the proposed settlement, including that:

(a) IBJ Schroder lacked the authority to participate in or settle the Satellite Litigation because the Investor Trust has terminated;

(b) any beneficiaries who desire to proceed with their "share" of the Satellite Litigation should be permitted by IBJ Schroder to do so pursuant to a "distribution" of interests in that Litigation by IBJ Schroder; and

(c) the proposed settlement provides inadequate amounts to the Investor Trust.

8. Under these circumstances, IBJ Schroder has been placed in an untenable position. Absent instructions from the Court, the Investor Trustee could be subject to conflicting claims by beneficiaries of the Investor Trust now or in the future as to the prudence of its actions relating to the Satellite Litigation and the proposed settlement.

Jurisdiction and Venue

9. This Court has jurisdiction over this action to entertain a special proceeding to determine matters relating to an express trust pursuant to CPLR Articles 77 and 4. Venue is proper in this Court as a proceeding related to the Satellite Litigation.

The Satellite Transaction

10. The Investor Trust and the Satellite Litigation relate to a series of sale-leaseback transactions entered into in 1985 (the "Satellite Transaction"). At that time, a satellite

(the "Satellite") was launched into orbit above the Earth. The Satellite carried 24 transponders. The transponders were devices used to transmit electronic signals (i.e., for radio, television, etc.) from one point on Earth to another. Broadcasters and other businesses that transmit electronic signals leased the transponders for set periods of time. As such, each transponder represented a stream of potential rental revenue to the owner of the Satellite (the "Satellite Owner").

11. In late 1985, the Satellite Owner sold 14 of the Satellite's 24 transponders (the "Transponders") to Integrated Equipment Leasing Corporation ("IELC") for approximately $124,000,000, about 85% of which was borrowed from bank lenders. IELC simultaneously leased the Transponders back to the Satellite Owner, who was to operate the Satellite and the Transponders. For tax purposes, IELC's ownership interests and lessor rights were placed in a trust (the "IELC Trust"). The Satellite Owner was to use the rental income produced by the Transponders to pay rent to the IELC Trust, which rent would be used by the IELC Trust to repay the bank lenders. The lease between the IELC Trust and the Satellite Owner was referred to as the "Original Lease."

12. IELC then entered into another sale-leaseback transaction in which all the assets of the IELC Trust were sold to Resources Satellite Corporation ("RSC") which, in turn, would sell beneficial interests in the Transponders to the public. RSC placed all these assets into the Investor Trust and then leased back to the IELC Trust all interests in the Satellite and the Transponders. Under a lease dated December 23, 1985, between RSC and the IELC Trust (the "Master Lease"), the IELC Trust was to pay rent to the Investor Trust for the use of the Transponders. Under another agreement (the "Master Collateral Assignment Agreement"), the IELC Trust assigned to RSC all its right, title and interest in the Original Lease.

13. Under the Investor Trust Agreement, RSC was the grantor of the Investor Trust. Units representing beneficial interests of the Investor Trust were sold as tax shelters to 408 trust beneficiaries (the "Beneficiaries"), in exchange for $60,000 and a note payable to the Investor Trust of $313,000 (the "Beneficiary Notes") from each such Beneficiary. A diagram of the Satellite Transaction is attached hereto as Exhibit B. Pursuant to Section 4.01 of the Investor Trust Agreement, each Beneficiary agreed that the Investor Trustee would repay the Beneficiary Notes from the proceeds of the Trust Estate, including, inter alia, the rent received on the Master Lease, before other proceeds, if any, were paid to the Beneficiaries. Pursuant to Section 4.01, all other distributions to the Beneficiaries by the Investor Trustee were subject to priorities, including reimbursement of the Investor Trustee for the costs of administration of the Trust, including accountants' and attorneys' fees.

14. Pursuant to Section 1.01 of the Investor Trust Agreement, the "Beneficial Interest" of each Beneficiary "shall mean a percentage undivided interest in the Trust Estate." Investor Trust Agreement, Ex. A, Section 1.01, at 2. As such, under Section 4.01 of the Investor Trust Agreement, any distribution of monies or payments of any kind to the Beneficiaries from the Trust Estate are to be "in proportion to their respective percentages of Beneficial Interest." Those percentage Beneficial Interests were represented by Trust Certificates issued to each Beneficiary pursuant to Article 3 of the Investor Trust Agreement. Under Section 11.04 of the Investor Trust Agreement, the Beneficiaries have no legal title to the Trust Estate beyond their percentage Beneficial Interests.

The Satellite Litigation

15. The appraised value of the Transponders in the 1985 Satellite Transaction was based on their expected usable life and the likely rents that could be charged for their use.

This appraised value was used in setting the purchase price of the Transponders, which, in turn, dictated the rents that would be due under the Original Lease and the Master Lease. Both Leases refer to an appraisal (the "Appraisal") issued as of December 23, 1985. The Appraisal stated that "[t]he useful economic life of each Transponder is expected to be at least 8.5 years, beginning on December 23, 1985," or, as stated in an Offering Memorandum received by each Beneficiary, the Transponders were expected to last until June 10, 1994.

16. Under the Original Lease, Basic Rent was due in thirteen payments to be made twice a year until March 11, 1992. Under the Master Lease, Fixed Rent was due in annual installments from 1985 through 1991 and a final partial year installment due September 11, 1992. All Basic Rent and Fixed Rent have been paid.

17. As noted, the Transponders were expected to be available until mid-1994, i.e., beyond the terms of the Original and Master Leases. As such, both the IELC Trust and the Investor Trust contemplated some period of time after the Original Lease was over when the Transponders could be remarketed, that is leased or sold to other parties for additional income. In the Original and Master Leases, the IELC Trust, RSC and the Investor Trust took steps to protect their expectation that income could be earned from the Transponders after the end of the Original Lease through the use of liquidated damage clauses which focused on the amount of fuel remaining on the Satellite as of certain dates.

18. The amount of fuel on the Satellite was important because in order to receive and transmit Transponder signals the Satellite must be properly positioned over the Earth. The commercial life of the Transponders was therefore dependent on the ability to position the Satellite in its designated orbit, despite gravitational and other forces that would cause it to stray from its proper position. The Satellite used rockets powered by hydrazine fuel to correct for the

pull of gravity. Thus, the amount of fuel on board the Satellite necessarily determined the usable life of the Transponders, since without fuel for the rockets the Satellite (and the Transponders) could not be positioned to receive and transmit signals and would be worthless.

19. Under Section 9 of the Original Lease, if at the end of the Original Lease term (March 11, 1992) the fuel on the Satellite was less than 54 pounds (the "First Fuel Amount"), then the Satellite Owner had to make certain fuel shortfall payments calculated under the Original Lease. In addition, if at the end of a renewal term under the Original Lease (September 11, 1992) the fuel on the Satellite was less than 42 pounds (the "Second Fuel Amount"), then fuel shortfall payments were due as to any Transponders for which the Satellite Owner had renewed the Original Lease.

20. If the fuel shortfall exceeded 10% of the First Fuel Amount (i.e., if it was more than 5.4 pounds below 54 pounds, or 48.6 pounds or less) or the Second Fuel Amount (i.e., more than 4.2 pounds below 42 pounds, or 37.8 pounds or less), then an "Event of Loss" occurred. Upon the occurrence of an Event of Loss, under Sections 4(c) and 11(a) of the Original Lease, the Satellite Owner was obligated to make liquidated damage payments under a schedule attached to the Original Lease ("Stipulated Loss Values"). A portion of any such payments were payable to the Investor Trust under Sections 4.02 and 6.01 of the Master Lease. The Stipulated Loss Values were a percentage of the original appraised cost of the Transponders to IELC ($124 million), and can equal several million dollars for each of the Transponders.

21. In March 1992, at the end of the fixed term of the Original Lease, the Satellite Owner reported to the trustee of the IELC Trust that there were 51.55 pounds of hydrazine fuel on board the Satellite. This was enough fuel to avoid an Event of Loss, but low enough to obligate the Satellite Owner to make some fuel shortfall payments. The reported fuel

amount was later amended by the Satellite Owner to 52.11 pounds as of March 11, 1992 and 41.482 pounds as of September 11, 1992. Under the Original and Master Leases, the IELC trustee and IBJ Schroder had a right to inspect the Satellite Owner's fuel records. Based on that inspection, a dispute developed as between the IELC Trust and IBJ Schroder, on the one hand, and the Satellite Owner, on the other hand, regarding the actual amount of fuel on board the Satellite as of March 11 and September 11, 1992.

22. On October 19, 1992, the Satellite Owner, the trustee for the IELC Trust and IBJ Schroder entered into an Agreement Regarding Fuel (the "Fuel Agreement"). Under Section 7.4, New York law governs the Fuel Agreement. A copy of the Fuel Agreement is attached as Exhibit C.

23. Under the Fuel Agreement, the Satellite Owner agreed to make certain fuel shortfall payments. The parties then agreed that the last day of the Satellite's life would be the day it could no longer be maneuvered by its rockets into the positions needed to maintain use of the Transponders (the "Last Day"). In Article III of the Fuel Agreement, the parties addressed Events of Loss based on deviations from the First or Second Fuel Amounts. The parties agreed that if there had been 48.6 pounds of fuel on the Satellite as of March 11, 1992 (or 37.8 pounds as of September 11, 1992), then the Last Day should be August 18, 1994. If the Satellite's Last Day occurred after August 18, then no Stipulated Loss Value damages would be due. However, under Section 3.4 of the Fuel Agreement, if the Last Day occurred before August 18, 1994, then this would constitute a "Total Loss Event" and the Satellite Owner had to pay the Stipulated Loss Values owing under the Original Lease (a "Total Loss Amount").

24. Under Section 4.1 of the Fuel Agreement, the parties set forth the burdens of proof with respect to any dispute regarding the fuel amounts as of the Last Day:

> "The use of the Last Day pursuant to this [Fuel] Agreement to determine the amounts, if any [to be paid by the parties based on the occurrence of the Last Day] is predicated upon Fuel being utilized since March 11, 1992 until the Last Day to maintain [the Satellite in proper position] at rates to be expected absent any extraordinary circumstances or event ("Normal Fuel Usage"). Accordingly, notwithstanding anything contained in this [Fuel] Agreement to the contrary, in the event (A) of the occurrence or non-occurrence of any event, matter, fact, thing, loss, catastrophe (whether by act of god or otherwise) or other occurrence . . . as the result of which Normal Fuel Usage ceases prior to August 18, 1994 or (B) the [Satellite cannot be kept in proper position] from March 11, 1992 until August 18, 1994, (either, a "Total Loss Event"), then (i) the provisions of Article III of this [Fuel] Agreement shall be inapplicable; (ii) unless [the Satellite Owner] can carry the burden of demonstrating to a reasonable certainty that the Actual March 11 Fuel Amount was greater than or equal to 48.6 pounds, then [the Satellite Owner shall pay the Total Loss Amount]."

25. In addition, under Section 7.2 of the Fuel Agreement, the parties, including the Satellite Owner, expressly reserved all claims, rights, positions and arguments with respect to matters not covered by the Fuel Agreement. This would include the defenses and counterclaims described below with respect to the Satellite Litigation.

26. Upon information and belief, the terms of the Fuel Agreement reflected a recognition by the Satellite Owner, IELC, the IELC Trustee and IBJ Schroder that (a) there may have been some fuel shortfall; (b) but determining the actual fuel amounts was extremely difficult, in part, because the Satellite fuel records were inconclusive; and (c) as such, the Satellite Owner (i) would agree to a higher standard of proof with respect to proving the Satellite's fuel usage, but (ii) would preserve the opportunity to prove that any fuel shortfalls resulted from causes other than the actual fuel usage of the Satellite, that there was more fuel on board the Satellite on

March 11, 1992 than 48.6 pounds and/or that the Stipulated Loss Value provisions of the Original Lease were unenforceable under New York law.

27. On July 27, 1994 (22 days short of August 18), the Last Day occurred when the Satellite strayed from its orbit and could no longer be properly positioned by its rockets. IBJ Schroder and the IELC Trust claimed an Event of Loss and demanded payment of the Stipulated Loss Value under the Fuel Agreement. The Satellite Owner, however, refused to pay, claiming that it could show (i) that a catastrophic event or mechanical failure had occurred that blocked fuel from getting to the rockets, or (ii) that there was a reasonable certainty that the fuel amount as of March 11, 1992 had exceeded 48.6 pounds.

28. Unable to resolve their dispute, on March 8, 1996, IBJ Schroder, IELC and the IELC Trust commenced the Satellite Litigation in this Court. As calculated under the Original Lease, the Stipulated Loss Value due was $42,073,507. Under the Fuel Agreement this amount was reduced by the rental income received by the IELC Trust and the Investor Trust from Leasing the Transponders after March 11, 1992, less fees, costs and expenses. With interest accrued under the Fuel Agreement through March 11, 1996, the amount demanded by IBJ Schroder and the IELC Trust was $40,785,455. See Satellite Litigation Complaint ¶¶ 56, 66, 71, 77 and 81.

29. The defendants in the Satellite Litigation served answers and counterclaims, denying all liability and pleading numerous defenses and counterclaims. Among the defenses and counterclaims already raised by the Satellite Litigation defendants are (a) that the Stipulated Loss Value used as the basis of the claims in the Satellite Litigation is unenforceable under New York law; (b) that the Satellite's loss of maneuverability on July 27, 1997 resulted from a catastrophic event or mechanical failure and not a lack of fuel; (c) that the method used to calculate the Last Day in the Fuel Agreement was rendered invalid by a mechanical failure on the

Satellite; and (d) that there is a reasonable certainty that the Satellite on March 11, 1992 had enough fuel to avoid an Event of Loss or Total Loss Event.

30. The Investor Trustee has informed the Beneficiaries of the Fuel Agreement and the Satellite Litigation.

The Proposed Settlement

31. In September 1997, the parties to the Satellite Litigation conditionally agreed to a settlement (the "Proposed Settlement"). The Proposed Settlement is embodied in a Settlement Agreement, which is attached hereto as Exhibit D. By its conditions, the Proposed Settlement cannot be consummated absent certain rulings sought by this Petition.

32. Section 3 of the Settlement Agreement provides for the Satellite Owner to pay $8,500,000, of which $6,970,000 (82%) plus applicable interest would be paid to IBJ Schroder, as Investor Trustee for the Beneficiaries of the Investor Trust, and $1,530,000 (18%) plus applicable interest would be paid to IELC. In exchange for such payments the parties agreed to exchange mutual releases.

33. The 82%-18% split was agreed to by the Investor Trust and IELC in 1992 at the outset of the Satellite fuel dispute. The split was based on IELC's estimation, based on a 1991 appraisal of the Satellite and its then purported fuel use, that the Satellite would probably remain in use until December 1994. This was 33 months after March 1992, when the Original Lease term ended. With respect to any recoveries based on a fuel shortfall as of March 1992, IELC agreed to accept 6/33 or 18%. This corresponded to the six months, from March to September 1992, by which the Master Lease exceeded the Original Lease. The Investor Trust would receive 27/33 or 82%. Even though the Satellite's Last Day occurred in July 1994, IELC

and the Investor Trust did not change the split to reflect the shorter measurement period. In the context of the Settlement Agreement, this yields an additional $291,429 to the Investor Trust.

34. The Settlement Agreement is intended to give all parties to the Satellite Litigation repose from any further claims relating to the fuel dispute involving the Satellite, the Transponders or the Satellite Transaction. The Settlement Agreement includes broad releases of such claims given and received by the Satellite Litigation plaintiffs, defined to include the Investor Trustee and the Beneficiaries of the Investor Trust, and the Satellite Litigation defendants, defined with identical breadth. Each Satellite Litigation plaintiff and defendant, including IBJ Schroder, represents in the Settlement Agreement that it has the authority to enter into the Settlement Agreement. Each Satellite Litigation plaintiff then agrees to indemnify and hold harmless each defendant from any claims released under the Settlement Agreement. A similar obligation runs from each defendant to each of the plaintiffs.

35. The Investor Trustee has informed the Beneficiaries of the Proposed Settlement and IBJ Schroder's intention to bring this proceeding to seek instructions from the Court under Article 77.

The Investor Trustee's Need For Instructions

36. As Investor Trustee, IBJ Schroder owes a fiduciary duty to all the Beneficiaries to act in good faith and with reasonable prudence in conserving and protecting the Trust Estate. This duty applies even to the extent one or more of the Beneficiaries disagree with the Investor Trustee's actions. At the same time, however, the Investor Trustee is not obligated to act at its peril or in the absence of express terms in the Investor Trust Agreement.

37. The Investor Trust Agreement's provisions make it unclear whether the Investor Trustee may settle the Satellite Litigation it commenced on behalf of the Beneficiaries and the Trust Estate. This leaves IBJ Schroder in the untenable position of either pursuing litigation which it believes imprudent or attempting to settle the litigation and face exposure for acting beyond the powers expressly provided to it under the Investor Trust Agreement. In addition, in order to make the required representations, and ensure compliance with the releases and indemnification clauses under the Settlement Agreement, the Investor Trustee must know that it is acting with the proper authority and that the Beneficiaries will be bound by the Settlement Agreement and the releases contained therein.

38. IBJ Schroder's need for instructions is made manifest by the communications it has received from one Beneficiary who purports to speak for other Beneficiaries asserting various objections to the Proposed Settlement, including that:

(a) IBJ Schroder lacked the authority to participate in or settle the Satellite Litigation because the Investor Trust has terminated;

(b) any Beneficiaries who desire to proceed with their "share" of the Satellite Litigation should be permitted by IBJ Schroder to do so pursuant to a "distribution" of interests in that Litigation by IBJ Schroder to the Beneficiaries; and

(c) in any event, the Proposed Settlement provides inadequate amounts to the Investor Trust.

These objections place the terms of the Investor Trust Agreement directly in issue. In this proceeding, IBJ Schroder seeks an instruction to address each of these objections.

The Investor Trustee's Ability to
Commence But Not Resolve the Satellite Litigation

39. The Investor Trust has not terminated because the requirements for termination in Section 11 of the Investor Trust Agreement have not been met. As such, under the

terms of the Investor Trust Agreement, only IBJ Schroder had the authority to bring the Satellite Litigation. The Beneficiaries did not have standing to bring the Satellite Litigation, because they have no title to the Trust Estate assets, nor do they have severable interests in the Trust Estate.

The Investor Trust Has Not Terminated

40. The Investor Trust is a grantor trust governed by the laws of the State of New York. Section 1.01 of the Investor Trust Agreement provides that the Trust Estate held by IBJ Schroder shall include both the Transponders and "all amounts of payments or proceeds of any kind for or with respect to the [Investor Trust] Assets, including, without limitation, rent payable pursuant to the Master Lease and any and all payments and proceeds received by the Trustee after the termination of the Master Lease with respect to [Satellite] Equipment as the result of a sale, lease, casualty or other disposition thereof...." Investor Trust Agreement § 1.01; Exhibit A, at 3. Under Section 1.01, the Satellite Litigation, which relates to an alleged casualty to the Equipment (the Transponders), is part of the Trust Estate held by IBJ Schroder.

41. The Investor Trust Agreement further provides that:

> "This Trust Agreement and the Trust created hereby in any event shall terminate and this Trust Agreement shall be of no further force or effect upon the earlier of (a) the sale, transfer or other final disposition, and the final distribution, by the Trustee of all Equipment, money, other property and proceeds constituting the Trust Estate, (b) August 26, 1993 (or if the Equipment is covered by a lease on such date, the date which is eleven months and fifteen days after the date on which such lease expires or is sooner terminated), (c) termination or revocation by all of the Beneficiaries in accordance with the provisions of Section 11.03, or (d) the resignation or removal of the Trustee and failure to appoint a Successor Trustee pursuant to Section 9.01(a) hereof because a Beneficiary objects to such appointment or for any reason; otherwise this Trust Agreement and the trusts created created hereby shall continue in full force and effect in accordance with the terms hereof."

Investor Trust Agreement Section 11.02, Ex. A, at 22 (emphasis added).

42. The Investor Trust continues to exist pursuant to the Investor Trust Agreement because none of the conditions of Section 11.02 have been met. Subsections (a), (c) and (d) of Section 11.02 do not apply here because none of the events mentioned in those subsections has occurred. Subsection (b) of Section 11.02 also does not apply here because the Equipment is still covered by a lease.

43. Under the Master Lease, "Equipment" is defined as the Transponders on the Satellite that were the subject of the Satellite Transaction. Under Section 11(a)(i) of the Original Lease, the Satellite Owner was obligated to pay, inter alia, the Stipulated Loss Value upon an Event of Loss as to any Transponder. The next paragraph of Section 11(a) of the Original Lease then provides for termination of that lease upon such payment:

> "Upon payment in full of all amounts due pursuant to clause (i) of the preceding paragraph, . . . the obligation of the Lessee [the Satellite Owner] to pay Basic Rent with respect to such Transponder shall terminate, such Transponder shall no longer be subject to this [Original] Lease and the Lease Term with respect to such Transponder shall end."

44. Consistent with Section 11 of the Original Lease, under Sections 6.01, 6.03 and 4.02 of the Master Lease, the IELC Trust remains obligated to pay to the Investor Trust certain amounts relating to Events of Loss on the Transponders even if such recoveries come after all Fixed Rent has been paid under the Master Lease.

45. There has been an outstanding claim for a fuel related Event of Loss as to all the Transponders since March 11, 1992. Under Section 11 of the Original Lease, that lease has not terminated as to those Transponders because an Event of Loss payment is still due and owing. Under the Master Lease, any such payments must be shared with the Investor Trustee. Under Section 11 of the Investor Trust Agreement, the Equipment is, therefore, still subject to a lease and no grounds for terminating the Investor Trust exist.

46. Accordingly, IBJ Schroder requests a declaration by this Court that under the terms of the Investor Trust Agreement, the Investor Trust and Trust Estate have not terminated and that IBJ Schroder, as Investor Trustee, and the Beneficiaries continue to be subject to the Investor Trust Agreement.

IBJ Schroder's Ability to Initiate the Satellite Litigation

47. Section 2.02 of the Investor Trust Agreement provides that IBJ Schroder, as Investor Trustee, shall "hold the Trust Estate . . . for the purpose of protecting and conserving the Trust Estate" for the Beneficiaries. Investor Trust Agreement § 2.02, Ex. A, at 4.

48. The Satellite Owner's failure to pay the Stipulated Loss Value demanded by IBJ Schroder, IELC and the IELC Trust constituted an event of default under the Original and Master Leases. Consistent with its power to conserve and protect the Trust Estate, absent a cure of the default or a direction from all the Beneficiaries, the Investor Trustee is expressly authorized to exercise its discretion to preserve that Trust Estate and enforce on behalf of the Beneficiaries their rights under various agreements, including the Master Collateral Assignment Agreement referenced in paragraph 12, above. Section 5.02 of the Investor Trust Agreement provides in relevant part:

> "In the event that such event of default has not been cured within 30 days ... the Trustee shall take such action or shall refrain from taking such action, not inconsistent with the provisions of the [other Satellite Transaction] Agreements, with respect to such event of default as the Trustee shall be directed in writing by all of the Beneficiaries, or, if no such direction has been received from all of the Beneficiaries ... the Trustee shall, in its sole discretion and subject to the provisions of Sections 6.05 and 7.01 hereof [which limit the liability of the Investor Trustee], take such action as shall be necessary to terminate the Master Lease, to obtain the benefits of the Master Collateral Assignment Agreement and to cause the Lessee thereunder to perform all of its obligations upon such termination."

Investor Trust Agreement § 5.02; Ex. A, at 9-10.

49. Having notified the Beneficiaries of the Satellite Owner's failure to pay Stipulated Loss Value, IBJ Schroder did not receive direction from all the Beneficiaries. Under Section 5.02 of the Investor Trust Agreement, IBJ Schroder then exercised its discretion to join with IELC and the IELC Trust in commencing the Satellite Litigation to preserve and protect the Trust Estate and to obtain for the Beneficiaries the benefits of the Satellite Transaction under the Leases and other Satellite Transaction agreements.

50. Accordingly, IBJ Schroder requests a declaration by this Court that under the terms of the Investor Trust Agreement, IBJ Schroder, as Investor Trustee, had the authority to commence the Satellite Litigation on behalf of the Investor Trust.

The Beneficiaries Lack Standing to Pursue the Satellite Litigation

51. As opposed to the Investor Trustee, the Beneficiaries have no title to the Trust Estate. No Beneficiary has standing to declare a default, terminate the Leases or otherwise take any step to pursue Trust Estate assets. Section 11.04 of the Investor Trust Agreement provides in relevant part:

> "The Beneficiaries shall not have legal title to any part of the Trust Estate, unless this Trust is revoked ... or is otherwise terminated."

Ex. A, at 28-29. Instead, each Beneficiary holds a certificate representing a beneficial interest in the Trust Estate equal to the percentage value of their unit holding.

52. The Beneficiaries do not have standing to pursue the Satellite Litigation. Nor may the Beneficiaries simply elect to take over "shares" of the Satellite Litigation. Any attempt to split or assign "pieces" of the Satellite Litigation would (i) fail under the Investor Trust Agreement; (ii) subject the Beneficiaries to unique and serious defenses regarding their standing; and (iii) potentially subject IBJ Schroder to claims for acting contrary to the Investor Trust Agreement.

53. Accordingly, IBJ Schroder seeks a declaration that the Investor Trust Agreement does not permit the Satellite Litigation to be split into percentage "shares" and assigned to those Beneficiaries who may wish to pursue it.

IBJ Schroder's Inability to Resolve the Satellite Litigation Without Instructions From the Court

54. Notwithstanding its powers to protect and conserve the Trust Estate, there are express limitations on IBJ Schroder's powers with respect to assets of the Trust Estate. Section 5.01 of the Investor Trust Agreement provides that:

> Except as expressly required by the terms of the [other Satellite Transaction] Agreements, including, without limitation, this [Investor] Trust Agreement, or in written instructions from all of the beneficiaries pursuant to section 5.02 and 5.03 hereof, the Trustee shall not have any duty, obligation or power to, and the Trustee agrees that it will not, manage, control, use, sell, lease (other than pursuant to the Master Lease), dispose of or otherwise deal with the Equipment or any other part of the Trust Estate, or otherwise to take or refrain from taking any action under, or in connection with, the Agreements, and no implied duties shall be read into this Trust Agreement against the Trustee.

Investor Trust Agreement § 5.01; Ex. A, at 9 (emphasis added).

55. The Proposed Settlement represents a disposition of Trust Estate property -- the Satellite Litigation. Failing an instruction from the Court, IBJ Schroder would have no choice but to prosecute the Satellite Litigation in the absence of a unanimous direction from all the Beneficiaries. Given the substantial risks attendant to the Satellite Litigation, this prospect places IBJ Schroder at peril. Absent instructions, some Beneficiaries may make claims against IBJ Schroder for acting imprudently in not settling. However, as shown by communications received from one Beneficiary purporting to speak for others, other Beneficiaries would pursue IBJ Schroder if it were to settle without Court approval for acting without authority under the Investor Trust Agreement.

56. Given that the Investor Trust is for the benefit of 408 Beneficiaries and the multiple potential courses of action the Beneficiaries may wish undertaken, there is no prospect that IBJ Schroder will receive clear and unanimous instructions from all the Beneficiaries. It would be a waste of Trust Estate assets to seek such instructions as any incompleteness in the result or divergence of views would immediately force IBJ Schroder back into an Article 77 proceeding like this one.

57. Accordingly, IBJ Schroder requests a declaration by this Court that under the terms of the Investor Trust Agreement it may not settle the Satellite Litigation absent instructions from this Court.

The Proposed Settlement Should Be Approved As Reasonable and Prudent

58. The Proposed Settlement embodied in the Settlement Agreement is reasonable and prudent and should be approved. As explained more fully in the annexed Affirmation of John S. Willems, sworn to January 21, 1998 ("Willems Aff."), notwithstanding the merits of IBJ Schroder's claims in the Satellite Litigation, IBJ Schroder believes that there is a substantial likelihood that the defendants in the Satellite Litigation would meet their burden of proof with respect to their various defenses and counterclaims to the Stipulated Loss Value claims. As such, there is a substantial risk that the defendants will raise issues of fact and law that would preclude any recovery by the Investor Trust in the Satellite Litigation. At the same time, prosecuting the Satellite Litigation will be very costly and time consuming, because such cases are extremely expert-intensive and technically complex. As such, the Settlement Agreement represents the most reasonably prudent way to conserve and protect the Trust Estate.

59. Among the principal defenses that already have been raised by the defendants in the Satellite Litigation are (i) that the Stipulated Loss Value of over $42 million is disproportionate to any damages suffered by the Beneficiaries and is otherwise unenforceable under New York law, in part, because the Beneficiaries had not only received all rent due under the Master Lease but had otherwise received the full value of their bargain; (ii) that the Satellite did not experience a loss of fuel, but rather a catastrophic or mechanical failure; and/or (iii) that as of March 11, 1992, at the expiration of the Original Lease, the Satellite did have a least 48.6 pounds of fuel such that no Stipulated Loss Value damages were owing. Willems Aff. ¶¶ 6-29.

60. In questioning the enforceability of the Stipulated Loss Value provisions, the defendants in the Satellite Litigation have raised or will likely raise other facts to defeat any claim for liquidated damages, including:

(a) Stipulated Loss Value was meant to compensate the Beneficiaries and IELC for a loss of the Transponders that denied them a chance to profit from the remarketing of the Transponders after the Original Lease. Here, there was enough fuel on the Satellite such that the Transponders lasted longer than their appraised useful life. As such, the Beneficiaries and IELC received all the benefits for which they bargained and are not entitled to a windfall of $42 million.

(b) By 1994, the Transponders were generating only $1,000 to $1,500 per day in rental income. Assuming all 14 Transponders could have been rented for the remaining 24 days until August 18, 1994, the Investor Trust would have received only an additional $350,000-$500,000 (an amount already exceeded by fuel shortfall payments). As such, the claimed Stipulated Loss Value damages constitute a windfall of over $42 million and are disproportionate to any harm suffered due to the alleged breach.

See Willems Aff. ¶¶ 6-17

61. Under New York law there is a substantial risk that the Stipulated Loss Value will be held unenforceable. In addition, it is likely that the defendants in the Satellite Litigation would meet their burden of proof under the Fuel Agreement in showing either that a mechanical failure caused the Satellite's Last Day or that, as of March 11, 1992, there was a reasonable certainty that there was more than 48.6 pounds of fuel on the Satellite. See Willems Aff. ¶¶ 22-29.

62. In order to defend against these contentions and the other arguments set forth above, IBJ Schroder would have to retain on behalf of the Investor Trust experts (a) on satellite fuel use and whether fuel use changes as a satellite gets older and carries less fuel in its tanks; (b) on satellite mechanics to rebut allegations that mechanical failure was the cause of the Satellite losing position after July 27, 1994; (c) on satellite aging and failure, who would likely have had to create and rebut historical models regarding the probability of certain kinds of failures; and (d) on the transponder rental market to address the value of the lost Transponders and the windfall issue. In addition, depending on the issues introduced by the Satellite Litigation defendants, IBJ Schroder also might be compelled to retain and present experts to address telemetry, physics, economics and tax issues. Retaining such experts could easily cost over $500,000 to the extent the Satellite Litigation proceeded to trial. Willems Aff. ¶ 30.

63. The Settlement Agreement represents a reasonable and prudent result to the Satellite Litigation. It would be imprudent to, in effect, "roll the dice" by attempting to seek a bigger recovery than that provided by the Settlement Agreement. Given the substantial risk of little or no recovery and significant costs and time associated with the Satellite Litigation, IBJ Schroder would be acting at its peril with respect to the Beneficiaries if it were to pursue the Satellite Litigation instead of the Proposed Settlement embodied in the Settlement Agreement.

64. Accordingly, IBJ Schroder seeks an instruction from the Court approving the Proposed Settlement embodied in the Settlement Agreement and directing it to consummate the Settlement Agreement immediately.

WHEREFORE, petitioner IBJ Schroder requests that a judgment be entered, pursuant to CPLR § 7701:

(a) declaring that under the terms of the Investor Trust Agreement, the Investor Trust and Trust Estate have not terminated and that IBJ Schroder, as Investor Trustee, continues to be subject to the Investor Trust Agreement;

(b) declaring that under the terms of the Investor Trust Agreement, IBJ Schroder, as Investor Trustee, had the authority to commence the Satellite Litigation;

(c) declaring that the Investor Trust Agreement does not permit IBJ Schroder to split the Satellite Litigation and assign it to individual Beneficiaries;

(d) declaring that under the terms of the Investor Trust Agreement, IBJ Schroder may not settle the Satellite Litigation absent instructions from the Court;

(e) approving the Proposed Settlement embodied in the Settlement Agreement and directing IBJ Schroder to consummate the Settlement Agreement immediately;

(f) declaring that the Beneficiaries be bound by the Settlement Agreement and that IBJ Schroder will not, by virtue of continued service as Investor Trustee under the Investor Trust Agreement or of actions taken in seeking or pursuant to the order in this proceeding, (i) be subject to claims for damages or otherwise based on alleged breaches of the Investor Trust Agreement or its duties to the Beneficiaries thereunder or (ii) impair the rights it has under the Investor Trust Agreement to be compensated for the fees and expenses it incurs in discharging its duties as Investor Trustee;

(g) retaining the jurisdiction of the Court with respect to the Investor Trust and the final disposition of its assets; and

(h) for such other and further relief as this Court deems just and proper.

WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200

Attorneys for Petitioner
IBJ Schroder Bank & Trust Company

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JENNIFER L. SHEPPARD, being duly sworn, deposes and says that she is a Senior Counsel of IBJ Schroder Bank & Trust Company, the petitioner in this Article 77 proceeding and that the foregoing petition is true to her own knowledge, except as to those matters stated on information and belief, and as to those matters she believes it to be true; that the grounds of her belief as to all matters not stated upon her knowledge are documents from petitioner's files and that the reason this verification is not made by petitioner is that said petitioner is a domestic corporation.

Jennifer L. Sheppard
JENNIFER L. SHEPPARD

Sworn to before me this
14th day of January, 1998

Owen C. Pell
Notary Public

OWEN C. PELL
Notary Public, State of New York
No. 31-4994846
Qualified in New York County
Commission Expires April 13, 1998

EXHIBIT B

EXECUTION COPY

BAC Home Loans Servicing, LP
6400 Legacy Drive
Plano, TX 75024

June 28, 2011

The Bank of New York Mellon, as Trustee or Indenture Trustee
101 Barclay Street
New York, New York 10286
Attn: Mortgage-Backed Securities Group

Ladies and Gentlemen:

Re: Pooling and Servicing Agreements and Sale and Servicing Agreements

We refer to the Pooling and Servicing Agreements (the "PSAs") and Sale and Servicing Agreements (the "SSAs" and together with the PSAs, the "Sale Agreements"), as applicable, for the transactions identified on Exhibit 1 hereto, each, in PSAs, among the Depositor thereunder, the Sellers thereunder, BAC Home Loans Servicing, LP (f/k/a Countrywide Home Loans Servicing, LP), as Master Servicer (the "Master Servicer") and The Bank of New York Mellon (f/k/a The Bank of New York), as trustee (or, in the case of SSAs, the indenture trustee, together the "Trustee") and each, in SSAs, among the Depositor thereunder, BAC Home Loans Servicing, LP (f/k/a Countrywide Home Loans Servicing, LP), as Sponsor and Master Servicer, the Trust thereunder and the Trustee. We also refer to the Guaranty of Bank of America Corporation, dated as of June 28, 2011, attached hereto as Exhibit 2 (the "Guaranty"). Capitalized terms used but not defined in this letter have the meanings specified in the Sale Agreements.

Section 8.05 (*Trustee's Fees and Expenses*) of each PSA and Section 7.03 (*Master Servicer to pay Indenture Trustee's and Owner Trustee's Fees and Expenses*) of each SSA (together, the "Indemnity") each provide, in part, that "The Trustee and any director, officer, employee or agent of the Trustee shall be indemnified by the Master Servicer and held harmless against any loss, liability or expense (including reasonable attorneys fees) (i) incurred in connection with any claim or legal action relating to (a) [the Sale Agreement], (b) the [applicable securities] or (c) in connection with the performance of any of the Trustee's duties [under the Sale Agreement], other than any loss, liability or expense incurred by reason of willful malfeasance, bad faith or negligence in the performance of any of the Trustee's duties hereunder . . . ." Certain Sale Agreements also exclude from the scope of the Indemnity "any loss, liability or expense incurred . . . by reason of any action of the Trustee taken at the direction of the [investors]."[1]

[1] We note that the language referenced in this letter may vary in certain ways in the Sale Agreements. Notwithstanding such variances, we intend this letter to apply, with same effect, to all the Sale Agreements for the transactions identified on Exhibit 1 hereto, except if such variances are material, in which case the parties hereto will consider in good faith how to implement the intent of this letter to such variances if the need arises.

We confirm that we view any actions taken by the Trustee in connection with its entry into the settlement in respect of Mortgage Loan repurchase and other alleged claims against the Sellers and Master Servicer relating to the transactions identified on Exhibit 1 hereto (the "Settlement"), including but not limited to the Trustee's participation in settlement negotiations, the Trustee's analysis of the Settlement, the filing by the Trustee of any petition in connection with the Settlement, the provision of notices concerning the Settlement to interested parties (including investors), and any further actions by the Trustee in support of the Settlement, including the response by the Trustee to any objections to the Settlement and any implementation of the Settlement by the Trustee (such actions together being the "Trustee Settlement Activities") as being actions that, for purposes of the Indemnity, relate to the Sale Agreements, the applicable securities, or the performance of the Trustee's duties under the Sale Agreements. We also confirm that the manner of entering into the Settlement or undertaking the activities to prepare therefor or contemplated thereby will not serve to disqualify the Trustee from receiving the benefits of the Indemnity or the Guaranty.

We also confirm that we view the Institutional Investor Agreement and any letter or other correspondence from the investors or their counsel which requests that the Trustee take the Trustee Settlement Activities, or any portion thereof, as not being the equivalent of a direction from the investors for purposes of the Indemnity. We further confirm that neither the receipt by the Trustee of any such letter or other correspondence nor the entry by the Trustee into the Institutional Investor Agreement will disqualify the Trustee from receiving the benefit of either the Indemnity or the Guaranty.

Finally, we note that the Indemnity also provides, with certain exceptions expressly provided for, that "the Master Servicer covenants and agrees . . . to pay or reimburse the Trustee for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of [the Sale Agreement] with respect to (A) the reasonable compensation and the expenses and disbursements of its counsel not associated with the closing of the issuance of the [applicable securities], (B) the reasonable compensation, expenses and disbursements of any accountant, engineer or appraiser that is not regularly employed by the Trustee, to the extent that the Trustee must engage such persons to perform acts or services [under the Sale Agreement] and (C) printing and engraving expenses in connection with preparing any Definitive [securities]."[2] We confirm that we view reasonable expenses, disbursements and advances otherwise within the Indemnity, if incurred or made by the Trustee in connection with the Trustee Settlement Activities, as being reimbursable by the Master Servicer under the Indemnity.

Without limiting any of the foregoing, we confirm that following the entry by the Trustee into the Settlement, Bank of America Corporation, BAC Home Loans Servicing, LP, Countrywide Financial Corporation and/or Countrywide Home Loans, Inc. shall pay the reasonable fees and expenses of the Trustee for Trustee Settlement Activities (including its reasonable attorneys' fees and expenses) on a current and ongoing basis (including all accrued

[2] We note that the language referenced in this letter may vary in certain ways in the Sale Agreements. Notwithstanding such variances, we intend this letter to apply, with same effect, to all the Sale Agreements for the transactions identified on Exhibit 1 hereto, except if such variances are material, in which case the parties hereto will consider in good faith how to implement the intent of this letter to such variances if the need arises.

and unpaid fees and expenses as of the date hereof, which shall be paid in full no later than 15 days from the execution of the Settlement).

Except as noted above, nothing herein is intended to limit, modify, supersede, or in any way affect any exceptions to the liability of the Master Servicer under the Indemnity that are based on the conduct of the Trustee. It is understood and agreed that the Indemnity does not cover any loss or liability incurred by reason of any tax consequences of the Settlement or arising out of the determination, administration or distribution (including distribution within each Covered Trust) of the Allocable Shares pursuant to the Settlement, which the Final Order and Judgment to be entered with respect to the Settlement shall provide shall not give rise to liability on the part of the BNYM Parties, the Bank of America Parties or the Countrywide Parties (all as defined in the Settlement Agreement). Nothing herein is intended to limit, modify, or in any way affect the limitations on the liability of the Master Servicer under Section 6.03 (*Limitation on Liability of the Depositor, the Sellers, the Master Servicer and Others*) of each PSA and Section 5.03 (*Limitation on Liability of the Seller, the Master Servicer and Others*) of each SSA.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

BAC HOME LOANS SERVICING, L.P.

By: _____
Name: Terrence P. Laughlin
Title: Legacy Asset Servicing
Division President,
Bank of America, N.A.
By: BAC GP, LLC, its general partner
By: Bank of America, N.A., its manager

Accepted and Agreed:

BANK OF AMERICA CORPORATION

By: _____
Name: Terrence P. Laughlin
Title: Legacy Asset Servicing Division President.

THE BANK OF NEW YORK MELLON

By: _____
Name:
Title:

Accepted and Agreed:

BANK OF AMERICA CORPORATION

By: _____
Name:
Title:

THE BANK OF NEW YORK MELLON

By: _____
Name: Loretta A. Lundberg
Title: Managing Director

EXHIBIT C

GUARANTY

This GUARANTY (as amended, supplemented, amended and restated or otherwise modified from time to time, this "Guaranty"), dated as of June 28, 2011, is made by BANK OF AMERICA CORPORATION (the "Guarantor"), in favor of THE BANK OF NEW YORK MELLON (f/k/a THE BANK OF NEW YORK) (the "Guaranteed Party").

W I T N E S S E T H:

WHEREAS, pursuant to the Pooling and Servicing Agreements and Sale and Servicing Agreements for the transactions identified on Exhibit 1 hereto (together the "Sale Agreements," and each a "Sale Agreement"), each, in Pooling and Servicing Agreements, among the Depositor thereunder, the Sellers thereunder, BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.), as Master Servicer (the "Master Servicer") and the Guaranteed Party, as Trustee, and each, in Sale and Servicing Agreements, among the Depositor thereunder, BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.), as Sponsor and Master Servicer, the Trust thereunder and the Guaranteed Party, as Indenture Trustee, the Master Servicer agreed to indemnify the Guaranteed Party in respect of certain losses, liabilities and expenses that might be incurred by the Guaranteed Party thereunder; and

WHEREAS, in connection with the activities of the Guaranteed Party that relate to the settlement of Mortgage Loan repurchase and other claims now or hereafter arising against the Sellers and/or the Master Servicer relating to the transactions identified on Exhibit 1 hereto (the "Settlement"), the Guarantor has agreed to execute and deliver this Guaranty.

NOW THEREFORE, for good and valuable consideration the receipt of which is hereby acknowledged, the Guarantor agrees, for the benefit of the Guaranteed Party, as follows.

ARTICLE I
DEFINITIONS

SECTION 1.1. Certain Terms. The following terms (whether or not underscored) when used in this Guaranty, including its preamble and recitals, shall have the following meanings (such definitions to be equally applicable to the singular and plural forms thereof):

"Guaranteed Party" is defined in the preamble.

"Guarantor" is defined in the preamble.

"Guaranty" is defined in the preamble.

"Master Servicer" is defined in the first recital.

"Material Adverse Effect" means a material adverse effect on (i) the business, assets, operations, prospects or condition, financial or otherwise, of the Guarantor or (ii) the ability of the Guarantor to perform any of its obligations under this Guaranty.

"Obligations" means the payment obligations of the Master Servicer, whether now or hereafter arising, direct or indirect, absolute or contingent, under any Sale Agreement, in accordance with the terms and conditions thereof, to indemnify, hold harmless or otherwise reimburse the Guaranteed Party against certain losses, liabilities or expenses that may arise in connection with the Settlement.

"Parties" means the Guarantor and the Guaranteed Party.

"Sale Agreement" is defined in the first recital.

"Settlement" is defined in the second recital.

SECTION 1.2. Sale Agreement Definitions. Unless otherwise defined herein or the context otherwise requires, terms used in this Guaranty, including its preamble and recitals, have the meanings provided in each applicable Sale Agreement solely with regard to that Sale Agreement (and not the other Sale Agreements).

ARTICLE II
GUARANTY PROVISIONS

SECTION 2.1. Guaranty. The Guarantor hereby absolutely, unconditionally and irrevocably guarantees the full and punctual payment when due of all existing and future Obligations and indemnifies and holds harmless the Guaranteed Party for any and all costs and expenses (including reasonable attorneys' fees and expenses) incurred by the Guaranteed Party in enforcing any rights under this Guaranty. This Guaranty constitutes a guaranty of payment when due and not of collection, and the Guarantor specifically agrees that it shall not be necessary or required that the Guaranteed Party exercise any right, assert any claim or demand or enforce any remedy whatsoever against the Master Servicer or any other Person before or as a condition to the obligations of the Guarantor hereunder.

SECTION 2.2. Reinstatement, etc. The Guarantor hereby agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if at any time any payment (in whole or in part) of any of the Obligations is invalidated, declared to be fraudulent or preferential, set aside, rescinded or must otherwise be restored by the Guaranteed Party as though such payment had not been made.

SECTION 2.3. Guaranty Absolute, etc. This Guaranty shall in all respects be a continuing, absolute, unconditional and irrevocable guaranty of payment, and shall remain in full force and effect until the Obligations shall have been paid in full in cash and the Master Servicer shall have no further obligation under any Sale Agreement to indemnify, hold harmless or otherwise reimburse the Guaranteed Party. The Guarantor guarantees that the Obligations of the Master Servicer will be paid strictly in accordance with the terms of each Sale Agreement under which they arise. The liability of the Guarantor under this Guaranty shall be absolute, unconditional and irrevocable irrespective of:

(a) any lack of validity, legality or enforceability of the Obligations;

(b) whether or not the Settlement is ever finally approved or consummated;

(c) the failure of the Guaranteed Party (i) to assert any claim or demand or to enforce any right or remedy against the Master Servicer or any other Person under the provisions of any Sale Agreement or otherwise, or (ii) to exercise any right or remedy against any other guarantor of, or collateral securing, any Obligations;

(d) any amendment to, rescission, waiver or other modification of, or any consent to or departure from, any of the terms of any Sale Agreement; or

(e) any other circumstance (other than payment of the Obligations in full in cash) which might otherwise constitute a legal or equitable discharge of any surety or any guarantor.

SECTION 2.4. Waiver, etc. The Guarantor hereby waives promptness, diligence, notice of acceptance and any other notice with respect to any of the Obligations and this Guaranty and any requirement that the Guaranteed Party exhaust any right or take any action against the Master Servicer or any other Person (including any other guarantor) or entity or any collateral securing the Obligations, as the case may be.

SECTION 2.5. Postponement of Subrogation, etc. The Guarantor agrees that it will not exercise any rights which it may acquire by way of rights of subrogation until all of the Obligations shall have been paid in full in cash and the Master Servicer shall have no further obligation under any Sale Agreement to indemnify, hold harmless or otherwise reimburse the Guaranteed Party in respect of the Obligations. Any amount paid to the Guarantor on account of any such subrogation right in violation of the foregoing limitation shall be held in trust for the benefit of the Guaranteed Party and shall immediately be paid and turned-over to the Guaranteed Party in the exact form received by the Guarantor (duly endorsed in favor of the Guaranteed Party, if required) to be credited and applied against the Obligations.

SECTION 2.6. Payments. The Guarantor hereby agrees with the Guaranteed Party that all payments made by the Guarantor hereunder will be made in lawful currency of the United States to the Guaranteed Party, without set-off, counterclaim or other defense (other than that payment is not due) and without withholding or deduction for or on account of any present or future taxes, duties or other charges, unless the withholding or deduction of such taxes or duties is required by law.

ARTICLE III
REPRESENTATIONS AND WARRANTIES

SECTION 3.1. Representations. The Guarantor hereby represents and warrants to the Guaranteed Party as set forth below.

(a) The Guarantor is a corporation incorporated under the laws of the State of Delaware, duly organized or formed, validly existing and in good standing and is duly qualified to do business, and is in good standing in, every jurisdiction in which the nature

of its business requires it to be so qualified, except where the failure to be so qualified would not reasonably be expected to have a Material Adverse Effect. This Guaranty has been duly authorized, executed and delivered by the Guarantor;

(b) the execution, delivery and performance of this Guaranty have been and remain duly authorized by all necessary organizational action and do not contravene any provision of (i) the Guarantor's organizational documents, (ii) any law, rule or regulation, (iii) any contractual restriction binding on Guarantor or its property or (iv) any order, writ, judgment, award, injunction or decree binding on or affecting the Guarantor or its property, except in the case of the foregoing clauses (ii) through (iv), where such contravention would not reasonably be expected to have a Material Adverse Effect and would not reasonably be expected to impose any liability on the Guaranteed Party;

(c) all consents, licenses, clearances, authorizations and approvals of, and registrations and declarations with, any governmental authority or regulatory body necessary for the due execution, delivery and performance of this Guaranty have been obtained and remain in full force and effect and all conditions thereof have been duly complied with, except where the failure to so obtain such consents, licenses, clearances, authorizations and approvals, registration or declarations or to satisfy the conditions thereof would not reasonably be expected to have a Material Adverse Effect, and no other action by, and, except as contemplated herein, no notice to or filing with any governmental authority or regulatory body is required in connection with the execution, delivery or performance of this Guaranty; and

(d) this Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against the Guarantor in accordance with its terms, subject to general principles of equity and applicable bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally.

ARTICLE IV
MISCELLANEOUS PROVISIONS

SECTION 4.1. Binding on Successors, Transferees and Assigns; Assignment. This Guaranty shall be binding upon the Guarantor and its successors, transferees and assigns and shall inure to the benefit of and be enforceable by the Guaranteed Party and its successors, transferees and assigns.

SECTION 4.2. Amendments, etc. No amendment to or waiver of any provision of this Guaranty, nor consent to any departure by the Guarantor herefrom, shall in any event be effective unless the same shall be in writing and signed by the Guaranteed Party and the Guarantor and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

SECTION 4.3. Notices. All notices and other communications provided for hereunder shall be in writing (including facsimile communication) and mailed, telecopied or delivered to the Guarantor, attention Edward P. O'Keefe, General Counsel, Bank of America Corporation, at

100 N. Tryon Street, Charlotte, North Carolina 28255-0001, or, if such notice or communication is to the Guaranteed Party, attention Jane Sherburne, General Counsel, The Bank of New York Mellon, at One Wall Street, New York, New York 10286. All such notices and other communications, when mailed and properly addressed with postage prepaid or if properly addressed and sent by pre-paid courier service, shall be deemed given when received; any such notice or communication, if transmitted by facsimile, shall be deemed given when the confirmation of transmission thereof is received by the transmitter.

SECTION 4.4. No Waiver; Remedies. In addition to, and not in limitation of, Section 2.3 and Section 2.4, no failure on the part of the Guaranteed Party to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

SECTION 4.5. Captions. Section captions used in this Guaranty are for convenience of reference only, and shall not affect the construction of this Guaranty.

SECTION 4.6. Severability. Wherever possible each provision of this Guaranty shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Guaranty shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Guaranty.

SECTION 4.7. Governing Law, Entire Agreement, etc. **THIS GUARANTY SHALL BE DEEMED TO BE A CONTRACT MADE UNDER AND GOVERNED BY THE INTERNAL LAWS OF THE STATE OF NEW YORK (INCLUDING FOR SUCH PURPOSE SECTIONS 5-1401 AND 5-1402 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK). THIS GUARANTY CONSTITUTES THE ENTIRE UNDERSTANDING AMONG THE PARTIES HERETO WITH RESPECT TO THE SUBJECT MATTER HEREOF AND SUPERSEDES ANY PRIOR AGREEMENTS, WRITTEN OR ORAL, WITH RESPECT THERETO.**

SECTION 4.8. Forum Selection and Consent to Jurisdiction. **ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF THE GUARANTEED PARTY OR THE GUARANTOR SHALL BE BROUGHT AND MAINTAINED IN THE COURTS OF THE STATE OF NEW YORK, NEW YORK COUNTY OR IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. EACH PARTY HEREBY EXPRESSLY AND IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF THE COURTS OF THE STATE OF NEW YORK, NEW YORK COUNTY AND OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FOR THE PURPOSE OF ANY SUCH LITIGATION AS SET FORTH ABOVE. EACH PARTY IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS BY REGISTERED MAIL, POSTAGE PREPAID, OR BY PERSONAL SERVICE WITHIN**

OR WITHOUT THE STATE OF NEW YORK TO THE INDIVIDUAL DESIGNATED TO RECEIVE NOTICES UNDER SECTION 4.3. EACH PARTY HEREBY EXPRESSLY AND IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION WHICH IT MAY HAVE OR HEREAFTER MAY HAVE TO THE LAYING OF VENUE OF ANY SUCH LITIGATION BROUGHT IN ANY SUCH COURT REFERRED TO ABOVE AND ANY CLAIM THAT ANY SUCH LITIGATION HAS BEEN BROUGHT IN AN INCONVENIENT FORUM. TO THE EXTENT THAT ANY PARTY HAS OR HEREAFTER MAY ACQUIRE ANY IMMUNITY FROM JURISDICTION OF ANY COURT OR FROM ANY LEGAL PROCESS (WHETHER THROUGH SERVICE OR NOTICE, ATTACHMENT PRIOR TO JUDGMENT, ATTACHMENT IN AID OF EXECUTION OR OTHERWISE) WITH RESPECT TO ITSELF OR ITS PROPERTY, SUCH PARTY HEREBY IRREVOCABLY WAIVES SUCH IMMUNITY IN RESPECT OF ITS OBLIGATIONS UNDER THIS GUARANTY.

SECTION 4.9. Counterparts, etc. This Guaranty may be executed by the Parties hereto in several counterparts, each of which shall be deemed to be an original and all of which shall constitute together but one and the same agreement. A copy of this Guaranty executed and delivered by facsimile or in electronic form, including as a PDF file, shall be effective as delivery of an originally executed counterpart of this Guaranty.

SECTION 4.10. Counsel Representation. **EACH PARTY ACKNOWLEDGES AND AGREES THAT IT HAS BEEN REPRESENTED BY COMPETENT COUNSEL IN THE NEGOTIATION OF THIS GUARANTY, AND THAT ANY RULE OR CONSTRUCTION OF LAW ENABLING ANY PARTY TO ASSERT THAT ANY AMBIGUITIES OR INCONSISTENCIES IN THE DRAFTING OR PREPARATION OF THE TERMS OF THIS GUARANTY SHOULD DIMINISH ANY RIGHTS OR REMEDIES OF THE OTHER PARTY ARE HEREBY WAIVED.**

SECTION 4.11. Waiver of Jury Trial. **EACH PARTY HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS GUARANTY OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF THE OTHER PARTY. EACH PARTY ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION.**

IN WITNESS WHEREOF, this Guaranty has been duly executed and delivered by the Guarantor to the Guaranteed Party as of the date first above written.

BANK OF AMERICA CORPORATION

By:_____
Title: Legacy Asset Servicing
Division President

ACCEPTED AND AGREED:

THE BANK OF NEW YORK MELLON

By:_____
Title:

IN WITNESS WHEREOF, this Guaranty has been duly executed and delivered by the Guarantor to the Guaranteed Party as of the date first above written.

BANK OF AMERICA CORPORATION

By:_____
Title:

ACCEPTED AND AGREED:

THE BANK OF NEW YORK MELLON

By: [signature]
Title: Loretta A Lundberg
Managing Director

EXHIBIT D

At IAS Part 10 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse, 60 Centre Street, New York, New York, 10007 on the 6 day of September, 2000.

PRESENT:

HON. BEATRICE SHAINSWIT,

Justice.

In the Matter of the Application of	
IBJ SCHRODER BANK & TRUST COMPANY (not in its individual capacity but in its capacity as Trustee under a Trust Agreement dated as of December 21, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company and the Beneficiaries thereunder),	Index No. 101530/98
Petitioner,	ORDER AND JUDGMENT
for an order, pursuant to CPLR § 7701, for a Construction of an Indenture and Approval of a Settlement.	

Petitioner, IBJ Bank &Trust Company (now known as IBJ Whitehall Bank & Trust Company) ("IBJ"), solely in its capacity as successor trustee under a trust (the "Investor Trust") established under a trust agreement (the "Investor Trust Agreement") dated as of December 23, 1985 among Resources Satellite Corp., J. Henry Schroder Bank & Trust Company (now known as IBJ) and the beneficiaries thereunder, having applied to this Court for an order pursuant to CPLR § 7701 for, inter alia, approval of a settlement (the "Proposed Settlement") of an action currently pending before this Court and captioned, IBJ Schroder Bank & Trust Company, et al. v. GE Capital Spacenet Services, Inc., et al., Index No. 601228/96 (Shainswit, J.) (the "Spacenet Action"), such Proposed Settlement being embodied in the settlement agreement

(the "Settlement Agreement") attached as Exhibit D to the Petition (the "Verified Petition") filed by IBJ in this proceeding and verified on January 14, 1998 (a copy of the Settlement Agreement is annexed hereto as Exhibit A); and

Certain beneficiaries (the "Dissenting Beneficiaries") of the Investor Trust being represented by William H. Bode of Bode & Beckman LLP and having objected to the Proposed Settlement and the relief sought by Petitioner in this proceeding; and

The Appellate Division, First Department having ruled on April 20, 2000 that IBJ has the power as trustee of the Investor Trust to settle the Spacenet Action and having remanded this proceeding to this Court to determine whether the Court's approval of the Proposed Settlement is warranted; and

Upon reading and filing the Verified Petition and the exhibits thereto; the Affidavit of William H. Bode in Support of the Motion to Dismiss the Verified Petition, sworn to April 14, 1998 and the exhibits thereto; the Affirmation of Owen C. Pell, for Petitioner, in Opposition to Motion for an Order Removing IBJ as Trustee and in Opposition to Cross-Motion to Dismiss the Verified Petition, dated April 20, 1998 and the exhibits thereto; the Reply Affirmation of John S. Willems, for Petitioner, in Further Opposition to Cross Motion to Dismiss the Verified Petition, dated April 20, 1998; the written memoranda submitted by counsel for the Petitioner and counsel for the Dissenting Beneficiaries dated June 6, 2000; the reply letter submitted by counsel for the Dissenting Beneficiaries dated June 16, 2000; the reply letter submitted by counsel for the Petitioner dated June 23, 2000; and upon all prior proceedings and pleadings herein; and after the matter was submitted to the Court by White & Case LLP attorneys for IBJ and Tashjian & Padian and Bode & Beckman LLP attorneys for the Dissenting Beneficiaries, and due deliberation having been had thereon; and this Court having rendered its decision in writing dated August 16, 2000, it

is hereby ADJUDGED, [redacted] that:

(a) The Proposed Settlement as embodied in the Settlement Agreement is approved by the Court; and

(b) IBJ's decision to enter into the Proposed Settlement as embodied in the Settlement Agreement is within its powers under the Investor Trust Agreement and is reasonable and prudent; [redacted]

[redacted]

FILED

OCT 0 3 2000

COUNTY CLERK'S OFFICE
NEW YORK

ENTER

BV

J.S.C.

Norman Goodman

Clerk

EXHIBIT E

FEDERAL HOUSING FINANCE AGENCY

STATEMENT

For Immediate Release
August 30, 2011

Contact: Corinne Russell (202) 414-6921
Stefanie Johnson (202) 414-6376

Federal Housing Finance Agency Action Regarding Court Consideration of Proposed Bank of America Settlement

The Federal Housing Finance Agency (FHFA), in its capacity as conservator of Fannie Mae and Freddie Mac (the Enterprises), today filed an Appearance and Conditional Objection regarding the proposed settlement between Bank of America and a consortium of 22 investors being considered by a court in New York. This pleading was filed to obtain any additional pertinent information developed in the matter. The conservator is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time. In fact, FHFA considers it positive that the proposed settlement includes subservicing requirements, specific terms for the servicing of troubled mortgages and the curing of certain document deficiencies. Additionally, FHFA is encouraged that a number of significant market participants support the proposed settlement.

Due to its duty to preserve and conserve Enterprise assets, the conservator believes it prudent not only to receive additional information as it continues its due diligence of the proposed settlement, but also to reserve its capability to voice a substantive objection in the unlikely event that necessity should arise.

###

The Federal Housing Finance Agency regulates Fannie Mae, Freddie Mac and the 12 Federal Home Loan Banks. These government-sponsored enterprises provide more than $5.7 trillion in funding for the U.S. mortgage markets and financial institutions.

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of	:	
THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreement and Indenture Trustee under various Indentures) *et al.*,	:	**2011-cv-5988 (WHP)**
Petitioners,	:	
-against-	:	
WALNUT PLACE LLC *et al*.,	:	
Intervenor-Respondents.	:	

INSTITUTIONAL INVESTORS' STATEMENT IN SUPPORT OF SETTLEMENT AND CONSOLIDATED RESPONSE TO SETTLEMENT OBJECTIONS

WARNER PARTNERS, P.C.
Attorneys for Intervenor-Petitioners
950 Third Avenue, 32nd Floor
New York, New York 10022

Of Counsel:
GIBBS & BRUNS LLP
By: Kathy D. Patrick, Esq.
Robert D. Madden, Esq.

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TO THE HONORABLE WILLIAM PAULEY III:

This brief in support of the settlement, and in consolidated response to the various settlement objections discussed below, is filed by BlackRock Financial Management Inc., Kore Advisors, L.P., Maiden Lane, LLC, Maiden Lane II, LLC, Maiden Lane III, 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., as adviser to its funds and accounts, Teachers Insurance and Annuity Association of America, Invesco Advisers, Inc., Thrivent Financial for Lutherans, Landesbank Baden-Wuerttemberg, LBBW Asset Management (Ireland) plc, Dublin, ING Bank fsb, ING Capital LLC, ING Investment Management LLC, New York Life Investment Management LLC, as investment manager, 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 (collectively, the "Institutional Investors").

The Institutional Investors support the Trustee's application to settle repurchase and servicing claims for 530 Countrywide RMBS Trusts ("Trusts"). The Trustee's decision to settle the claims was reasonable. The settlement is highly beneficial to the Trusts and to the investors in their securities. There is likely no litigation alternative for 341 Trusts at issue in the

settlement, so they will get nothing if the settlement is not approved. For all Trusts, the $8.5 billion settlement obtains a final resolution with Bank of America, and thus protects them from the risks of a Countrywide bankruptcy. The comprehensive servicing improvements, which will cost Bank of America $400 million but may spare investors billions of dollars of losses, could not be obtained through contested litigation. The same is true of the defective document indemnity, under which Bank of America has agreed to indemnify the Trusts against 100% of the losses they suffer if the Trusts are unable to liquidate a loan due to unrecorded or incomplete mortgage or title policies.

The overwhelming majority of the thousands of investors who hold Trust securities have chosen *not* to contest the settlement.[1] The interests of this "silent majority" of Certificateholders—none of whom opposes the settlement—should not be ignored. They prefer settlement over: a) litigation to contest the settlement, or b) pursuing litigation of the Trustee's claims themselves. The interests of these investors, who prefer certainty over *any* form of litigation, are not served by disapproving the settlement.

The 44 objectors in this proceeding are not monolithic in opposition to the settlement. Half of the objectors express *no opposition* to the settlement. Instead, as authorized by Justice Kapnick's order below, they appeared simply to seek additional information concerning one or more of its terms.[2] The remaining objectors fall into four categories: a) financial guaranty and monoline insurers who seek only to clarify their rights under the settlement, b) waterfall objections that, necessarily, assume the settlement *will* be approved but seek clarification

[1] The settlement has been widely publicized and was the subject of a world-wide, months long notice program implemented by order of Justice Kapnick in the Supreme Court of New York.

[2] A chart listing the objections may be found at the beginning of Part III, *infra*.

concerning its distribution, c) objectors who are *litigating* their own, separate claims against BNY Mellon or Bank of America ("Litigation Claimants"), and d) miscellaneous objectors.

Given the requirement that Certificateholders act for the "common benefit" of the Trusts and their Certificateholders, the Litigation Claimants' objections must be scrutinized carefully to ensure they comply with PSA Section 10.08 and are not a prohibited "individual course of action," *Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1982), that seeks to advance "individual and conflicting pecuniary interests." *In re Innkeepers USA Trust*, 448 B.R. 131, 144 (Bktcy. S.D.N.Y. 2011). These Litigation Claimants offer only speculation and innuendo in opposing the settlement. Of this group, only one objector, Walnut Place, even proposes to litigate the Trustee's claims. Walnut's proposal covers at most three Trusts. It rests on the assumption that an anonymous LLC, formed for the purpose of litigating claims, has the financial wherewithal and staying power to obtain a better result through litigation than the excellent result the Trustee has already obtained through settlement, and it is devoid of any analysis as to whether or how that could be achieved. An anonymous hedge fund's desire to speculate with the Trustee's claims in this way does not portend any result, much less a better one, than the highly favorable resolution embodied in the Trustee's settlement.

The Trustee's decision to seek court approval through an Article 77 proceeding, which ensured all Certificateholders could and would be heard, is a well and firmly embodied procedure that appears in decades of federal and New York case law, New York statutory law, and the RESTATEMENT (SECOND) OF TRUSTS. The settlement should be approved and the objections to it should be overruled.

I. Overview of the Issues

1. The Trusts exist pursuant to Pooling and Servicing Agreements (PSAs). The PSAs govern the rights and obligations of the Trustee, Certificateholders and the Mortgage

Sellers.[3] Under the PSAs, the contract claims resolved in the settlement belong to the Trustee. *See* PSA §§ 2.01(b), 2.04. The Trustee holds those contract claims for the ultimate benefit of the Certificateholders, but the claims do not belong to Certificateholders. The Trustee has the power to pursue the claims, *see* PSA §§ 2.03(c), 2.04, and 3.03[4]; but it is not required to investigate them, *see* PSA § 8.02(iv), or to expend its own funds to do so, *see* PSA § 8.02(vi). These provisions significantly limit the litigation options for the Trustee.

2. The circumstances in which Certificateholders can pursue these claims are also very narrow. The PSAs require Certificateholders to aggregate 25% of the Voting Rights, provide a financial indemnity to the Trustee, and give two consecutive sixty day notice periods. *See* PSA §§ 7.01, 8.01, 8.02 and 10.08; *see also Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC* v. *Countrywide Fin. Corp.*, No. 650474/2008, slip op. at 6-7 (Sup. Ct. N.Y. Oct. 7, 2010), attached as Ex. 1 to the Warner Declaration, filed herewith.[5] Only then can Certificateholders file suit: but they must sue derivatively, on behalf of the Trusts, for the common benefit of Certificateholders. *See* Part II(A), *infra.*

3. The sole issue to be decided here is whether the Trustee's decision to settle the Trustee's claims was reasonable. The PSAs authorize the Trustee to settle disputed claims. *See* PSA §§ 2.01, 2.03(c), 2.04, and 3.03. The Trustee retained five experts to advise it concerning the settlement, so it could make an informed, independent decision whether to accept it. The

[3] Unless otherwise indicated, capitalized terms are defined consistently with the PSAs.

[4] S*ee also LaSalle Bank, N.A. v. Nomura Asset Capital Corp.*, 180 F.Supp.2d 465, 471 (S.D.N.Y. 2001) ("the plain meaning" of a conveyance of "all right, title, and interest in the mortgages to LaSalle as Trustee . . . ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted.") and *Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 784 N.Y.S.2d 513, 14 (N.Y.A.D. 1st Dep't. 2004) (under PSA, authority to sue "is committed solely to the trustee of the pooled loans").

[5] All subsequent references to Exhibits refer to Exhibits to the Warner Declaration.

Court has questioned whether the Trustee was entitled to rely on experts for this purpose. *See* Tr. of Sept. 1 Hearing at 27:3-5. The PSAs expressly permit the Trustee to do so. *See* PSA § 8.02(ii). In fact, the Trustee's good faith reliance on the opinion of these experts "shall be full and complete authorization and protection in any action taken or suffered or omitted by it hereunder." *Id.* The Second Circuit has recognized that, where an Indenture authorizes a trustee to rely on opinions of counsel, the *correctness* of the underlying opinion is irrelevant: "Nor is the Trustees' good faith put in question merely by virtue of the fact that the opinion relied upon may have been wrong; to so hold would eviscerate the opinion of counsel defense." *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992). For this reason alone, the PSAs and applicable law require that the court approve the settlement. *See* Part II(C)(2), *infra*.

4. Even if the court could ignore the plain language of the PSAs, and it cannot, the settlement itself is reasonable. The $8.5 billion settlement the Trustee asks the court to approve is the second-largest litigation settlement in history, and the largest ever achieved in private litigation. If approved, it will provide the Trusts with a favorable and early resolution of uncertain claims for repurchase of ineligible mortgages. It will substitute a solvent obligor, Bank of America, for the deeply insolvent Countrywide entities who are otherwise liable for the repurchase claims. It effects a complete reform of mortgage servicing, at Bank of America's expense, in a manner that is favorable not only to investors, but to borrowers. Finally, it provides the Trusts with a complete, and automatic, indemnity for losses they suffer as a result of unrecorded mortgages and defective and missing title policies.

5. There are 530 Trusts involved in the settlement. The Institutional Investors hold 25% of the Voting Rights in 189 of these Trusts. If the settlement is not approved, they can and will litigate claims for those Trusts, but they do not believe litigation would achieve a better—or

more certain—result than the settlement the Trustee has in hand. Though they are prepared to litigate, they prefer the settlement. There are 341 other Trusts involved in the settlement. In all but two of those 341 Trusts, no group alleges that they hold 25% of the Voting Rights. In fact, of the over $40 billion in securities held by the Institutional Investors or by funds and clients they advise, almost $14 billion are in Trusts where the Institutional Investors lack the required 25% threshold. If the settlement is disapproved, these Trusts will receive no remedy at all. *See* Part II(F), *infra*. Rejection of the settlement would be devastating for these Trusts and their investors. The Court should press the objectors carefully to determine whether they have any plan, at all, to obtain relief for these Trusts if the settlement is disapproved.

6. If the settlement is rejected, the industry-reforming servicing improvements and the document indemnity will also be lost for all of the Trusts. These are affirmative, negotiated remedies. They are not mandated by the PSAs, so they cannot be achieved through contested litigation of prudent servicing claims. Destroying the settlement, and thus the servicing improvements, could cause investors to suffer billions of dollars of additional losses they will likely avoid if the settlement is approved. Borrowers will be hurt too, because the servicing improvements—which provide important protections and incentives for them—will not be implemented fully.

7. Evaluation of any settlement necessarily requires consideration not only of the terms of the proposed settlement but an estimate of the likely outcome of a litigated alternative. It is a truism, and also true, that litigation is inherently uncertain. The inaccurate assertion that there are "billions of dollars in toxic mortgage claims" in the pools does not establish that those claims will succeed if pursued in litigation. Speculative claims that Bank of America is liable as a successor in interest for contracts with the Countrywide Mortgage Sellers do little to assure

investors that years of contested litigation will not end with only an insolvent Countrywide to respond to their claims. The raw assertion that the Trustee's claims "*may* exceed $150 billion" similarly fails to grapple with the barriers to these claims imposed by the governing agreements. Also left unaddressed are the legal rulings and risks that might render these claims worthless, or at a minimum worth *far* less than the settlement the Trustee has actually achieved.

8. The Institutional Investors are 22 of the world's largest and most reputable investors. They have appeared here to support the settlement because they believe it is reasonable. Their open support for the settlement, and their disclosed efforts to achieve it, were well known to the market and to investors in the Trusts' securities. As the Court has observed, the group grew over time because other investors observed what was happening, believed the Institutional Investors' litigation strategy had merit and wanted to be part of achieving the solution. We submit that the Institutional Investors' group grew for another reason: the market knew these were institutions of sterling reputation. It knew they were not pursuing these claims to obtain an individual advantage: they simply wanted the deals to work, as they were envisioned, for the common benefit of all Certificateholders.

9. The Institutional Investors will receive the *same* benefit under the settlement that will flow to every other, similarly situated investor. None of them has offered to trade approval of this settlement for an individual advantage, whether in litigation or elsewhere. It remains to be seen whether the same is true of the objectors. The reasonableness of the settlement is also evident from another key fact: the vast majority of investors in securities issued by the Trusts, including institutions that hold billions of dollars of certificates, have chosen not to object to the settlement. The court must consider their interests, and those of the Institutional Investors who

want the substantial benefits and certainty conferred by the settlement, in assessing whether to approve the settlement.

10. In the following sections, we provide more detail concerning the reasonableness of the settlement, the feasibility of litigated alternatives, and specific responses to arguments made to date by the objectors. The Institutional Investors, like all other Certificateholders, reserve their right to supplement this brief in support as additional information is disclosed through discovery and litigation of the approval proceedings.

II. The Settlement is Reasonable Given the Terms of the Governing Agreements, the Result Achieved and the Potential Value of the Claims

A. Overview of Contract Provisions and Claims

11. By the summer of 2010, the situation faced by investors in the Trusts' securities had become dire. By virtually *every* measure, Bank of America's home loan servicing was *worse* than that of other firms in the industry. Defaults and delinquencies in the underlying pool of mortgages were mounting. Investors' losses were mounting too. Separately, monoline and private mortgage insurers had filed suit seeking to rescind their insurance coverage on certain Trusts, claiming that they contained high levels of mortgages that were originated in violation of applicable reps and warranties.[6] Emails released by the Securities and Exchange Commission indicated that Countrywide had originated loans "through our channels with disregard for process [and] compliance with guidelines," even though it knew of a "serious lack of compliance within [its] origination system." *See* Complaint ¶ 49, *SEC v. Mozilo*, No. 09-cv-03994 (C.D.

[6] "Rep and warranty" is the term used to describe the representations Mortgage Sellers make to the Trusts when they sell a mortgage. The violation of these representations and warranties gives rise to a right, on the part of the Trusts, to demand that the Seller repurchase the mortgage if the defect "materially and adversely affects the interests of Certificateholders in that Mortgage Loan." *See* PSA § 2.03(c).

Cal. June 4, 2009). Faced with mounting losses, a group of institutional investors began to organize to try to compel the Trustee to act.

12. The PSAs *prohibit* Certificateholders from enforcing the Trusts' contracts individually. Instead, they must do so *collectively*, for the good of *all* Certificateholders. *See* PSA § 10.08 ("no one or more Holders of the Certificates shall have any right in any manner whatever . . . to enforce any right under this Agreement, except in the manner provided in this Agreement and for the common benefit of all Certificateholders"). Certificateholders who seek to pursue claims derivatively for the Trusts must also meet a number of technical conditions precedent:

> a. A prior notice of an Event of Default that must be issued by investors holding not less than 25% of the Voting Rights in the Trust. *See* PSA § 7.01;
>
> b. The Event of Default must remain uncured for a period of sixty days. *Id.*;
>
> c. The 25% holders must then demand that the Trustee file suit. *See* PSA § 10.08;
>
> d. The 25% holders must couple their demand with an offer to indemnify the Trustee against all costs and expenses associated with pursuing any investigation or claims. *Id.*; and,
>
> e. The Trustee must fail to file suit for a period of sixty days, after which any Certificateholder who participated in the Notice of Non-Performance and offered the required indemnity may file suit derivatively on behalf of the Trusts. *Id.*

13. These "no-action" clauses have been rigorously enforced by the courts. As the New York Supreme Court recently observed in enforcing *a substantively identical provision*, under this "broad language," certificateholders "are barred from bringing [an] action" that does not strictly comply with the provision's terms. *Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC*, No. 650474/2008, slip op. at 6-7, attached as Ex. 1. No-action clauses, like the one

contained in Section 10.08, ensure that "the *judgment* of the Trustee concerning whether to resort to the courts is controlling upon all of the bondholders." *Campbell* v. *Hudson & Manhattan R.R. Co.*, 277 A.D. 731, 734 (N.Y. App. Div. 1951), *aff'd*, 302 N.Y. 902 (1951).[7] These clauses "prevent[] individual bondholders from pursuing an individual course of action." *Batchelder* v. *Council Grove Water Co.*, 131 N.Y. 42, 46 (1892). No-action clauses also "protect[] against the risk of strike suits," and against the risk that "a single bondholder or a small group of bondholders . . . might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest." *Feldbaum* v. *McCrory Corp.*, C.A. No. 11866, 1992 WL 119095, at *6 (Del. Ch. June 1, 1992) (applying New York law). As the New York Supreme Court held in *Greenwich*, certificateholders "agree[] to" the restrictions of a no-action clause "when they purchase[] the certificates." Slip op. at 7. Courts applying New York law have repeatedly dismissed complaints on the basis of plaintiffs' failure to comply with no-action clauses.[8]

[7] Unless noted, all emphasis is added.

[8] *See, e.g.*, *Peak Partners, LP v. Republic Bank*, 191 F. App'x 118, 126-27 (3d Cir. 2006); *Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.*, 2010 WL 4867533, at *2-*4 (M.D. Fla. Oct. 8, 2010); *Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, 2010 WL 3324705, at *3-*5 (N.D. Ill. Aug. 20, 2010); *Bank of N.Y. v. Battery Park City Auth.*, 251 A.D.2d 211 (1st Dep't 1998); *Greene v. N.Y. United Hotels, Inc.*, 236 A.D. 647, 648 (1st Dep't 1932), *aff'd*, 261 N.Y. 698 (1933); *Levy v. Paramount Publix Corp.*, 149 Misc. 129, 133-34 (Sup. Ct. N.Y. Co. 1933), *aff'd*, 241 A.D. 711 (1st Dep't 1934), *aff'd*, 265 N.Y. 629 (1934); *see also Sutter v. Hudson Coal Co.*, 259 A.D. 1053 (2d Dep't 1940) (denying plaintiff's motion for summary judgment); *Schallitz v. Starrett Corp.*, 82 N.Y.S.2d 89, 91 (Sup. Ct. N.Y. Co. 1948) (directing judgment); *Relmar Holding Co. v. Paramount Publix Corp.*, 147 Misc. 824, 825 (Sup. Ct. N.Y. Co. 1932) (denying motion to strike defense), *aff'd*, 237 A.D. 870 (1st Dep't 1933); *Van Wezel v. McCord Radiator & Mfg. Co.*, 20 N.Y.S.2d 91, 99-100 (N.Y. City Ct. 1939) (granting summary judgment); *McMahan & Co.* v. *Wherehouse Entm't, Inc.*, 859 F. Supp. 743, 748-79 (S.D.N.Y. 1994) (granting summary judgment), *rev'd in part on other grounds*, 65 F.3d 1044 (2d Cir. 1995); *Victor v. Riklis*, 1992 WL 122911, at *6 (S.D.N.Y. May 15, 1992) (denying leave to amend complaint). *Cf. Beal Sav. Bank* v. *Sommer*, 8 N.Y.3d 318, 332 (2007) (enforcing contractual provision restricting individual lenders from initiating separate, multiple lawsuits).

14. As a practical matter, no-action provisions *preclude* Certificateholders from pursuing claims on behalf of the Trusts unless they: a) aggregate large numbers of holders and holdings sufficient to satisfy the Voting Rights thresholds and b) prove they have the financial wherewithal to indemnify the Trustee and the Trusts for the expenses associated with lengthy and arduous litigation of servicing and repurchase claims.[9] *Compare Cruden*, 957 F.2d at 968 (noting that a no-action provision meant that "debenture holders could not bring suit 'upon or with respect to' the Indenture" without first complying with requirements of the clause). This important limitation must be considered when the Court assesses whether a litigated alternative is even available for most of the Trusts.

15. The Court has pressed the Trustee to explain why it acted (or failed to act) as it did. The answer lies in the terms of the PSAs. The PSAs significantly limit the Trustee's obligations to pursue these claims. The term "Trustee" is, in fact, something of a misnomer, at least as it describes BNY Mellon's role under the PSAs.[10] "The corporate trustee has very little in common with the ordinary trustee . . . . The trustee under a corporate indenture has his [or her] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His [or her] status is more that of a stakeholder than one of a trustee." *AG Capital Funding Ptnrs., L.P. v. State Street Bank & Trust Co.*, 11 N.Y.3d 46, 896 N.E.2d 61, 866

[9] With one exception, none of the objecting investors has expressed any willingness to provide the financial indemnity that must be offered before a Certificateholder can compel the Trustee to pursue these claims. The exception, however, is of dubious provenance: an indemnity has allegedly been offered by the anonymously named "Walnut Place LLC," a hedge fund that has not disclosed its balance sheet. Given the typical lifespan of most hedge fund partnerships, and the fact that it was organized *solely* to pursue litigation claims, Walnut's unstated resources offer the court (and other investors in the trusts for which it claims the right to act) no assurance that it has the financial wherewithal—or, indeed, the lifespan—to pursue these claims successfully through lengthy litigation.

[10] This "art of the possible" problem is endemic in this case, and must be borne carefully in mind when considering the alternatives to settlement.

N.Y.S.2d 578, 583-84 (N.Y. 2008). Under the PSAs, the Trustee is not required to expend any of its own funds to pursue claims or perform its duties, *see* PSA § 8.02(vi); it is not required to assume any financial risk in the performance of its duties, *see id.*; it is not obligated to investigate any fact unless instructed to do so by the holders of 25% of the Voting Rights, *see id.* at § 8.02(iv); and, it is not under any "obligation to exercise any of the trusts, rights or powers vested in it by this Agreement or to institute, conduct or defend any litigation . . . at the request of the Certificateholders . . . unless such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee against the costs, expenses and liabilities which may be incurred." *See id.* at §§ 8.02 and 10.08.

16. The Trustee was faced with competing demands from investors about what to do with the Trustee's claims. The Institutional Investors hold (or advise clients and funds that hold) more than $40 billion of outstanding securities issued by the Trusts. They believed the settlement was favorable. They wanted the Trustee to accept it. The Walnut Place objectors, in contrast, filed suit on February 23, 2011. *See* Walnut Place Objection, St. Doc. #28 at 2. That action, filed after repeated press releases by the Institutional Investors disclosed ongoing discussions with BNY Mellon and Bank of America, sought relief for only a single trust: CWALT Trust 2006-OA10, in which Walnut Place alleged to hold $704 million of original face securities.[11] *See id.*; *see also* St. Doc. #24, #25, Ex. A, p. 1-2. The Institutional Investors had sizeable holdings in the same trust.[12]

[11] Given payments of principal, the outstanding amount of these securities was likely no more than $500 million.

[12] In April 2011, Walnut Place filed an amended complaint to include an additional Trust, CWALT 2006-OA3, in which it alleged to hold $110 million of original face securities, and alleged that it had begun to prepare a lawsuit on a third trust, CWALT 2006-OA21. *See* Walnut Place Objection, St. Doc #28 at 2; St. Docs. #24, #25, Ex. A, p. 1-2. The Institutional Investors

17. In the face of these conflicting demands, BNY Mellon *could have* simply settled the claims without seeking court approval. *See* PSA §§ 2.03, 2.04, 3.03; *Redmond v. Commerce Trust Co.*, 144 F.2d 140, 154-55 (8th Cir. 1944). It did not. Instead, BNY Mellon did precisely what the law and the PSAs permitted it to do: it made a judgment about whether the settlement benefitted the Trusts and should be accepted, then it filed suit asking the court to approve the settlement. When it filed suit, the Trustee's pleading disclosed openly both the settlement and the competing demands of the Walnut Place Plaintiffs. *See* Memorandum of Law in Support of Trustee's Original Petition, St. Doc. #12, at 13-14.

B. The Trustee's Common Law Duties Do Not Offer Any Path to a Greater Recovery for the Trusts

18. The Trustee's common law duty to avoid conflicts of interest does not offer any path to a greater recovery for the Trusts.[13] Nor do those duties alter the reality that—in the absence of a settlement—claims on behalf of hundreds of Trusts likely will never be pursued.

19. A duty to avoid conflicts of interest cannot possibly be expanded to negate the PSAs' clear statement that the Trustee is not required to expend its own funds to pursue claims or perform its duties. PSA § 8.02(vi). Even after an Event of Default, when "the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary," *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 12, 632 N.Y.S.2d 520, 527 (App. Div. 1st Dep't. 1995), New York law is clear "that this by-now relatively minor change in the legal landscape, if change it is, does not render the indenture irrelevant." *Id.* As the *Beck* court explained, the terms of the contract still govern and define the Trustee's obligations post-default:

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had holdings in all three of those Trusts. It is as yet unclear how many of Walnut Place's securities were acquired *after* Walnut Place learned a settlement had been achieved; the Institutional Investors' holdings predate the settlement.

[13] *See* Part II(F), *infra*.

"The trustee must in the post-default context act prudently, *but only in the exercise of those rights and powers granted in the indenture*. The scope of the trustee's obligation then is still circumscribed by the indenture, albeit less narrowly. The Trustee is *not required to act beyond his contractually conferred rights and powers*, but must, as prudence dictates, exercise those singularly conferred prerogatives in order to secure the basic purpose of any trust indenture, the repayment of the underlying obligation." *Id.* (emphasis added).

20. Two principles thus emerge from *Beck* and the cases that apply it. First, in a post-default world, the Trustee is obligated to exercise those rights it has, prudently. Second, even in a post-default world, the Trustee is not required to act beyond its contractually conferred rights and powers. These principles matter. They have real consequences for the Trusts and their Certificateholders if the settlement is not approved. Under these agreements, the Trustee does not have—and will never have—an obligation to expend its own funds to pursue years of contentious and difficult litigation on behalf of the Trusts.[14] PSA § 8.02(vi). The Trustee does not have, and will never have, an obligation to investigate facts to determine whether an Event of Default has occurred unless 25% of the Certificateholders instruct it to do so. *Id.* at §8.02(iv). Even after an Event of a Default, if the Certificateholders seek to compel the Trustee to take action, they must offer the Trustee an indemnity of the expenses it will incur to do so.[15] Given

[14] No reported case has held that either of the common law duties cited by the Court—the duty to avoid conflicts and the duty to perform ministerial actions competently—would impose on a Trustee the obligation to expend its own funds, in the absence of an indemnity, to pursue claims for a Trust.

[15] *Id.* at §8.02(ix) (Trustee is "under no obligation to exercise any of the trusts, rights or powers vested in it by this Agreement or to institute, conduct or defend any litigation . . . at the request, order or direction of any of the Certificateholders, pursuant to the provisions of this Agreement, unless such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee against the costs, expenses and liabilities which may be incurred therein or thereby").

the barriers imposed by these agreements, there is reason to question whether the Trustee would ever be obligated to pursue these claims in the future if the settlement were disapproved.

C. The Value and Reasonableness of the Settlement of the Repurchase Claims

21. The issue here is not whether the Trustee's decision to enter into the settlement was right; the issue is whether it was reasonable. *See In re Application of IBJ Schroder Bank & Trust Co.*, Index No. 101530/1998, at 6 (N.Y. Sup. Ct. N.Y County Aug. 16, 2000) ("the trustee's decision to compromise the . . . action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference"); *In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. County 1980); *see also* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."). As in any decision regarding a settlement, the Trustee was entitled to consider the relative costs, benefits and risks associated with the proposed settlement and with the litigation alternative. A critical set of risks and uncertainties concerns the Trusts' rights to demand the repurchase of ineligible mortgages held in their collateral pools.

1. The Terms that Govern the Repurchase Obligation

22. The Mortgage Sellers' obligation to repurchase defective mortgages is found in Section 2.03 of the PSAs. In pertinent part, it reads as follows:

> "Upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a Mortgage Loan made . . . that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. Each Seller hereby covenants that within 90 days of the earlier of its discovery or receipt of a written notice from any party of a breach of any representation or warranty with respect to a Mortgage Loan sold by it . . . shall cure such breach in all material respects, and if such breach is not so cured, shall . . . repurchase the affected Mortgage Loan . . . from the Trustee at the Purchase Price . . . ."

23. The "parties" to the agreement are Countrywide Home Loans, Inc. and various "Park" entities (Park Granada, Park Monaco, and/or Park Sienna, all of which were aggregation conduits for Countrywide). Countrywide Home Loans, Inc. is the Mortgage Seller obligated to repurchase defective loans. The other parties are the Depositor, Countrywide Home Loans Servicing, L.P. as Master Servicer, and BNY Mellon as Trustee. The Certificateholders are not parties to the agreements. They thus have no direct rights to demand the repurchase of defective Mortgage Loans. Repurchase claims, if they are pursued, must be pursued by the Trustee (or derivatively, for the common benefit of all Certificateholders, by Certificateholders who have met the conditions precedent).

24. Only the Mortgage Seller, Countrywide Home Loans, Inc., is obligated to repurchase defective mortgage loans. *See* PSA § 2.03(c). Countrywide Financial Corporation, the then-public parent company of Countrywide Home Loans has no obligation, under the PSAs, to repurchase defective mortgage loans. *Id.* It also made no representation or warranty concerning the credit quality or features of the underlying mortgage loans. *Id.* at § 2.03(a).

25. Bank of America, which at the time had no relationship at all with Countrywide, likewise is not a party to any of the PSAs. It therefore made no representation regarding the credit quality of the underlying mortgage loans. It also has no direct contractual obligation to repurchase defective Mortgage Loans. Instead, its sole liability—if it has any—is as the successor in interest to, or as a de facto merger party with, Countrywide Home Loans, Inc.

26. The PSAs require that a defective loan be cured or repurchased. Missing or defective loan documents, liens, endorsements and title policies can often be cured *without* triggering a repurchase obligation. This is authorized by the PSAs, *see* PSA § 2.03(c), and by

law.[16] Thus, an allegedly "toxic" defective mortgage may remain in the pools if the Mortgage Seller can cure the identified defect. Where a defect cannot be cured, the Seller is required to repurchase "that Mortgage Loan" if the defect "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan." *Id.* The reference to "that Mortgage Loan" creates significant litigation uncertainties the Trustee was entitled to consider in deciding whether to settle the claims. Does this language require loan by loan litigation of thousands of individual loan files?[17] If not, how is a defect as to "that Mortgage Loan" to be proved?[18] The Trustee was also entitled to consider this likelihood of delay, if loan by loan litigation was

[16] *See, e.g.*, UCC §§ 3-203 (right of transferee for value to compel unqualified endorsement), 3-205 (permitting completion of blank endorsements), and 3-309 (permitting proof of existence of a missing note through a *valid* lost note affidavit). *See also* N.Y. UCC §§ 3-201, 3-204, and 3-804. All fifty states have enacted some version of the UCC. *See Veal v. Am. Home Mortg. Servicing, Inc.* (*In re Veal*), 449 B.R. 542, 554 (B.A.P. 9th Cir. 2011). That a lawful cure is permitted does not mean that robo-signing a false document or affidavit is sufficient to constitute a cure. To the contrary, signing false documents or affidavits would be an independent breach of the prudent servicing obligation that exposes the Trusts to liability and additional risks of loss. *See also* Ex. 2, Bank of America Presentation Regarding Settlement with GSEs, entitled "Addressing Legacy Mortgage Issues," at p. 4, n.4, Jan. 3, 2011 (noting that GSE claims included "approximately $832 million of missing document claims in the process of being cured").

[17] Assuming there are 260 court days per year (52 weeks x 5 days a week) and eight hours of court time in each day, there are only 2,080 hours per year of court time available. There are at least 770,000 loans held as collateral by these Trusts. The Institutional Investors concluded that *at least* 30% of the loans were eligible for repurchase; the Trustee's expert used a much lower, 14.4% defect rate. Even if one used the Trustee's calculation, it would mean that 110,880 loans would be the likely subject of repurchase litigation. At a mere thirty minutes per loan, it would take a court—working full time on nothing but repurchase claims—26.6 years to process and decide all of these potential repurchase claims, without considering time for appeal. Even if the cases were spread among a number of courts, and shorter processing and longer trial days were assumed (neither of which is likely realistic), the litigation of these repurchase claims could easily drag on for more than a decade, if not longer.

[18] While one court granted a motion in limine permitting a bond insurer to present sampling evidence on a fraud claim (but left open the question of whether such evidence would be sufficient proof of any element of the claim), we have found no case permitting a trustee to use sampling to demonstrate the breach of a representation or warranty in support of a repurchase claim for an individual mortgage loan or loans.

required, as well as the prospect that years of delay would significantly diminish the value of any ultimate litigation recovery.

27. A separate area of uncertainty surrounds the issue of "material adversity" and when and how it must be demonstrated. The Institutional Investors believe firmly that adversity need be demonstrated only at the time the loan is sold to the securitized trust. Bank of America, however, has made two arguments the Trustee could reasonably consider in assessing the likelihood that litigation would achieve a better result.[19] The first argument concerns adversity: when, if ever, is a loan that is *performing* eligible for repurchase? The Institutional Investors have argued strenuously that performance is *not* a defense to repurchase claims. To cite one extreme example: if a Trust was represented to include loans that were only to prime borrowers, but some loans were made to subprime borrowers, the fact that the subprime borrowers were paying on their loans would not be sufficient to avoid a repurchase claim. This is the logical interpretation of the contract. It also vindicates the expectations of the investors and the contract parties at the time of the securitization.[20] There is, however, no reported case even considering whether a performing loan may properly be the subject of a repurchase demand; much less one that concludes a repurchase claim is valid. The second, more familiar argument, concerns "causation"; namely, the assertion that the Mortgage Sellers are not required to repurchase a Mortgage Loan unless the breach of the representation or warranty *caused* the loss that has been suffered on the loan. In this view, losses caused by macro-economic factors such as intervening

[19] Regardless of whether the Trustee agreed with the merit of these arguments, the fact that Bank of America has made them previously in other cases was a clear indication that Bank of America might make them in any litigation of the Trustee's repurchase claims. The Trustee therefore could reasonably consider the likelihood that it might succeed, or fail, in the argument that only initial adversity—at the time of the securitization—was required to prove a repurchase claim.

[20] Put bluntly, if this was not the intent, it is hard to understand why the structure would include a repurchase obligation for the breach of a representation or warranty.

declines in the housing market or the economy, or micro-economic factors such as a borrower's job loss, may be offered as evidence to negate a repurchase claim. The Institutional Investors reject this theory: the repurchase obligation exists because the Trusts are not supposed to be exposed to *any* risks associated with ineligible mortgages, and the mortgages simply aren't supposed to be in the Trusts. Having placed ineligible mortgages in the Trusts, the Sellers—not the Trusts—should bear all subsequent micro- or macro-economic risks associated with them. While the Institutional Investors believe logic and the contracts are firmly on their side in this matter, this too is an issue subject to dispute and uncertainty.[21]

2. Arguments that the Claims "May Exceed $150 Billion" Ignore the Likelihood that they May Be Worth Far Less.

28. The Trustee faced substantial uncertainty concerning the size of potential repurchase claims. It therefore retained experts to advise it, both with regard to legal issues affecting the likelihood of success on the repurchase claims, and their potential size. The Court has questioned whether the Trustee was entitled to estimate the size of the potential claim in deciding to settle or to retain an expert to assist it in doing so. *See* Tr. of Sept. 1 Hearing, at 27:3-5. The Trustee's reliance on experts for this purpose is not only expressly permitted by the terms of the PSAs, *see* PSA § 8.02(ii), in most circumstances it is conclusive. *Id.* The Trustee's expert concluded the reasonable value of the repurchase claims was between $8.8 billion and $11 billion.[22] *See* Report of Brian Lin at 7 ("[T]he settlement range of approximately $8.8 to $11

[21] The Trustee retained an independent expert to advise it about these risks. *See* Report of Professor Barry E. Adler. While the Institutional Investors have a different view of this risk, this is an area in which the case law has not yet developed, so the value of a certain recovery that eliminates these risks is higher.

[22] The Institutional Investors were not privy to the Trustee's expert reports before they were made public. While we disagree with some of the conclusions drawn by the Trustee's experts, the PSAs expressly permit the Trustee to rely on the opinions of experts in deciding whether to settle or prosecute these claims. *See* PSA § 8.02(ii) ("Except as otherwise provided in §8.01, . . .

billion is reasonable *without applying* any legal haircuts.") (emphasis added).[23] Based on the data he reviewed, the Trustee's expert concluded a breach rate of 36%, and a success rate of 40%, for an overall defect rate of 14%, was a reasonable basis on which to estimate the size of the potential repurchase exposure in the Trusts. *Id.* at 8. Those claims, of course, would then have to be proved successfully to yield a recovery.

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the Trustee may consult with counsel, financial advisers or accountants of its selection and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith . . . ."). The Trustee's ability to rely on experts for this purpose is not unique. In the context of derivative claims, for example, courts have held that special litigation committees are entitled to rely on advisors in deciding whether to dismiss such claims. *See, e.g.*, *Lichtenberg v. Zinn*, 260 A.d.2d 741, 744 (N.Y. 3d Dep't 1999) (affirming SLC's dismissal of derivative suit; concluding that SLC's investigation was appropriate because "SLC retained experienced independent counsel and three unaffiliated experts to assist it in evaluating the specific allegations set forth in the complaint, and, further, in reviewing the multitude of documents requested by the SLC"); *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 305829, at *18 (Del. Ch. 1997) (affirming SLC's decision to approve proposed settlement of derivative action brought against Delaware corporation, noting that SLC had exercised "a right to justifiably rely on an expert report"). Similarly, courts have held that bankruptcy trustees are entitled to rely on the advice of advisors in deciding whether to settle claims. *See, e.g.*, *JAS Partners, Ltd. v. Boyer*, No. 1:10-CV-303-TLS, 2011 U.S. Dist. LEXIS 42414, at *17-*18 (N.D. Ind. Apr. 19, 2011) (rejecting argument that bankruptcy trustee failed to properly investigate claim where trustee consulted experts in assessing value of claims); *In re Adler*, No. 09-34791-BKC-RBR, Chapter 11, 2010 Bankr. LEXIS 3001, at *10-*11 (Bktcy. S.D. Fla. Sept. 16, 2010) (in finding that trustee acted in good faith in entering into settlement agreement, citing trustee's familiarity with claims and his extensive work with estate's counsel and forensic experts in evaluating such claims); *Santos v. Elder* (*In re Macadam Computer, Inc.*), No. C 06-4889 SI, 2007 U.S. Dist. LEXIS 49848, at *13-*16 (N.D. Cal. June 28, 2007) (affirming bankruptcy court's approval of settlement where trustee had hired expert to opine on reasonableness of offer, and after thorough investigation, expert opined that settlement was reasonable); *Desmond v. ASR Acquisition Corp.* (*In re Desmond*), Bk. No. 03-13878-MWV, Ch. 7, Adv. No. 04-1107-MWV, Adv. No. 04-1112-MWV, 2006 BNH 20, 2006 Bankr. LEXIS 1021 (Bktcy. D.N.H. 2006) (finding that bankruptcy trustee competently and fairly assessed costs, merits, and possible outcomes in deciding to accept settlement offer, where trustee based estimates on opinions of accounting and lending experts he had hired).

[23] Each of the expert reports has been posted to www.cwrmbssettlement.com.

29. The Institutional Investors, in their separate assessment of the reasonableness of the settlement, estimated that the size of the potential repurchase claims was no more than $32.3 billion, *before* discounts for litigation risks and delay. This estimate was derived based upon the supported assumption[24] that 60% of the loans had breaches of reps and warranties, and that 50% would be successfully repurchased by a solvent obligor.[25] The $8.5 billion settlement thus represents a recovery of roughly 26.3 cents on the dollar for these claims, without the need to overcome legal hurdles such as the burden of proof, loss causation (if applicable), successor liability and losses associated with delay.[26]

30. In contrast to the Trustee's careful analysis, the claim by Walnut Place that the Trustee's claims "may exceed $150 billion," *see* Removal Notice at ¶ 13, is unsupported by a citation to any data, expert report or even logic. To be true, this would mean virtually every loan in the Trusts was eligible for repurchase. That extreme claim is not even supported by Walnut's own lawsuit. It also is not supported by the claim of any other objector. Below is a summary of the objectors' allegations concerning rates at which loans in the Trusts allegedly breach reps and warranties:

a. Walnut Place

[24] These assumptions were based on data from 150,000 actual loan repurchases on Countrywide originated loans, experience with whole loan repurchases, inquiries to loan review providers and a review of public data concerning loan repurchases.

[25] Successor liability, and whether these repurchase claims could be recovered, are discussed in the next section.

[26] In contrast, the class action structure advocated by certain objectors typically yields no more than two to seven cents on the dollar. *See* Ellen M. Ryan and Laura E. Simmons, *Securities Class Action Settlements: 2010 Review and Analysis*, Cornerstone Research, at Figure 5; Jordan Milev, Robert Patton, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review*, NERA Economic Consulting, at Figure 34 (July 26, 2011).

31. Walnut's initial complaint alleged that CWALT Trust 2006-OA10 held a total of 6,531 loans. Walnut Compl. at ¶ 2. Walnut claimed to have "investigated" 2,166 loans and determined that 1,432 had unspecified but false "representations and warranties." *Id.* This is a breach rate of 66%, not 100%. There is, of course, no guaranty that every repurchase claims on these allegedly ineligible loans would succeed.

b. AIG

32. Objector AIG filed a securities claim asserting that it had investigated 260,000 loans, and determined that 40% of them breached a representation or warranty. *See* Complaint ¶ 126, *American International Group Inc. v. Bank of America Corp.*, Index No. 652199/2011 (N.Y. Sup. Ct. Aug. 8, 2011).

c. FHFA

33. FHFA's Office of Inspector General reported a breach rate of only 15% in a post-mortem forensic review of loans purchased by Freddie Mac. *See* Evaluation of the Federal Housing Finance Agency's Oversight of Freddie Mac's Repurchase Settlement with Bank of America, FHFA Office of Inspector General, at 31 (Sept. 27, 2011).[27] This finding is especially noteworthy because the reps and warranties contained in the loans purchased by Freddie Mac are stronger than those contained in the Trusts' contracts.

34. In a separate securities action it filed against Countrywide, FHFA alleged it had conducted a "loan-level" analysis of 86 Countrywide securitizations, involving tens of thousands of loans, to assess compliance with reps and warranties concerning owner occupancy rates and

[27] MBIA has a lawsuit alleging breach rates of 90% in an adversely selected population of second lien deals. Only five Trusts in the Settlement involve second lien structures. Because they are different in kind, and because MBIA's review was on an adversely selected loan population, its findings regarding alleged breach rates do not undermine the reasonableness of the estimated exposure calculated by the Trustee's expert.

Loan-to-Value ratios. *See* Complaint, Tables 7 and 8, *FHFA v. Countrywide Financial Corp.*, No.11-cv-06195 (Sup. Ct. NY. Sept. 2, 2011). On average, FHFA alleged that it found 11% of the mortgage loans in the pools breached owner occupancy reps and warranties, 25.6% breached reps and warranties regarding the percentage of loans in the pools with LTV's greater than 80%, and 13.2% breached reps and warranties regarding the percentage of loans in the pools with LTV's greater than 100%, many of which findings were likely on the same loans.[28] *Id.* FHFA's findings may well explain why, as the Conservator of Freddie Mac and Fannie Mae, it issued a press release stating that "[FHFA's objection] was filed to obtain any additional pertinent information developed in the matter. [FHFA] is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time."[29]

35. The Trustee recognized that the pursuit of repurchase claims could require years. It could yield nothing, something, or a lot. But "a lot" is what the Trustee recovered through the settlement. By any measure, $8.5 billion is an enormous amount of money. It dwarfs Bank of America's earlier estimate that the *entirety* of its remaining repurchase exposure—across all platforms—faced an upper range of potential loss of between $7 billion and $10 billion.[30] The settlement compares favorably with the amount received by the GSEs in their separate settlement

[28] These findings are far lower than the breach rates the Institutional Investors assumed in their own settlement analysis.

[29] *See* Federal Housing Finance Agency Press Release, Aug. 30, 2011, *available at* http://www.fhfa.gov/webfiles/22570/BofA83011.pdf.

[30] *See* Andrew Frye, *BofA Says $10 Billion is Top of Buybacks Forecast*, BLOOMBERG NEWS, Jan. 21, 2011, attached as Ex. 3. This "remaining exposure" at the time was estimated to include remaining claims for repurchases by the government sponsored enterprises Fannie Mae and Freddie Mac for their guaranty portfolio, private label repurchase claims such as those held by the Trusts, repurchase claims filed by monoline insurers like MBIA and Ambac, and repurchase claims filed by whole loan buyers.

of repurchase claims with Bank of America, even though the GSE contracts contain stronger contractual reps and warranties than those contained in the Trusts' contracts.

36. The Trustee's filing of the instruction proceeding will permit all interested investors to test the reasonableness of the Trustee's decision to settle these claims. A difference of opinion does not render the Trustee's decision to settle unreasonable. Here, where there was substantial uncertainty concerning the likelihood that claims would be pursued for many Trusts, and where even those claims that might be pursued faced an uncertain legal landscape, the Trustee was entitled to conclude that it preferred an $8.5 billion "bird in the hand."

37. The Trustee was also entitled to consider whether there was any "bird in the bush" if a settlement was rejected. This was a particular concern given Countrywide's insolvency and the uncertainties concerning whether Bank of America could be held liable as its successor. It is to that issue that we now turn.

3. Successor Liability Risks

38. The successor liability risk here is obvious. Bank of America did not sign any of the PSAs. It never promised to repurchase a single loan. In 2008, Countrywide Financial Corporation (CFC) was merged into a subsidiary of Bank of America in a statutory Delaware merger. CFC did not merge into Bank of America itself. Though Bank of America assumed certain of CFC's corporate debt, it did not overtly assume the repurchase obligations owed by the Mortgage Seller, Countrywide Home Loans, Inc.

39. The case for successor liability or de facto merger is far from clear. A federal court in the Ninth Circuit has dismissed several Countrywide-based claims against Bank of America on separateness grounds, based on facts identical to those alleged by objectors such as

AIG.[31] That court undertook detailed analyses of the law that should govern the issue of successor liability and de facto merger. The *Maine State Retirement* opinion is particularly comprehensive and makes plain the stark risks the Trustee would face in litigating a successor liability/de facto merger claim.

40. An outlier among the cases that have considered whether Bank of America may be liable as a successor to the Countrywide-affiliated Mortgage Sellers is a case brought by the bond insurer MBIA. In that case, Justice Bransten denied *dismissal* of a claim of de facto merger after she concluded that MBIA had alleged sufficient facts to state such a claim under New York law. The decision does not hold, of course, that Bank of America is liable for Countrywide's liabilities. The court did not provide any basis to conclude that New York law applied to this issue (and other courts considering the matter have concluded it is governed by Delaware, rather than New York, law).

41. The Trustee also sought and obtained advice from a leading corporate and securities professor, and a valuation expert, to assess the risks associated with pursuing a successor liability claim for the Trusts. It was prudent for the Trustee to do so: the issue of successor liability, and the potential to win or lose it, is a huge risk to any prospect of a litigated recovery on the Trustee's claims. The Countrywide-affiliated Mortgage Sellers are deeply insolvent. The financial press is rife with speculation concerning when Bank of America will place them in bankruptcy.

42. The functional insolvency of the Countrywide entities was confirmed by the valuation report from the Trustee's expert, *see* Report of Capstone Valuation Services. The

[31] *See Maine State Ret. Sys.* v. *Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP (MANx), 2011 WL 1765509, at *8-*9 (C.D. Cal. Apr. 20, 2011); *Allstate Ins. Co., et al. v. Countrywide Financial Corp.*, et al., No: 2:11-CV05236-MRP (MANx), slip op. at 43-44 (C.D. Cal. Oct. 21, 2011).

report contains a key finding that neither the court, nor any rational investor, should ignore in evaluating whether to approve the settlement: if the Trusts had to look solely to Countrywide Financial Corporation to satisfy their repurchase claims,[32] their *maximum* potential recovery would not exceed $4.8 billion. *See* Capstone Report at 3. The Trusts have recovered almost twice that amount—$8.5 billion—by way of this settlement. It was inherently reasonable for the Trustee to settle for twice the likely recovery from Countrywide, given the prospect that successor liability issues might be lost. Settlement is also entirely reasonable given the very real prospect that Bank of America might yet bankrupt Countrywide, leaving the Trusts fighting for what they could get in a Countrywide Bankruptcy.

43. The Trustee was entitled to evaluate these risks and benefits in deciding whether to settle. The opinion of the Trustee's expert, Professor Robert Daines, makes clear that these risks are serious and might be insurmountable. *See* Daines Report at 38 (concluding as to a de facto merger theory: "I think the economic arguments and bulk of the case law favor BAC, but it is possible — though not likely — that the Trustee could succeed on this . . . New York could follow the lead of the recent decision in *MBIA v. Countrywide* and find that de facto merger allegations are plausible enough to survive a motion to dismiss. . . . The potential for a favorable ruling however is muted by the fact that New York law may not even apply," and noting elsewhere that "I do not believe New York law will apply."). It was not unreasonable for the Trustee to conclude that certainty, and the substitution of Bank of America as a solvent obligor, were a better outcome for the Trusts than years of uncertain litigation at the end of which there might be only a bankrupt Countrywide to satisfy the Trustee's claims. Given the risks, the

[32] This analysis assumes success on an additional uncertainty; namely, whether the corporate veil could be pierced between Countrywide Financial Corporation and its subsidiary, the Mortgage Seller Countrywide Home Loans Inc.

Trustee's decision to settle might well have been the only truly *prudent* conclusion to be drawn.[33]

D. Servicing Improvements and Litigation Risks

44. A key component of the settlement is the near complete transformation of loan servicing that will occur upon the approval of the settlement. This is a matter of keen importance to all investors in the trusts, no matter the tranche in which they hold, because poor loan servicing magnifies investor losses and increases poor outcomes for borrowers. As the chart below demonstrates, at the time of the settlement, Bank of America was by far the worst of the major bank loan servicers. Its consistently poor performance was endemic: regardless of loan type, regardless of activity, Bank of America was at the bottom of nearly every category:

Key Pool Statistics by Servicers – May 2011[34]

Alt-A	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60 Days DQ**	**Roll Rate 60 to 90 Days DQ**	**Number of Modifications Granted as % of UPB**	**6 Mo Mod Redefault Rate**	**Weighted Avg. Mos to Liquidation (last 12)**	**WA Mos to Liq from Foreclosure**
BofA	503,000/56,900	11.3%	43.2%	52.1%	11.2%	12.3%	21	23
JPM Chase	72,000/4,790	6.6%	42.3%	49.1%	7.1%	9.9%	20	19
CitiMortgage	49,000/1,709	3.4%	38.0%	34.6%	16.1%	5.1%	18	19
Wells Fargo	195,593/9,906	5.1%	40.7%	34.6%	15.4%	12.6%	21	19
Option ARM	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**	**Weighted Avg. Mos to Liquidation**	
BofA	153,604/36,876	24%	44.3%	57.0%	15.6%	17.2%	24	29
JPM Chase	51,199/4,949	9.6%	40.8%	49.0%	6.3%	11.5%	19	21
Prime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**	**Weighted Avg. Mos to Liquidation**	
BofA	131,568/10,163	7.7%	43.5%	54.3%	5.3%	9.3%	19	21
JPMorgan Chase	105,688/5,582	5.2%	49.2%	53.5%	3.8%	8.2%	17	13

[33] This is particularly true where the majority of Trusts lacked investors ready, willing, and able to fund the Trusts' litigation of these claims and bear the Trusts' substantial litigation risks.

[34] Source: RMBS My Final Look as of May 2011 Remittance, using data from CoreLogic Loan Performance, CoreLogic Home Price Index and RMBS 2000-2010 Vintages.

Wells Fargo	184,341/3,947	2.1%	36.1%	44.3%	3.5%	6.8%	15	14
Subprime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**	**Weighted Avg. Mos to Liquidation**	
BofA	426,616/117,472	27.5%	35.9%	42.5%	38.8%	18.9%	27	30
JPMorgan Chase	193,714/25,194	13%	29.4%	40.1%	41.7%	14.7%	23	25
Wells Fargo	155,681/14,391	9.2%	34.4%	33.0%	43.3%	16.5%	24	19

45. Bank of America's poor servicing had real and lasting consequences for investors and borrowers. Its markedly longer time to resolution meant that it advanced more funds, for longer, to pay principal and interest on loans that were hopelessly in default. While on the surface these advances benefitted the trusts, in reality, they magnified collateral losses: every advance creates a super-senior lien that must be satisfied on liquidation, at the expense of holders in loss bearing tranches. Bank of America granted fewer modifications to troubled borrowers, and those it granted failed at a much higher rate, thus exacerbating losses that might have been avoided through competent implementation of an appropriate modification. Bank of America also had much higher rates of delinquencies, and did less to re-convert them to performing loans, than did any other major bank servicer.

46. "Prudent servicing" plainly required a far better level of service than Bank of America was providing, but litigation offered little prospect of improving the situation. Litigation of servicing claims would likely be on a loan by loan basis; i.e., how much of the loss on Loan A could have been avoided through prudent servicing. This was an intractable problem, particularly for long term holders who depend on prudent servicing to minimize losses and maximize performance of their investments. Imprudent servicing was also exceedingly difficult to remedy under the PSAs. Certificateholders cannot compel the Trustee to replace a servicer without: a) amassing 66% of the Voting Rights, b) identifying a replacement subservicer acceptable to the rating agencies, and c) indemnifying the Trustee for any losses reasonably

occasioned by the instruction to replace the servicer. *See* PSA §§ 7.01, 7.02, and 8.02(ix). There are at least 770,000 loans in the Trusts' pools. Even assuming a replacement servicer for such a massive volume of loans could be found, the requirement that Certificateholders must indemnify the Trustee against all losses occasioned by instructed termination and transfer of the Master Servicer was an insurmountable barrier. No investor, much less the fiduciaries who were trying to achieve a better outcome for their investors, could indemnify the Trusts for the risk of loss associated with transferring servicing of $160 billion in loans.

47. The settlement avoids these problems, because it is a consensual agreement. Though the Trustee had no ability to force Bank of America to transfer loans to subservicing under the contracts,[35] by virtue of the settlement, Bank of America has agreed to do so at its own expense. Bank of America has estimated that the costs of implementing these servicing improvements will be roughly $400 million over and above the settlement payment itself. More important than these cost savings are the potential results. The sub-servicers are specialists. They are incentivized to provide outcomes that are beneficial to both borrowers and investors. Simply in terms of the $400 million cost to provide it, this benefit is enormous; if it succeeds in returning borrowers to performance through modifications, and otherwise reduces delinquencies, defaults, and loss severities, its value will likely be many times that amount.

48. This is not the only servicing improvement the Trustee has obtained in the settlement. Bank of America has also agreed to benchmark its servicing performance to national servicing standards. *See* Settlement Agreement at ¶ 5(c), attached as Ex. 25. If the settlement is approved, Bank of America will be required to compensate the Trusts, automatically and on a monthly basis, for servicing efforts that fall below the stated benchmarks. Nothing in the

[35] PSA § 3.02 (permitting, but not requiring, master servicer to transfer loans to subservicer).

contract requires Bank of America to do this. The Trusts could not have obtained this affirmative, automatic compensation mechanism through contested litigation. They will never be able to recover it if the settlement is not approved.[36] An annual, independent compliance review will monitor Bank of America's compliance with this requirement. *See* Settlement Agreement at ¶ 5(f) ("Reporting and Attestation of Compliance with Servicing Improvements"). These important servicing improvements will improve the performance of the Trusts' loans over time. They have substantial value to investors—value that will be destroyed, irretrievably, if the settlement is not approved.

49. The settlement also benefits borrowers. Ultimately, repayment of the securities issued by the Trusts depends upon the ability and willingness of borrowers to make their mortgage payments as and when they are due. The collapse in the American economy coupled with the decline in the housing and job markets has left many borrowers in deep financial distress. Many borrowers could and would benefit from loan modifications. It is widely recognized that principal reductions are one largely unused tool that could help troubled borrowers pay their loans. A positively performing loan, even at a reduced rate, is vastly preferable to having one more property in foreclosure. It is also preferable to ownership of a vacant property, in a depressed real estate market, that deteriorates because no one is there to maintain it. Bank of America (like many other servicers) faced uncertainty in implementing

[36] *See, e.g.*, Ex. 4, Amherst Mortgage Insight, "Amherst Analysis: The Bank of America Settlement," June 30, 2011 ("Most interesting, the settlement includes some sizeable steps to improve the servicing on the covered Trusts. Bank of America has agreed to move the servicing of high-risk loans to qualified sub-servicing firms, at Bank of America's expense . . . . We applaud this idea, but implementation of the transfer[s] will take time."); *see also* Ex. 5, *BofA to Move High-Risk Countrywide Mortgages to Subservicers*, HOUSING WIRE, July 28, 2011 ("'We believe that Bank of America's actions to move the servicing of high-risk loans to qualified sub-servicing firms, at Bank of America's expense, are particularly significant,' said Laurie Goodman, an analyst at Amherst Securities.").

significant principal reduction modifications or other innovations such as short sales or "cash for keys" programs because the generic "prudent servicing" mandate in the PSAs did not explicitly authorize them to do so.[37]

50. The settlement cures this problem: By confirming that principal reductions *are* permissible in the Trusts, the settlement offers hope to tens of thousands of borrowers who might otherwise have been unable to refinance and reduce their payments because their loans were under water.[38] By requiring that the servicing of loans for troubled borrowers be transferred to specialty servicers who are incentivized to provide prompt modifications that work over the long term, the settlement increases the likelihood that deserving borrowers' loans will return to performing status promptly. This outcome is plainly in the interest of borrowers and investors alike. The court should consider whether any feasible alternative exists before it relegates the Trusts to "loan by loan" litigation of prudent servicing claims.

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[37] The last time Bank of America agreed to implement large scale loan modifications in the Trusts was in connection with the Attorney Generals' multi-state settlement of predatory lending claims against Countrywide. *See* March 24, 2010 Press Release of Hon. Martha Coakley, Attorney General of the Commonwealth of Massachusetts (mandating not only loan modifications but "significant principal forgiveness"), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2010/ag-coakley-secures-3-billion-in-loan.html, and Final Judgment by Consent, C.A.No. 10-1169, *Commonwealth of Massachusetts v. Countrywide Financial Corp., et al.*, in the Superior Court of the Commonwealth of Massachusetts. This agreement precipitated a lawsuit by disgruntled investors who claimed that the Pooling and Servicing Agreements did *not* authorize principal reduction modifications of loans held in the Trusts. *See Greenwich*, No. 650474/2008, attached as Ex. 1.

[38] The Institutional Investors are not privy to the ongoing discussions among various Banks, the federal government, and the state Attorneys General. According to a recent Wall Street Journal article, the multi-state discussions with the Attorneys General appear to have been focused on loans in the "held for investment" portfolio of the target banks, rather than on those held in securitized trusts. *See* Ruth Simon, Nick Timiraos, and Dan Fitzpatrick, *New Mortgage Plan Floated*, WALL ST. J., Oct. 18, 2011, *available at* http://online.wsj.com/article/SB10001424052970204346104576637513972299854.html. While this may change or expand, the certainty that principal reductions *will be* available to borrowers whose loans are held in *these* Trusts removes any doubt and is an important benefit to borrowers.

E. The Document Indemnity

51. The settlement contains another automatic compensation mechanism that will spare the Trusts years of potentially costly and uncertain litigation: the document indemnity. *See* Settlement Agreement at ¶ 6. Recent Consent Judgments issued by the Office of the Controller of the Currency implemented important documentation requirements to protect borrowers against wrongful foreclosure. Those requirements, however, did not address what happened to the Trusts when they were unable to liquidate a loan because the required mortgage and title policies were missing or incomplete.

52. The settlement solves this problem, too. The documentation cure provision in the settlement targets loans where the Trusts' ability to foreclose may be compromised by deficiencies in the recording of the mortgage and where the Trusts' ability to recover insurance proceeds may be compromised by deficiencies in the Trusts' title policies. If the settlement is approved, Bank of America must either cure these deficiencies or, if it does not, and the Trusts cannot liquidate the loan as a first-lien holder as a result of these deficiencies, indemnify the Trusts for 100% of the loss suffered. This automatic remedy is highly beneficial to the Trusts. By imposing an immediate incentive to cure document deficiencies, the settlement will avert many document issues that might arise later. The indemnity for unrecorded mortgages and missing title policies affords the Trusts a certain, 100% recovery and avoids loan-by-loan litigation documentation issues. No provision of the contract could be invoked to achieve this affirmative, comprehensive cure and indemnity obligation through litigation. While individual loans certainly would be subject to repurchase claims if mortgages were unrecorded or title insurance did not exist, the expense and delay of loan by loan litigation is not a better option than an automatic compensation remedy for these defects.

F. What are the Alternatives to Settlement?

53. A key question in any settlement decision is: what is the alternative? That question must be probed carefully, because the PSAs afford Certificateholders few rights and even fewer remedies.

54. All parties agree on one fundamental fact: the claims being settled (or that would have been pursued in litigation in the absence of a settlement) belong to the Trustee. They do not belong to the Certificateholders individually. Section 10.08 of the PSAs expressly denies the Certificateholders any right to "control the operation and management of the Trust Fund, or the obligations of the parties" — and grants to the Trustee the exclusive right to control the trust and litigation on behalf of the trust. The provision goes on to provide, again in clear terms, that Certificateholders do not have the right to sue, but must instead rely on the Trustee: "No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement . . . ." PSA § 10.08.

55. There is, therefore, no mechanism under the PSAs by which Certificateholders have any possibility of litigating the Trustee's claims themselves, particularly over the Trustee's objection. The PSAs, again, are explicit in providing that the claims belong to the Trustee, not Certificateholders. In this, the Trust structure is not unique. Disgruntled shareholders may not pursue a corporation's claims themselves; instead, they must meet strict requirements, and proceed derivatively on behalf of the corporation. It would be extraordinary, therefore, to conclude that a party like the Trustee could not control the decision to prosecute—or settle—its own claims simply because a holder of one of its securities objected. This is not the law as it pertains to the highly technical terms of a Pooling and Servicing Agreement.

56. No action provisions are enforced strictly.[39] The court must therefore consider the following questions in evaluating the reasonableness of the Trustee's decision to settle and the validity of the objectors' demand for an "opt out" right:

- How can an "opt out" right for Certificateholders be reconciled with the plain language of § 10.08, which vests exclusive control of litigation decisions in the Trustee?
- What plan do the proposed objectors offer to the Trusts if they succeed in destroying the settlement? With few exceptions, none of the objectors has expressed a willingness to fund the litigation of these claims. For many Trusts, there is no identified group of objectors that has aggregated the 25% Voting Rights required to permit them to do so. This issue is important to the Institutional Investors, who have almost $14 billion in holdings in Trusts included in the settlement where they do not have (and no other objector has claimed to have) 25% of the Voting Rights.
- What certainty do the proposed objectors offer that the Trusts will recover more if the Trustee pursues these claims in litigation? The answer, necessarily, is none. Litigation is inherently uncertain.
- What indemnity do the proposed objectors offer if (on some as yet unrecognized theory) they displace the Trustee's right to control the claims and successfully exclude a Trust from the settlement? The answer, again, is none. No objector has offered to provide an indemnity equal to the risks associated with pursuing litigation over settlement. These risks include: loss of the settlement payment,

[39] *See* ¶13, *supra*.

loss of the funded servicing improvements, loss of the document indemnity *and* the costs of pursuing the contested litigation.

- What about the rights of investors who want to receive the benefits of the settlement? The PSAs require that the Trustee's claims be pursued for the common benefit of all Certificateholders. The views of those Certificateholders who value certainty over speculation are certainly entitled to deference, given the lack of any articulated plan for, or financial resources to pursue, litigation for most Trusts if the settlement is destroyed.

57. An order rejecting the settlement would also have broad implications for RMBS investors in other trusts created by other issuers. Stated plainly, if a group of well organized, reputable investors cannot gain approval of a settlement that is favorable to the Trusts, why would any other group of investors even try? If a trustee that has taken the extraordinary step of seeking court approval of a favorable settlement is sent packing, what assurance is there that any trustee would feel confident in settling claims later, for different trusts?

58. The law in this area is exceedingly difficult and unfavorable to investors. It imposes few burdens on trustees and interposes multiple barriers to investors' ability to compel trustees to act. This is a fact of life that cannot be ignored: absent this Settlement, it is difficult if not impossible to see how the investors in these Trusts could ever obtain benefits as great as those provided in the settlement. The PSAs present significant hurdles and obstacles to litigation by the Trustee, or the Certificateholders. Those difficulties here are magnified by the fact that no recovery approaching that guaranteed by the settlement could ever be achieved without also piercing the corporate veil and requiring Bank of America to answer for the liabilities of Countrywide—a formidable obstacle all by itself. Given this reality, the court should not lightly

conclude that litigation is a preferable alternative, much less that the outcome of a litigation effort would be better for the Trusts or for RMBS investors as a whole.

III. Response to Objections

59. The objections lodged against the settlement fall into five general categories. *See supra* pp. 2-3. We address each, briefly, below but reserve the right to supplement this response when discovery is concluded. A chart listing the objections appears below:

Objections to The Settlement				
Seek Additional Information	**Miscellaneous Objections**	**Litigation Claimant**	**Financial Guaranty And Monoline Insurers**	**Waterfall-Related Objections**
American Equity Investment Life Insurance Co., et al. (8/31, St. Doc. #169)	**Commonwealth Advisors, Inc.** (8/30, St. Doc. #184)	**American Fidelity Assurance Co.** (8/30, St. Doc. #170)	**Ambac Assurance Corporation, et al.** (8/30, Doc. #29)	**Waterfall Eden Master Fund, Ltd.** (8/29, St. Doc. #165)
Ballantyne Re PLC (8/30, St. Doc. #187)	**Cranberry Park LLC, et al.** (8/2, St. Doc. #90)	**American International Group, Inc., et al.** (8/10, St. Doc. #131)	**CIFG Assurance North America, Inc.** (8/24, St. Doc. #155)	**Clayhill Investors LLC** (8/30, St. Doc. #180)
Blue Mountain Credit Alternatives Master Fund, LP (8/30, St. Doc. #188)	**Monarch Debt Recovery Master Fund Ltd, et al.** (8/30, St. Doc. #173)	**Federal Home Loan Bank (FHLB) of Boston, et al.** (7/13, St. Doc. #55)	**Syncora Guarantee Inc.** (8/30, Doc. #24)	
Federal Deposit Insurance Corporation (8/29, Doc. #3)	**TM1 Investors, LLC** (7/13, St. Doc. #51)	**Knights of Columbus** (8/20, St. Doc. #141)		
Federal Housing Finance Agency (8/30, Doc. #15)	**Triaxx Prime CDO 2006-1, et al.** (8/24, St. Doc. #156)	**Mary Ellen Iesu, et al.** (8/30, Doc. #22)		
First Reliance Standard Life Insurance Co. (8/30, Doc. #33)	**United States Debt Recovery VIII, L.P., et al.** (8/30, St. Doc. #178)	**Policemen's Annuity & Benefit Fund of Chicago, et al.** (7/6, St. Doc. #32)		
Good Hill Partners LP (8/29, St. Doc. #167)	**Vertical Capital, LLC** (8/25) (Ltr.)	**Sterling Federal Bank, F.S.B., et al.** (8/29, St. Doc. #166)		
Goldman Sachs & Co. Securities Division (8/30, St. Doc. #190)	**V Re-REMIC, LLC** (7/14, St. Dkt. #61)	**The Western and Southern Life Insurance Co., et al.** (7/29, St. Doc. #85)		
Liberty View LLC (8/30, Doc. #28)		**Walnut Place LLC, et al.** (7/5, St. Doc. #28)		
Maine State Retirement System, et al. (8/30, St. Doc. #183)	**Attorney General of the State of Delaware** (8/10, St. Doc. #129)			
Mortgage Bond Portfolio LLC (8/30, St. Doc. #181)	**Attorney General of the State of New York** (8/4, St. Doc. #101)			
National Credit Union Administration Board (8/30, Doc. #26)				
Oriental Bank and Trust (8/30, St. Doc. #172)				
Pine River Master Fund Ltd., et al. (8/30, Doc. #7)				
Platinum Underwriters Re, et al. (8/30, Doc. #31)				
Reliance Standard Life Insurance Co. (8/30, Doc. #32)				
RMBS Acquisition Co. LLC (8/29, Doc. #4)				
Safety National Casualty Corporation (8/30, Doc. #35)				
Stone Creek LLC (8/30, St. Doc. #177)				
Sun Life Assurance Co. of Canada (U.S.) (8/30, Doc. #36)				
20	**10**	**9**	**3**	**2**

A. Standard of Review

60. Each of the Certificateholders became "contractually obligated to speak with one voice," *In re Innkeepers USA Trust*, 448 B.R. 131, 145 (Bktcy. S.D.N.Y. 2011), when they purchased securities governed by a Pooling and Servicing Agreement. The voice through which they speak, in the absence of compliance with the no action provision, is the voice of the Trustee.[40] *Id.* No action clauses are "strictly construed," *Cruden*, 957 F.2d at 968, and are "enforced in a variety of contexts in both state and federal courts." *McMahan & Co. v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044, 1050-51 (2nd Cir. 1995); *see also Teachers Insurance & Annuity Ass'n. v. CRIIMI Mae Svcs. L.P.*, 681 F.Supp.2d 501, 506 (S.D.N.Y. 2010) (no action clauses "are common features of trust indentures" that bar suit by Certificateholders in the absence of compliance with the condition). Claims by certificateholders that fail to comply with these provisions, or that otherwise seek to interfere with the decision of an RMBS trustee or Special Servicer, are routinely dismissed. *See* ¶ 13, *supra*.

61. A key reason no action provisions are enforced is this: "Granting standing to a certificateholder would not only override the terms of the [agreement] and alter the bargained for-terms and risks investors undertook when they bought certificated interests, . . . it would encourage and embolden other certificateholders to hire their own counsel to challenge the special servicer's authority and to advance their individual and conflicting pecuniary interests." *Innkeepers*, 448 B.R. at 145. Many of the objectors have filed individual securities claims or

[40] An alleged conflict on the part of the Trustee does not change this analysis. Instead, as the Second Circuit has recognized, albeit in a different context, the remedy certificateholders have against a conflicted trustee is an independent action for breach of fiduciary duty, *not* disapproval of the settlement. "[A] bankruptcy court's obligation is to determine whether a settlement is in the best interests of *the estate*, not to ensure that the creditors' representatives are honoring their fiduciary duties." *In re Refco, Inc.*, 505 F.3d 109, 119 (2d Cir. 2007) (denying "party in interest" bankruptcy standing to interest holders of a creditor who claimed their representative had breached a fiduciary duty in entering into a settlement) (emphasis original).

securities class actions against Bank of America. Both the PSAs and applicable law strictly prohibit these Certificateholders from using this proceeding—which concerns only the Trustee's claims—to "advance their individual and conflicting pecuniary interests." We do not suggest these objectors should not be heard;[41] rather, we submit that the Court should be vigilant to ensure that the individual pecuniary interests of Certificateholders seeking to advance securities claims do not deny the Trusts and their Certificateholders the common benefit of a highly favorable, and otherwise unobtainable, settlement.

B. The Institutional Investors Actions Were Open and Publicized, Not Secret

62. Rhetoric is rarely a substitute for reason. In this case, however, rhetoric—in the form of *ad hominem* attacks—has been employed to distract attention from the many reasons to support approval of the settlement. These attacks are unworthy of those who have made them; they are also inconsistent with the grave and important issues facing the Trusts, the Trustee and the investors in the Trusts' securities. The Institutional Investors respond to them here.

63. The Institutional Investors were not a secretive or exclusive "clique."[42] They began with six like-minded investors[43] who sought the right to pursue litigation to redress the

[41] A number of courts have, however, denied standing to certificateholders who seek to interfere with decisions of a trustee or Special Servicer unless the certificateholders have complied with the no action provisions. *See, e.g., Innkeepers*, 448 B.R at 144-45 citing Summary Order Denying Motion to Intervene, *Bank of America, N.A. v. PCV ST Owner L.P.*, Case No. 10-1178 (S.D.N.Y.) [Doc. #89].

[42] The Court's use of this term to describe the Institutional Investors is regrettable. It was also unfounded, even on the limited record then before it. *See, e.g.*, Institutional Investors' Response Regarding Intervention of AIG at 4-5 (describing press releases); Trustee Response to Walnut Objection at 3-4 (reciting Walnut's knowledge of settlement discussions and refusal to participate in them).

[43] The initial six investors were Blackrock, Kore Capital, MetLife, Neuberger Berman, PIMCO and one other investor who later dropped out. The fact that one investor dropped out demonstrates yet another risk associated with the pursuit of these claims; namely, that a group

repurchase and servicing issues that were ravaging the performance of the Trusts. The PSAs require that this litigation effort proceed through the Trustee, either with or without its cooperation, so these investors contacted the Trustee, first. On June 17, 2010 these investors sent a letter to the Trustee requesting that it meet with them. On August 2, 2010 this meeting occurred at the offices of the Trustee's counsel in New York. By then, the group had expanded to include two additional investors: Freddie Mac and the New York Fed. Nothing in the PSA required the Trustee to give notice to the world that this meeting occurred. The PSA, moreover, expressly contemplates that holders of 25% of the Voting Rights can take certain actions without the consent of other investors, if they meet the other requirements of the contract.

64. The Trustee's initial response was less than helpful. On August 20 the group sent the Trustee a letter instructing it to open an investigation of ineligible mortgages securing over $26 billion of Countryside-issued RMBS. A few days later, they issued a press release informing the market that this letter had been sent. The press release, a copy of which is attached as Ex. 6, also informed the market that the Institutional Investors "issued their instruction letter *after they met with* senior representatives of the Trustee, and its counsel, on August 2." The public disclosure that a large and organized group of reputable holders was seeking to litigate claims for the Trusts gave other investors hope that litigation of these claims might actually be possible. Other investors thereafter contacted the group and offered to commit their holdings to aggregate Voting Rights, and their balance sheets to fund the indemnity required to pursue the claims. They were welcomed into the group and the group grew.

65. On September 3, BNY Mellon responded to the Institutional Investors' instruction. Citing its indemnity rights and issues related to the calculation of Voting Rights

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will initially have 25% of the Voting Rights but will later lose the ability to provide binding instructions to the Trustee, if such instructions were needed.

under the PSAs, BNY Mellon initially resisted the investors' demand that it take action to enforce the agreements. Among the bases on which the Trustee refused to act was its claim that it had not been notified of any Event of Default that would require it to take action.[44] While unfortunate and unhelpful, BNY Mellon's position was nonetheless grounded in the terms of the PSAs. *See supra* Part II(A).

66. BNY Mellon's response left the investors with no choice. On October 18, 2010, the Institutional Investors issued a Notice of Non-Performance to BNY Mellon, as Trustee, and to BAC Home Loans Servicing, as Master Servicer.[45] The group issuing the Notice of Non-Performance was markedly larger than the group that sent the initial instruction letter. Its holdings had ballooned to 115 Trusts whose outstanding loans were $47 billion.

67. The Notice of Non-Performance is noteworthy for an additional reason: it was the first communication sent to BAC Home Loans Servicing (or any other affiliate of Bank of America) concerning the Institutional Investors' intent to pursue the Trusts repurchase and servicing claims through the Trustee. Notice was sent to BAC Home Loan Servicing because notice to the Master Servicer, and the running of a sixty day cure period, were mandatory conditions precedent to the Institutional Investors' ability to file suit and litigate claims. *See* PSA §§ 7.01 and 10.08.

68. Because the issuance of a Notice of Non-Performance might be material to investors in the Trusts' securities, the Institutional Investors issued a press release disclosing they

[44] BNY Mellon's reluctance to act without the indemnity required by the contract is by no means unique among RMBS Trustees. Deutsche Bank, for example, sent a notice to RMBS investors indicating it was willing to take action to enforce pooling and servicing agreements, "subject to conditions stated in the governing documents." *See* Ex. 7, Oct. 25, 2010 Notice. Other Trustees have taken no action at all, despite widespread evidence of ineligible mortgages in their pools.

[45] By this time, one investor had dropped out of the group, but another investor—Western Asset Management Company—had joined.

had sent the Notice to BNY Mellon and Bank of America. *See* Ex. 8. This release informed the entire securities market that holders of securities in 115 Trusts had started the running of a clock toward the declaration of an Event of Default. *See* Ex. 9. The Notice of Non-Performance was widely covered in the media.[46] It was the subject of questions put to Bank of America CEO Brian Moynihan in Bank of America's public earnings call the following Tuesday morning.[47] The securities markets reacted with alarm: up to that point, Bank of America had indicated it was unable to estimate its repurchase exposure to private label securitizations because no group of investors had organized to pursue these claims.[48] In the wake of the Notice, Bank of America's stock price dropped by 4.4%.[49] It has never recovered.[50]

69. With the disclosure that the Institutional Investors group was growing, and was only weeks away from instituting litigation to pursue the Trustee's claims, the group continued to expand. From an original group of six, the group eventually came to include 22 institutions: nine independent investment advisers,[51] seven insurance companies,[52] two European banks,[53]

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[46] A compilation of press reports regarding the October 18, 2010 Letter is attached as Ex. 10.

[47] *See* Nathaniel Popper, *BofA pressured to buy back loans; Separately, the bank reports a $7.3-billion loss, citing new debit-card fee rules*, LOS ANGELES TIMES, Oct. 20, 2010, Ex. 10 at 71.

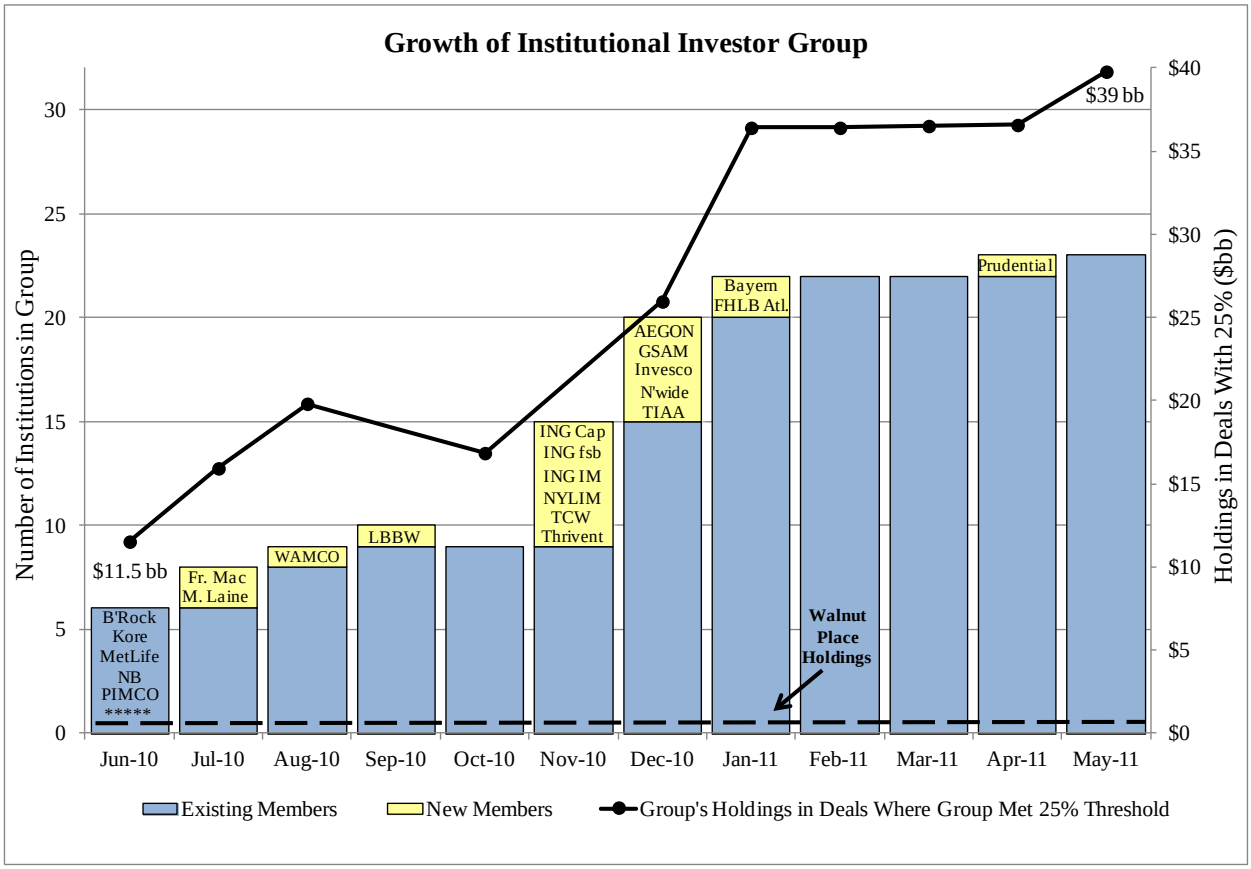
[48] *See, e.g.*, Bank of America 3Q10 SEC Form 10-Q at 40.

[49] *See, e.g.*, Alistair Barr, *NY Fed among investors pressuring Bank of America on mortgages*, MARKETWATCH, Oct. 19, 2010, Ex. 10 at 32.

[50] Though the particular motives of the Institutional Investors are largely irrelevant, these events belie any claim that the Institutional Investors "colluded" with Bank of America regarding the settlement.

[51] The registered investment advisers in the group are a "who's who" of reputable, highly regarded mutual fund, pension fund and separate account advisers: Blackrock, PIMCO, TCW (Trust Company of the West), Western Asset Management (WAMCO), Invesco, Neuberger Berman, Goldman Sachs Asset Management, ING Investment Management LLC, and Prudential Investment Management.

and four other investors and financial institutions.[54] From original holdings of 25% of 65 deals in June 2010 (in which deals the group held $11.5 billion), the group expanded to cover 25% of 265 deals by May 2011 (in which deals the group held over $39 billion). The table below sets out the members of the group, and the size of the holdings involved in their effort, on specific dates relevant to the settlement:



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[52] The insurance company and annuity investors are: MetLife, TIAA-CREF, Nationwide Insurance, New York Life, AEGON Insurance, ING, and Thrivent Financial for Lutherans.

[53] The European Banks include Landesbank Baden-Wurttemberg (LBBW), Bayerische Landesbank (BayernLB) and their affiliates.

[54] This category includes the New York Fed's Maiden Lane Portfolios, Freddie Mac, the Federal Home Loan Bank of Atlanta and Kore Capital.

70. The demonstrated expansion and openness of the Institutional Investor group is fundamentally *inconsistent* with the suggestion that the Institutional Investors were a preferred or secretive "clique" that excluded other investors from participating in their efforts to obtain a remedy that would benefit all of the Trusts and their investors.[55] Belated complaints by some Certificateholders that the Trustee failed to "include" them in ongoing settlement discussions also fail to consider these additional facts:

- The Institutional Investors were engaged in discussions with the Trustee because they were able to, and intended to, litigate the Trustee's claims.

- The Institutional Investor group expanded because it was open to other, like-minded investors willing to bear the risks, costs and burdens associated with contested litigation of the Trustee's claims.

- With the ostensible exception of Walnut Place, none of the remaining objectors has alleged that they ever *sought* to pursue claims on behalf of the Trusts, or made any demand that the Trustee do so, much less that they informed the Trustee they were willing to put their balance sheets on the line to fund the long term indemnity required to pursue the Trustee's claims derivatively.

- In contrast, the Institutional Investors were the *only* group of investors who *had* organized themselves for the purpose of litigating the Trustee's claims. They:

    - amassed the requisite voting rights,
    - possessed the required financial resources to offer a satisfactory indemnity, *and*
    - sent the required notice to trigger the running of the time periods required to permit them to pursue the Trustee's claims by sending the Notice of Non-Performance.

- Though the Institutional Investors' activities were the subject of multiple press releases and much media attention,[56] not a single one of the objectors has alleged it sought to join the Institutional Investors' group but was rebuffed.

[55] In contrast to the openness of the Institutional Investors, the objectors' activities have been far more secretive and opaque. *See infra*, Part III(F).

[56] *See* ¶72, *infra* (listing press releases and other disclosures).

- None of the objectors has alleged that they made—or were willing to make—any effort to reform and cure mortgage servicing deficiencies for the *common benefit* of all Certificateholders.

- None of the objectors has alleged that they offered the Trustee a plan to improve mortgage servicing so that borrowers would have an easier route to returning their loans to performing status.

71. Some objectors and observers have made the fatuous suggestion that the Trustee was required to "notify" other Certificateholders and "invite them" into the discussions. Nothing in the law or the PSA requires this. Every investor in these certificates understood that a group of holders of 25% of the Voting Rights, willing to provide a robust indemnity, *could* invoke their right to direct the Trustee to act *without* notice to any other Certificateholders. The PSAs do not require investors who do so to thereafter consult with (or obtain the consent of) investors who are bearing none of the risks and who have assumed none of the financial burdens associated with the indemnity. The agreements and the law impose no such requirement on the Trustee, either.

72. To be clear: the Institutional Investors issued regular press releases informing other investors of their activities and advising them that forbearance agreements had been entered tolling claims for some, but not all, of the Trusts. Bank of America also issued press releases and discussed ongoing settlement negotiations in its public filings. In total, the Institutional Investors and Bank of America issued at least 10 press releases or other disclosures informing the market of the ongoing negotiations:

- September 3, 2010, Institutional Investors' press release announcing the instruction to the Trustee to take action. A copy is attached as Ex. 6.

- On October 18, 2010, counsel for the Institutional Investors sent Bank of America, Countrywide and the Trustee a letter alleging a variety of claims alleging improper handling of mortgages in the trusts. The Institutional Investors

issued a press release regarding the letter, which identified the Trusts to which it applied. A copy of the October 18, 2010 letter is attached as Ex.9, and a copy of the press release is attached as Ex. 8.

- The October 18 letter was reprinted in the New York Times's DealBook and received widespread coverage in the financial press. A compilation of selected articles reporting on the October 18 letter is attached as Ex. 10 (the New York Times's DealBook article is at pp. 35-49).
- Following the October 18 letter, the Institutional Investors' counsel received calls from entities interested in joining the Institutional Investor group. Over time, the group added an additional 14 entities.
- December 15, 2010, Bank of America issued a press release that notified the public of the "constructive dialogue" Bank of America was having with the Trustee and counsel for the Institutional Investors regarding the claims the Institutional Investors had raised, and that the parties had agreed to toll any time periods raised by the October 18, 2010 letter to "continue" that dialogue. A copy of Bank of America's press release, which lists the trusts covered by the tolling agreement, is attached as Ex. 11.
- Bank of America's December 15, 2010 announcement was widely covered in the press, which reported that Bank of America was in settlement talks with a group that had "expanded" and "now includes 17 investors and 167 bond deals." There was additional press coverage of the announcement of continued talks again in early-January 2011, in connection with Bank of America's separate settlement of

certain GSE-repurchase claims. A compilation of selected articles reporting on the release is attached as Ex. 12 (quoted at p. 7).

- On a January 21, 2011 analyst call, Bank of America's then Chief Financial Officer indicated that Bank of America was open to discussions with interested parties: "we always want to talk to everybody in the world to make sure we understand where they stand." This invitation to investors was widely reported in the press. A copy of the transcript from the analyst call is attached as Ex. 13 (quote at p. 11).
- On January 28, 2011, counsel for the Institutional Investors issued a press release stating that the parties had agreed to toll any time periods commenced by the Institutional Investors' October 18, 2010 letter discussing alleged Countrywide defaults, an obvious indication that discussions were ongoing. This press release identifies the trusts covered by the tolling agreement. A copy of the January 28, 2011 press release is attached as Ex. 14.
- On February 2, 2011, Bloomberg reported that the Institutional Investors had agreed to renew "their extensions of any time periods" in the October 18, 2010 letter alleging an Event of Default, and that Bank of America "confirmed that discussions were continuing." A copy of the Bloomberg article is attached as Ex. 15.
- Throughout the winter, newspapers continued to report on the settlement negotiations. For example, a February 15, 2011 article in Debtwire reported that the settlement being negotiated "could bind other CFC [Countrywide Financial Corporation] RMBS investors" and that the parties were "attempting to

encompass all Countrywide RMBS into the deal." A compilation of this article along with other press reports that appeared at the time is attached as Ex. 16. (the Debtwire article is at pp. 3-5)

- Another article, appearing on February 23, 2011, quoted David Grais, Esq., of Grais & Ellsworth, counsel for objectors now alleging "secrecy", as stating that an agreement among the negotiating parties "could bind all non-agency mortgage backed securities issued by Countrywide, BofA and potentially Merrill Lynch." A copy of this article is attached as Ex. 16, p. 6-7.
- On February 25, 2011, Bank of America released its 10-K. In that document, the Bank stated that "BAC Home Loans Servicing, LP and Gibbs & Bruns LLP on behalf of certain investors including those who signed the letter, as well as The Bank of New York Mellon, as trustee, have agreed to a short extension of any time periods commenced by the letter to permit the parties to explore dialogue around the issues raised." An excerpted copy of Bank of America's 10-K is attached as Ex. 17.
- On February 28, 2011, a Bloomberg article reported that the amount of debt the Institutional Investor group represented had almost doubled since October and that the number of deals had grown to 225, due to more investors joining the group. Citing the Institutional Investors' counsel, the article explains that "[t]he investors have only considered a settlement that pays through the mortgage trust, a channel that would serve even the bondholders Patrick doesn't represent" and that "enough progress" had been made in negotiations "to warrant continued talks." (Emphasis added.) A copy of the article is attached as Ex. 16, p.8-9.

- On March 31, 2011, counsel for the Institutional Investors again publicly reported that the parties had agreed to toll any time periods commenced by the Institutional Investors' October 18 letter discussing alleged Countrywide defaults. A copy of the press release issued by the Institutional Investors' counsel, which identifies the trusts covered by the tolling agreement, is attached as Ex. 18.
- On May 5, 2011, Bank of America issued its 10-Q for the first quarter 2011. In that document, the Bank stated that "[t]o permit the parties to discuss the issues raised by the letter, BAC Home Loans Servicing, LP and [Gibbs & Bruns LLP] on behalf of certain investors including those who signed the letter, as well as The Bank of New York Mellon, as trustee, have entered into multiple extensions to toll . . . [the time] periods commenced by the letter. We are in discussions with [Gibbs & Bruns], the investors and the trustee regarding the issues raised and more recently the parties have discussed possible concepts for resolution of any potential representations and warranties, servicing or other claims." An excerpted copy of Bank of America's 10-Q is attached as Exhibit 19.

73. Not a single one of the objectors has asserted it was unaware of these press releases. Not a single one has alleged that they, in a similarly open and obvious fashion, disclosed their efforts (if, indeed, they made any) to pursue claims for the Trusts. Nor have any objectors alleged that they informed the Institutional Investors, or anyone else, of any of their efforts to negotiate separate settlements with Bank of America and/or BNY Mellon—though such efforts plainly occurred and may indeed be continuing without the Court's knowledge.

74. The Trustee was entitled to consider the obvious facts that affected the likelihood that one or more investor groups might seek to pursue the Trustee's claims. The Institutional

Investors were organized. They had retained experienced trial counsel. They were moving forward aggressively, and publicly, to pursue the Trustee's claims. They had notified other investors they were doing so. They presented a credible threat of "hand to hand combat" to achieve a litigated recovery for the Trusts. The Trustee was also entitled to consider that investors who stood on the sidelines, unwilling to provide an indemnity to the Trustee, or those who would later seek a quick recovery for one or two trusts to serve their own interests rather than the common benefit of all Certificateholders, did not pose a credible threat. In these circumstances, it would be *unusual*—and inconsistent with the contract requirements—for BNY Mellon to invite other, unknown Certificateholders to participate in settlement negotiations when they had expressed neither an interest in, nor the willingness to pursue, the Trustee's claims.[57]

C. The Institutional Investors Did Not Seek, Or Obtain, Any Individual Benefit.

75. Though the Institutional Investors were instrumental in forcing Bank of America and BNY Mellon to the negotiating table, they will receive the same benefit under the settlement that any similarly situated investor would receive, no more and no less. The settlement proceeds will flow down the waterfall, in accordance with the contract to which every investor agreed. As a result, pro rata amount of this settlement will likely flow to investors who did *nothing* to pursue the Trustee's claims. Even though they took no risks and invested no time or money, these investors will receive the same benefit as those who did.

76. This "free rider" problem is inherent in the structure of the Pooling and Servicing Agreements. Precisely because the agreements *require* collective action and *preclude* individual

[57] We address in Part III(F) below the false claims by AIG and Walnut Place that they were excluded from participating in settlement discussions. Whatever communications these entities may have had with BNY Mellon or Bank of America, they never contacted the Institutional Investors to express a desire to join the group or participate with them in efforts to obtain a recovery for the Trusts claims.

benefit at the expense of other Certificateholders, they create barriers to the effective assertion of the Trustee's claims by Certificateholders. Under the PSAs, an investor (or group of investors) that seeks to pursue the Trustee's claims must commit itself to bear 100% of the costs to do so,[58] even though it will receive only its ratable share of any recovery. In any Trust where an investor holds less than 100% of the certificates, the risk reward ratio is skewed to make it less likely the claims will be pursued, or pursued effectively. That, too, is a factor the Court should consider in assessing whether the objectors' litigation preference actually represents a feasible alternative.

D. The Trustee's Alleged Conflict

77. Eleven of the objectors assert that the settlement process was flawed because the Trustee was conflicted, allegedly because it stood to gain an expanded indemnification upon entering into the settlement. *See, e.g.*, Western & Southern Life Ins. Co. *et al.* Objection, St. Doc. #85 at 3. This is false. The indemnity the Trustee received in the settlement was no more and no less than the indemnity it was *already* entitled to receive under the contract. *Compare* PSA §§ 8.02 and 8.05 (requirement of Master Servicer indemnity) *with* Indemnity Confirmation from Master Servicer at Settlement Agreement Ex. C.

78. Another variant of the "conflict" claim is the contention that the Settlement Agreement indemnified the Trustee for any breach of fiduciary duty arising from entry into the settlement: "[T]he relief sought here appears designed largely to insulate BNYM from fiduciary

[58] These costs are very high. *See, e.g.*, Ex. 20, Royal Bank of Scotland, *Non-Agency MBS Loan Repurchases: Practical Considerations*, Sept. 17, 2010 (estimating that "*without* litigation, the cost could range from $24 million to $88 million" just to review loan files, make demands and comply with initial cure periods . . ." on the 229,000 loans in the 55 deals then at issue in the Institutional Investors' instruction to BNY Mellon). Extrapolating from that cost, to cover the more than 770,000 loans at issue in the settled trusts, yields a potential out of pocket cost—again exclusive of litigation expense and delay—of between $42.5 and $149.6 million. None of the objectors has offered an indemnity sufficient to defray that cost (even assuming they held 25% of all Trusts), much less the years of attorneys' fees that would be incurred to evaluate and prosecute claims on those loans.

claims arising from the settlement." N.Y.A.G. Objection, St. Doc. #101-4 at 4. This is incorrect. The Settlement Agreement does not release any claim of breach of fiduciary duty against the Trustee. *See* Settlement Agreement at ¶ 9(a) (reciting releases *by* the Trustee but granting none *to* the Trustee). The settlement also does not release any individual tort, fraud or securities claims against either BNY Mellon or Bank of America. *See* Settlement Agreement at ¶¶ 9 and 10. The Trustee is not seeking—and will not obtain—any release of breach of fiduciary duty or fraud claims in the proposed judgment contemplated by the settlement. *Id*. at Ex. B. Nowhere in the Settlement Agreement has the Trustee been indemnified for breaching any fiduciary duty by entering into the settlement. *Id.* Importantly, the PSAs are not amended by the Settlement Agreement, *see* Settlement Agreement at ¶ 21, and they state plainly that "[n]o provision of this Agreement shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct . . ." PSA § 8.01.

E. The Trustee Is Entitled to Seek an Instruction Concerning Whether to Consummate the Settlement.

79. Certain objectors have argued that the Trustee's use of an Article 77 Proceeding to seek court approval of the settlement was improper. The Court has also observed that, "Without exception, the often-uncontested proceedings described in these decisions and orders were garden-variety matters of trust administration." The objectors' argument, and the Court's observation, are each incorrect. A leading case recognizing the right of a trustee to seek court approval of a settlement of commercial litigation, in the face of a heated dispute among bondholders in a securitized trust, is a New York case arising under Article 77. *See In re Application of IBJ Schroder*, 271 A.D. at 322.[59] This case involved substantial litigation, as its

[59] This decision was attached as Ex. D to the Trustee's reply brief and was discussed at length in the reply briefs filed by the Trustee and the Institutional Investors in support of their motion to remand. Rather than restate those arguments here, we incorporate them by reference.

procedural history involves an appeal to and decision by the First Department prior to a final decision by the New York Supreme Court approving the Trustee's decision to enter into the settlement.

80. New York and federal case law recognize that seeking an instruction is exactly what a Trustee *should* do when it: a) faces conflicting instructions from beneficiaries about what to do or b) is itself conflicted regarding a given course of action. In *Redmond v. Commerce Trust Co.*¸144 F.2d 140, 154-55 (8th Cir. 1944), the court recognized the propriety of Trustee's decision to seek court approval to consummate a settlement: "Where it is reasonably prudent, in the exercise of good faith sound judgment, to make a contract of compromise, the trustee may do so but, if such compromise is made without proper court approval, the trustee takes the risk of his good faith and sound judgment being attacked successfully by the beneficiaries. If the compromise is made only upon proper court approval, the trustee may safely do so and such is binding upon the beneficiaries." The New York Court of Appeals[60] recognized that even a self-dealing trustee may proceed with a conflicted transaction, if it does so with court approval. "The rule has long been established that a trustee 'should not be allowed to become a purchaser of trust property, because of the danger in such a case that the interest of the beneficiary might be prejudiced. However, there is little danger of such prejudice if the transaction is subjected to prior judicial scrutiny and given court approval. Accordingly, the rule against self-dealing has not been applied, *and does not apply*, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing at which all interested parties are represented, approves and authorizes the sale." *In the Matter of Scarborough Properties Corp.*,

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[60] In this removed, state court proceeding which arose under state law, the Court is required to apply the substantive law of New York as established by the New York Court of Appeals.

255 N.E.2d 761, 25 N.Y.2d 553 (N.Y. 1969) (emphasis added and citations omitted). The right of a trustee to conditionally agree to a settlement, subject to court approval of its decision to do so, is so well-settled that it has been incorporated into the RESTATEMENT (SECOND) OF TRUSTS. *See id.* at §292 cmt. d (2010) ("If the trustee is in doubt whether he should compromise or submit to arbitration a claim, he may ask the instruction of the court or he may agree thereto conditionally upon the subsequent approval of the court.").

81. The Trustee followed this clear law when it filed a proceeding seeking an instruction about whether it should consummate the settlement. The case filed in New York state court, which has now been removed to this court, was one in which all interested parties could be heard. It raises a single issue appropriate for resolution by a court: is the Trustee's decision to settle reasonable? That the case is now pending in federal court does not change its fundamental nature. It also does not negate the Trustee's right to obtain that which it is entitled to obtain under governing New York law; namely, an instruction concerning whether it is entitled to proceed with this settlement of disputed claims.

82. The above discussion should put to rest the belated complaints by some Certificateholders that the Trustee failed to include them in settlement discussions. Even if there had been a way to include all Certificateholders in the settlement negotiations, the objectors' pleadings make clear that no consensus could have been reached. The Trustee would then have had no option but to do exactly what it did: make a good faith decision about whether to settle in the face of competing demands and then seek court approval of its decision.

F. The Settlement Was Not "Clandestine" or "Collusive"

83. AIG and a handful of other objectors have suggested that the Institutional Investors somehow "colluded" with Bank of America in negotiating the settlement. *See, e.g.*,

AIG Objection, St. Doc. #131 at 5-6. This is false. The attack on the Institutional Investors is also beyond absurd when the Court considers the illogical inferences on which it rests.

84. Eight of the Institutional Investors are independent investment advisers. They will receive not a penny of this settlement for themselves; the recovery will go to their clients. These investment advisers are competitors with one another. Many are competitors with Bank of America. The bizarre suggestion that they would abandon their fiduciary and contractual obligations to their clients in an effort to "help" Bank of America is an irrational inference the Court should dismiss out of hand. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (explaining that to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is *plausible* on its face")*; Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.") (citations omitted). The claim of collusions enter the realm of fantasy when it adds to the claimed cabal not only eight independent investment advisers but seven insurance companies, who hold these securities largely to fund policy payments to insurance and pension beneficiaries. Neither the insurance companies nor the investment advisers have a possible motive to take *less* than a fair settlement, anymore than do the other Institutional Investors who appear here to support the settlement.

85. The simple fact is this: these investment advisers and the other Institutional Investors joined together precisely because, in the absence of a decision to cooperate, there was no way to aggregate the Voting Rights required to pursue litigation of the Trustee's claims derivatively, for their clients' benefit. Had they not done so, it is highly likely that none of these

claims would have been pursued at all.[61] Under every potentially applicable pleading standard, these claims of collusion fail as a matter of law.

1. Newly Revealed AIG Documents Refute Its "Clandestine" Negotiation Claim.

86. AIG's claims that the settlement was "clandestine" or "exclusive," *see* AIG Objection, St. Doc. #131 at 5-6, are especially baseless in light of recent disclosures in AIG's securities lawsuit against Bank of America (filed on the same day as its objection to the settlement). Newly filed pleadings in that action ***directly refute*** AIG's contention that it was "kept in the dark by BoNY and the Inside Institutional Investors." *Id.* at 6. *See* Defendants' Motion to Disqualify Quinn Emmanuel as Counsel For Plaintiffs, Docs. #37, 39, and 42, No. 11-cv-06212 (S.D.N.Y.). In a letter attached as evidence to this motion, Quinn's disqualification counsel states—on behalf of AIG and its counsel, Quinn Emmanuel—that "in March or April [2011], AIG rejected [Bank of America's] express request that AIG stop seeking advice from Quinn Emanuel as a condition of allowing AIG access to settlement talks between [Bank of America] and certain institutional investors." *Id.* at Doc. #42, Ex. F to Dworsky Declaration, p. 4. This letter establishes two facts that refute AIG's claim of clandestine negotiation. First, by its own admission, AIG knew about the ongoing "settlement talks." Second, again by its own admission, *if* AIG was excluded from settlement discussions, it was excluded by *Bank of*

[61] Even today, no group of holders has stepped forward to offer to fund the hundreds of millions of dollars in litigation costs necessary to pursue the Trustee's claims. *Compare* RBS Report re Likely Cost of Litigation. Though Walnut Place has alleged it is willing to pursue claims for three trusts, the Court can have no confidence that an anonymous LLC formed specifically for the purpose of litigation has either the financial wherewithal—or the staying power—to litigate hotly contested claims for years.

America, due to an alleged conflict on the part of AIG's counsel. Neither the Institutional Investors nor the Trustee limited AIG's access to the settlement talks.[62]

87. The AIG letter should be scrutinized closely by the Court for another reason. In it, AIG acknowledges that it attended a mediation with Bank of America "in July of 2011." *Id.* at 4. The mediation obviously occurred *after* the settlement in this matter was announced on June 29, 2011. *See 22 Institutional Investors in Countrywide-Issued RMBS Announce Global Settlement*, PR NEWSWIRE, June 29, 2011, attached as Ex. 21. AIG's objection was filed on August 8, 2011, less than a month after it was unable to obtain an *individual* settlement with Bank of America in the "July of 2011" mediation. Given the strictures of Section 10.08 of the PSAs, and the prohibition on invoking rights under the agreement to advance "individual and conflicting interests," *Inkeepers*, 448 B.R. at 145, the contents of AIG's letter are cause to question whether AIG's objection is in good faith or seeks the common benefit of all Certificateholders.

88. AIG also questions the attorneys' fee that will be paid to the Institutional Investors' counsel if the settlement is approved. It is normal and customary for counsel to be paid for their work. The fee to be paid is markedly lower than the fees paid to counsel who achieved similar results in complex, high stakes cases.[63] The fee is also significantly lower than the contingent fee the Institutional Investors were prepared to instruct the Trustee to accept, if it had become necessary to pursue contested litigation on behalf of the Trusts. When paid, the fee will be in addition to, rather than out of, the settlement payment. That benefits investors in the

[62] To reiterate, AIG has not alleged that it ever contacted either the Institutional Investors' counsel or counsel for BNY Mellon to ask to participate in the ongoing settlement discussion with Bank of America.

[63] *See* Ex. 22, Cases of Comparable Size and Complexity Ranked by Attorneys' Fee.

Trusts, who will receive a superb settlement at no cost to them or the Trusts. The payment of fees in addition to the settlement amount is also in keeping with Section 2.03 of the PSAs, which permits the Trustee to recover not only the Purchase Price for ineligible mortgages but also "any expenses reasonably incurred by . . . the Trustee in respect of enforcing the remedies for such breach."

2. Walnut Place Also Knew of Settlement Discussions But Refused to Participate

89. The secrecy allegations in the Walnut Place objection are particularly questionable, since its counsel — the Grais & Ellsworth firm — was provided with personal, first-hand information about ongoing settlement negotiations by both Bank of America and BNY Mellon[64]

90. Walnut Place's initial allegation was that "BNYM made no effort to inform Walnut Place" of the ongoing settlement negotiations. In response, the Trustee's counsel submitted a sworn declaration attesting that, to the contrary, on February 2, 2011, counsel for Walnut Place met with counsel for the Trustee, as well as counsel for Bank of America. During this meeting, counsel for the Trustee and counsel for Bank of America each "told counsel for Walnut Place that they were negotiating a settlement, . . . offered to report to Walnut Place on a current and ongoing basis about settlement discussions, [and] invited Walnut Place to provide input on settlement discussions. Walnut Place refused, and instead filed a lawsuit asserting claims against Countrywide, Bank of America and BNY Mellon (as nominal defendant) that are intended to be released by the Settlement." St. Doc. #43. Simply put, if the settlement

[64] The Institutional Investors did not participate in these private discussions with Walnut. What follows has been assembled from what has come to light since the settlement was announced.

negotiations took place behind Walnut Place's back, that is because Walnut Place turned its back on those negotiations.

91. Walnut's counsel told newspaper reporters as far back as mid-February that he was evaluating "potential recourse against [BNY Mellon] in case it participates in the settlement." (That news article goes on to report in further detail BNY Mellon's involvement in the Settlement.). *See* Ex. 16, p. 3-5. Furthermore, though Walnut Place claims that it was not informed that the negotiations involved the two Trusts in which Walnut Place holds positions,[65] that claim is likewise unsupportable. Walnut Place's counsel declared in open court at the August 5, 2011 hearing in the Settlement Court that "*the express purpose" behind the filing of its February 2011 lawsuit against Countrywide and the Trustee was "to stop the settlement" from extinguishing Walnut Place's claims.*[66]

3. Knights of Columbus

92. Similar allegations made in the Knights of Columbus objection are equally meritless. The Knights of Columbus claims it was not personally informed by the Trustee of the settlement negotiations in correspondence about its separate lawsuit against the Trustee.[67] Given the widespread public reports on the settlement negotiations, it is implausible for Knights of Columbus to suggest that it was unaware of the negotiations. In fact, four of the Trusts in which the Knights of Columbus claims to own certificates — CWALT 2005-6CB, CWHL 2005-30,

[65] Walnut Place Reply at 5 (St. Doc. #49).

[66] *See* Ex. 23 (Transcript of August 5, 2011 hearing) at 33:20-23.

[67] *See* Knights of Columbus Objection at 2-3, 7-11 (St. Doc. #141).

CWHL 2004-14, and CWHL 2006-6 — were named in the press releases issued by Bank of America and Gibbs & Bruns regarding the settlement negotiations.[68]

G. Miscellaneous Objections

1. Allocation Issues

93. The proposed settlement allocation, both among the trusts and across the tranches of any individual trust, is the subject of nine objections. In general, these objectors ask why the settlement documents do not specify the amounts that any given trust or tranche will actually receive when the settlement is eventually approved. The Federal Home Loan Banks, for example, complain that "[i]n addition, the Banks need more information about the way in which the settlement fund would be allocated." FHLB Objection, St. Doc. #55 at 4.

94. These objections are in error. The methodology for allocating the Settlement Payment is described in detail in the Settlement Agreement and described precisely in the Trustee's filings. *See* Ex. 25 (Settlement Agreement) at ¶ 3(c). Specifically, the Trustee's independent allocation expert, NERA, will allocate the Settlement Payment among the Covered Trusts according to the amount of net realized and projected losses in each of the trusts. *Id.* at 55. NERA will determine the amount of net losses based on past losses and estimates of future losses (using models to determine the projected performance of the loans in the Covered Trusts and the loss severity on those loans). *Id.* A copy of NERA's methodology was attached as Exhibit E to the Trustee's Verified Petition, and is also attached as Ex. 24. The reason an allocation is not available now is simple: the allocation is based on losses of each, individual

[68] *See* Ex. 8 (October 18, 2010 Gibbs & Bruns LLP press release) (naming CWHL 2005-30); Ex. 11 (December 15, 2010 Bank of America press release) (naming CWALT 2005-6CB and CWHL 2005-30); Ex. 14 (January 28, 2011 Gibbs & Bruns LLP press release) (naming all four trusts); Ex. 18 (March 31, 2011 Gibbs & Bruns LLP press release) (same). The trusts that Knights of Columbus allegedly holds certificates in are listed on Exhibit 1 to the Affirmation of Peter N. Tsapatsaris (St. Doc. #145).

Trust. That figure is constantly evolving and could vary considerably between the time the Settlement Agreement was signed and the date on which the settlement is approved, particularly if the approval process is protracted. The Trustee made a reasonable decision to avoid preventing potentially misleading preliminary calculations that might confuse investors. Equally in error is the suggestion that the settlement does not inform investors how it will be allocated among tranches in a given trust. There was no need to include this in the settlement, because the distribution mechanisms in each PSA already provide for the treatment of "Subsequent Recoveries." The Settlement Agreement confirms that the payment would flow down the tranches in each Trust in accordance with the existing waterfall in each PSA. *Id.* at ¶ 3(d)(i)-(vi). This was consistent with investors' expectations and rights under the PSAs.

2. Waterfall Issue

95. A related set of objections concerns the use of the payment waterfall in the Governing Agreements to distribute settlement funds. One such objection complains that "the settlement fund is allocated among investors in accordance with the 'payment waterfall' set forth in the Pooling and Servicing Agreements, which may provide some investors with a windfall and may not appropriately compensate others for their actual loss." *See* Policeman's Annuity & Benefit Fund of Chicago Objection, St. Doc. #32 at 4; *see also* Clayhill Investors LLC Objection, St. Doc. #180 at 2; The Western & Southern Life Ins. Co. *et al.* Objection, St. Doc. #085 at 3. This form of payment is not an optional or negotiated matter: "[t]hat payment stream is required by the governing agreements, to which all Certificateholders agreed when they purchased trust certificates, and the Trustee is required to follow that agreement when it disburses funds that flow into the trusts." *See* Mem. of Institutional Investors in Opposition to the Policemen's Annuity's Motion to Intervene, St. Doc. #45 at 5. As the New York Supreme Court recently held in a similar context, noteholders "are bound by the agreements that they

made." *ASR Levensverzekering NV v. Swiss Re Fin. Prods. Corp.*, Index No. 650557/09, slip op. at 7 (N.Y. Sup. Ct. Oct. 11, 2011); *see also Greenwich*, *supra* and *Innkeepers*, *supra*. This includes the contract terms establishing the payment waterfall. The use of the waterfall as a distribution mechanism is not only proper, it is required.

3. Former Holders

96. Other objectors claim that former Certificateholders should receive compensation or that initial purchasers should receive greater compensation than secondary-market purchasers. Those contentions seem to miss the point of the settlement entirely. The Settlement Agreement is a settlement of contract-based claims. The contracts provide no entitlements to former Certificateholders; all benefits flowing from the contracts transferred to the Certificateholders that purchased from the former holders. Likewise, the contracts provide no additional entitlements to original purchasers compared to secondary-market purchasers of the certificates. Regardless of when Certificateholders purchased their securities, they purchased the same exact bundle of contract rights under the PSAs. The Settlement treats all contract-right holders the same. There is nothing unreasonable about that.

More fundamentally, none of the allocation objections should bar Final Court Approval of the Settlement, regardless of what the Settlement Court determines is a reasonable allocation within each Covered Trust. The Settlement Agreement specifically provides that changes to the distribution method within each of the Covered Trusts will not constitute material changes to the terms of the Settlement. *See* Ex. 25 (Settlement Agreement) ¶ 3(d)(v). Accordingly, if the Settlement Court determines that a distribution according to the terms of the PSAs is not reasonable, it is free to refashion those distributionn provisions accordingly.

4. Rights of Monoline and Financial Guaranty Insurers

97. Two monoline insurers, Syncora Guarantee Inc. and Ambac, and one financial guaranty insurer, CIFG, wrapped certain tranches in certain of the 530 settled Trusts or insured certain losses in one or more Trusts. They have appeared as objectors solely to confirm that the Settlement Agreement does not prejudice their rights to pursue recovery under their own insurance contracts with BOA and CW. The Settlement Agreement fully preserves these separate contract rights. *See id.* at ¶ 10(d) ("To the extent that any third-party guarantor or financial-guaranty provider with respect to any Covered Trust has rights or obligations independent of the rights or obligations of the Investors, the Trustee, or the Covered Trusts, the release and waiver in Paragraph 9 is not intended to and shall not release such rights, or impair or diminish in any respect such obligations or any insurance of indemnity obligation owed by or to any such Person). The agreement thus states plainly that it does not compromise or affect the monolines' independent contract rights.

5. Homeowners' Class Action

The final objection is filed by a purported class of homeowners. *See* Mary Ellen Iesu et al. Objection (Doc. #17). It is not cognizable here. The homeowners are neither parties to the PSAs nor holders of certificates issued by the Trusts. They therefore lack standing to appear in this proceeding. Respectfully submitted,

Dated: New York, New York
October 31, 2011

WARNER PARTNERS, P.C.

By:___/S/ Kenneth E. Warner_____
Kenneth E. Warner (KW-5524)

950 Third Avenue, 32nd Floor
New York ,New York 10022
Phone: (212) 593-8000

Attorneys for Intervenor-Petitioners, the Institutional Investors

Of Counsel:

GIBBS & BRUNS, LLP
By: Kathy D. Patrick
Robert J. Madden

EXHIBIT 11

Financial Releases

Bank of America Issues Statement

CHARLOTTE, N.C., Dec 15, 2010 (BUSINESS WIRE) -- Bank of America today issued the following statement:

Counsel for BAC Home Loans Servicing, LP and Gibbs & Bruns LLP on behalf of certain investors including those who signed the previously reported October 18, 2010 letter with respect to private label residential mortgage-backed securitizations, as well as counsel for The Bank of New York Mellon, as trustee, have agreed to extend any time periods commenced by the October 18 letter. This extension will permit the parties to continue constructive dialogue around the concerns raised. The agreement covers all of the securitizations listed on the attached Exhibit A. The claims and defenses of all parties are preserved.

Exhibit A

CWALT 2004-14T2	CWALT 2005-24	CWALT 2006-OC8	CWALT 2007-HY5R	CWHL 2005-30	CWHL 2007-HYB2	CWL 2005-9	CWL 2006-9
CWALT 2004-29CB	CWALT 2005-32T1	CWALT 2006-14CB	CWALT 2007-J2	CWHL 2005-9	CWHL 2007-J1	CWL 2005-AB2	CWL 2006-BC2
CWALT 2004-35T2	CWALT 2005-35CB	CWALT 2006-20CB	CWALT 2007-17CB	CWHL 2005-HYB3	CWHL 2007-J3	CWL 2005-AB3	CWL 2006-BC3
CWALT 2004-J6	CWALT 2005-36	CWALT 2006-41CB	CWALT 2007-23CB	CWHL 2005-HYB9	CWHL 2007-12	CWL 2005-AB4	CWL 2006-BC4
CWALT 2004-32CB	CWALT 2005-44	CWALT 2006-HY12	CWALT 2007-OA7	CWHL 2005-R3	CWHL 2007-16	CWL 2005-BC5	CWL 2006-BC5
CWALT 2004-6CB	CWALT 2005-45	CWALT 2006-OA11	CWALT 2008-2R	CWHL 2006-14	CWHL 2008-3R	CWL 2005-IM1	CWL 2006-SD1
CWALT 2004-J1	CWALT 2005-56	CWALT 2006-OA16	CWHL 2004-13	CWHL 2006-15	CWL 2004-SD1	CWL 2006-S9	CWL 2006-SD3
CWALT 2005-16	CWALT 2005-57CB	CWALT 2006-OA17	CWHL 2004-HYB2	CWHL 2006-20	CWL 2004-SD2	CWL 2006-10	CWL 2006-SD4
CWALT 2005-19CB	CWALT 2005-64CB	CWALT 2006-OA6	CWHL 2004-HYB5	CWHL 2006-3	CWL 2004-SD3	CWL 2006-12	CWL 2006-SPS2
CWALT 2005-48T1	CWALT 2005-72	CWALT 2006-OA9	CWHL 2004-HYB6	CWHL 2006-HYB1	CWL 2004-SD4	CWL 2006-15	CWL 2007-10
CWALT 2005-53T2	CWALT 2005-73CB	CWALT 2006-OC10	CWHL 2004-22	CWHL 2006-J4	CWL 2005-12	CWL 2006-16	CWL 2007-4
CWALT 2005-59	CWALT 2005-74T1	CWALT 2006-OC2	CWHL 2004-25	CWHL 2006-OA4	CWL 2005-10	CWL 2006-19	CWL 2007-2
CWALT 2005-65CB	CWALT 2005-81	CWALT 2006-OC4	CWHL 2004-29	CWHL 2006-9	CWL 2005-11	CWL 2006-2	CWL 2007-5
CWALT 2005-6CB	CWALT 2005-AR1	CWALT 2006-OC5	CWHL 2004-HYB9	CWHL 2006-HYB2	CWL 2005-13	CWL 2006-20	CWL 2007-6

CWALT 2005-82	**CWALT 2005-J5**	**CWALT 2006-OC6**	**CWHL 2005-J1**	**CWHL 2006-HYB5**	**CWL 2005-16**	**CWL 2006-22**	**CWL 2007-7**
CWALT 2005-85CB	**CWALT 2005-J9**	**CWALT 2006-OC7**	**CWHL 2005-11**	**CWHL 2006-J2**	**CWL 2005-2**	**CWL 2006-24**	**CWL 2007-9**
CWALT 2005-14	**CWALT 2006-21CB**	**CWALT 2007-15CB**	**CWHL 2005-14**	**CWHL 2006-OA5**	**CWL 2005-4**	**CWL 2006-25**	**CWL 2007-BC1**
CWALT 2005-21CB	**CWALT 2006-23CB**	**CWALT 2007-22**	**CWHL 2005-18**	**CWHL 2006-R2**	**CWL 2005-5**	**CWL 2006-26**	**CWL 2007-BC2**
	CWALT 2006-39CB	**CWALT 2007-5CB**	**CWHL 2005-19**	**CWHL 2007-10**	**CWL 2005-6**	**CWL 2006-3**	**CWL 2007-BC3**
	CWALT 2006-46	**CWALT 2007-7T2**	**CWHL 2005-2**	**CWHL 2007-11**	**CWL 2005-7**	**CWL 2006-5**	**CWL 2007-QH1**
	CWALT 2006-OA21	**CWALT 2007-8CB**	**CWHL 2005-3**	**CWHL 2007-14**	**CWL 2005-8**	**CWL 2006-7**	**CWL 2007-S3**

Bank of America

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Investors May Contact:
Kevin Stitt, Bank of America, 1.980.386.5667
Lee McEntire, Bank of America, 1.980.388.6780
or
Reporters May Contact:
Jerry Dubrowski, Bank of America, 1.980.388.2840
jerome.f.dubrowski@bankofamerica.com