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

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

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

Index No. 651786/2011

Assigned to: Kapnick, J.

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT VACATE THE INSIDE INSTITUTIONAL INVESTORS' DISCOVERY DEMANDS

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The undersigned Intervenor-Respondents and potential objectors ("Intervenors") respectfully move the Court pursuant to CPLR § 3103 to vacate in their entirety all of the document requests and deposition notices served on Intervenors by the Inside Institutional Investors on March 11, 2013 ("Discovery Demands"). The Discovery Demands are improper.[1]

INTRODUCTION

Nearly two months before they are even allowed to attempt to seek discovery in this case, the Inside Institutional Investors served extensive discovery on most of the Intervenors, including eighteen irrelevant and burdensome written requests for production.[2] In doing so, the Inside Institutional Investors blatantly disregarded this Court's Amended Scheduling Order and the Court's rationale for rejecting the Inside Institutional Investors' prior attempts to accelerate the deadlines contained in the Order. Under the Order, discovery of any party objecting to the settlement cannot even commence until May 3, 2013, the objection filing deadline. The Inside Institutional Investors coupled their premature discovery with an unduly burdensome and prejudicial demand that all Intervenors declare whether they will file an objection one month before they are required to do so under the Court's Order.

The Steering Committee has made it clear from the beginning of this case that they will oppose any attempt by the settlement proponents to obtain discovery from Intervenors other than holdings information, which the Steering Committee has already produced. The reason for this

[1] As best that undersigned counsel can tell, the Inside Institutional Investors served identical demands for documents and depositions "on all intervenors, proposed intervenors, and objectors." Representative examples of the Discovery Demands are submitted with the affirmations accompanying this motion. *See, e.g.*, Exs. 1-3 to Reilly Aff. in Support of Motion to Vacate (3/11/13 cover letter and enclosed discovery requests) (AIG Entities); *see also* Exs. 1-3 to Loeser Aff. in Support of Motion to Vacate (same) (Federal Home Loan Banks of Boston, Chicago and Indianapolis); Exs. 1-3 to Moon Aff. in Support of Motion to Vacate (same) (Triaxx Entities).

[2] To undersigned counsel's knowledge, the Inside Institutional Investors did not send the Discovery Demands to the Attorneys General of New York and Delaware.

is straightforward. The issues before the Court are whether the settlement is reasonable, and whether the Trustee, the Bank of New York Mellon, acted appropriately by endorsing the settlement and seeking the broad relief set forth in the Proposed Final Order and Judgment ("PFOJ"). Discovery from Intervenors, who had no involvement in the settlement negotiations, has no bearing whatsoever on the issues before the Court. There is only one purpose for the discovery, a purpose made clear by the discovery improperly served on most of the Intervenors: to harass Intervenors and discourage them from questioning the settlement.

The Inside Institutional Investors have not only intentionally jumped the gun on when they can attempt to seek discovery, they have also attempted to move the Court's objection deadline up without seeking the Court's permission to do so. These tactics are obviously intended to dissuade and intimidate objectors.

Undersigned counsel respectfully requests that the Court vacate the premature, improper, and irrelevant discovery requests in their entirety.

PROCEDURAL BACKGROUND

On February 26, 2013, after a "hearing and oral argument on the record on February 7, 2013 with respect to issues of scheduling," the Court amended its August 10, 2012 scheduling order and adopted the proposed amended scheduling order submitted by all parties, including the Inside Institutional Investors. *See* Doc. No. 525 (proposed amended scheduling order); Doc. No. 526 (the "Order"). Under the Order, May 3, 2013 is the deadline for Intervenors to object to the proposed settlement, and discovery may commence of those entities on that day. *See* Order at 2. Nevertheless, on March 11, 2013, less than two weeks after the Court entered its Order and nearly two months before the objection deadline, the Inside Institutional Investors propounded extensive discovery on "all intervenors, potential intervenors, and objectors." Ex. 1 to Reilly Aff., Loeser Aff., & Moon Aff.

As part of their Discovery Demands, the Inside Institutional Investors require that "those who still contemplate a possible objection . . . confirm by April 1, 2013 that you intend to respond and produce documents on May 3, 2013, and make a witness available for deposition prior to the May 30 hearing." *Id.* Under the Order, however, objections are not due until May 3, 2013. This date was proposed by counsel for the Inside Institutional Investors during the February 7, 2013 hearing after the Court recognized that the April 17, 2013 objection deadline was impractical. Ex. 4 to Reilly Aff., at 25:9-11 (Feb. 7, 2013 Hrg. Tr.). The Court's expressed rationale for the May 3, 2013 deadline was to provide investors with the benefit of all expert reports (due April 11, 2013) and time to review the record before deciding whether to object. *Id.* at 22:18-24, 23:2-3.

ARGUMENT

In New York, "[i]t is counsel's obligation to propound a properly formulated set of [discovery requests] and not the court's obligation to attempt to prune improper or burdensome questions." *Wyda v. Makita Electric Works, Ltd.*, 162 A.D.2d 133, 133 (1st Dep't 1990) (internal citations omitted); 7A Carmody-Wait 2d § 42:535 (updated Mar. 2013). "A party does not have to comply with a discovery demand that is palpably improper." *Robert Plan Corp. v. Onebeacon Ins.*, 10 Misc. 3d 1053(A), 2005 WL 3193700, at *2 (Sup. Ct. Nassau Cnty. 2005). Instead, when a discovery demand is palpably improper, including where the demands are unduly burdensome and prejudicial, the appropriate remedy is to vacate the entire demand. *See, e.g.*, *Poon v. McSam Hotel Grp. LLC*, 37 Misc. 3d 138(A), 2012 WL 5989381, at *1 (1st Dep't 2012) (vacating entire discovery demand which was "palpably improper since it was overbroad and burdensome or sought irrelevant information"); *see also Perez v. Bd. of Educ. of N.Y.*, 271 A.D.2d 251, 251-52 (1st Dep't 2000); *Sol Mor Novelty Co. v. Nw. Nat'l Ins. Co.*, 60 A.D.2d 543, 543 (1st Dep't 1977).

Here, there is no question that the Inside Institutional Investors' Discovery Demands are improper. The Discovery Demands are in direct violation of this Court's Amended Scheduling Order, the terms of which the Inside Institutional Investors had agreed to before it was filed with the Court. *See* Order at 2; Doc. No. 525; *see also* N.Y. Ct. Rules, § 202.70(g), Rule 13(a) ("Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders"). The Court's Order is clear: "Discovery of intervenors and/or objectors *who give notice of objections* pursuant to [the Amended Scheduling Order] . . . shall commence" on May 3, 2013. Order at 2 (emphasis added). The Order provides for discovery to begin on May 3, 2013 (not before), and only of those who file an objection (and no others). *See id.* On March 11, 2013, less than two weeks after the Court entered the Order and nearly two months before discovery is set to commence, the Inside Institutional Investors propounded their Discovery Demands with blatant disregard for the Court's Order on parties who are not yet subject to discovery. *See* Ex. 1 to Reilly Aff. (conceding that "under the Amended Scheduling Order, discovery of objectors commences on May 3, 2013"); *see also* Ex. 1 to Loeser Aff. (same); Ex. 1 to Moon Aff. (same). Therefore, the Inside Institutional Investors' Discovery Demands, as a whole, are facially improper and should be vacated.

Forcing Intervenors to comply with the Inside Institutional Investors' improper Discovery Demands by May 3, 2013 would also be unduly burdensome and prejudicial. As the Inside Institutional Investors are well aware, Intervenors are in the middle of complying with accelerated expert deadlines, to be followed with expert depositions, and preparations for filing objections on May 3, 2013. The Amended Scheduling Order appropriately calls for staging of the discovery phases, so that responses to any discovery of objectors will occur *after* objections are filed. *See generally* Order at 1-2. In an attempt to overburden Intervenors and prejudice

their ability to produce substantive objections, the Inside Institutional Investors demand that Intervenors produce "All Documents" on May 3, 2013 for at least 18 separate requests for production and prepare corporate representatives for depositions which are all noticed to take place as well on May 3, 2013 (the same day final objections are due). Furthermore, by simultaneously seeking discovery through overly broad requests for production and depositions of each objector's corporate representative, the Inside Institutional Investors violated the generally accepted practice "that one method of disclosure should be completed before resorting to another." *See, e.g.*, *Samsung Am., Inc. v. Yugoslav-Korean Consulting & Trading Co.*, 199 A.D.2d 48, 48-49 (1st Dep't 1993) (vacating plaintiff's notices for discovery and inspection "with leave to renew, in more limited form and extent, following completion of [defendant's] deposition").

The Inside Institutional Investors also wrongly seek to accelerate the date on which Intervenors must give notice of objections. According to the Inside Institutional Investors, Intervenors "who still contemplate a possible objection" are required to "confirm by April 1, 2013 that [they] intend to respond" to the Discovery Demands. *Compare* Ex. 1 to Reilly Aff., Loeser Aff., & Moon Aff., *with* Order at 2. Such a demand is an end-run around the Court's objection deadline and is prejudicial to Intervenors' ability to fully and fairly decide whether to object to the proposed settlement or to participate in the hearing thereon. *See* PFOJ ¶ e. Indeed, the Court recognized the importance that all expert reports be complete and Intervenors have an opportunity to review the record *before* having to decide whether to object to the proposed settlement. *See* Ex. 4 to Reilly Aff., at 22:20-24 (Feb. 7, 2013 Hrg. Tr.) ("I don't think it's fair that people who are considering whether or not they want to object, support or something else shouldn't have a little time to look at all the stuff that you've spent a year and a half putting

together."); *id.* at 23:2-3 ("I think people should have a chance to look at [the discovery] and then make their submissions."); *see also id.* at 19:24-20:22 (rejecting Ms. Patrick's attempt to require potential objectors to file objections on April 17, 2013, which is not a "very realistic" date). The Inside Institutional Investors' Discovery Demands are yet another attempt to move up the objection deadline despite the Court's clear comments to the contrary. The Inside Institutional Investors must wait until the Court-ordered deadline of May 3, 2013 to hear from "all intervenors, proposed intervenors, and objectors" on whether they will object to the proposed settlement and the grounds for any objections.

The timing of the Discovery Demands is also highly questionable, and appears to be nothing more than an attempt to chill substantive objections. Rather than wait until objections are in to serve discovery only on those who object (as the Order contemplates), the Inside Institutional Investors decided to serve "all intervenors, proposed intervenors, and objectors" with burdensome requests nearly two months before the Court-ordered time. *See* Ex. 1 to Reilly Aff., Loeser Aff., & Moon Aff. Tellingly, the Inside Institutional Investors note that any investors "who do not object to the Settlement" are free to "ignore the[] requests." *Id.* This not-so-subtle attempt to dissuade "those who *still* contemplate an objection" through the use of expensive and burdensome discovery tactics is palpably improper. *Id.* (emphasis added).

Intervenors are under no obligation to substantively respond (and object) to the Inside Institutional Investors' Discovery Demands at this time. Nevertheless, the Discovery Demands plainly seek attorney-client privileged, work product protected, and irrelevant information—sufficient grounds for vacating the Discovery Demands in their entirety. *See Heimowitz v. Handler, Kleiman, Sukenik & Segal P.C.*, 51 A.D.2d 702, 703 (1st Dep't 1976) (affirming lower court's order vacating interrogatories "contain[ing] many irrelevant, unduly broad and

unreasonably oppressive questions, including some which obviously call for breach of the attorney-client privilege"); *e.g.*, Ex. 2 to Reilly Aff., Loeser Aff., & Moon Aff. at Doc. Request Nos. 1, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17. For example, Document Request Number 1 seeks "All Documents containing information and analyses that were considered by You in deciding to Object to the Settlement." *Id.* at Doc. Request No. 1. Presenting the information and analyses that provide a basis for objecting to the settlement is the very purpose of the pre-hearing briefing that begins May 3. Any "analyses" beyond those submitted to the Court are plainly attorney-client privileged or work product protected. In a similar vein, the Inside Institutional Investors are not entitled to Intervenors' "communications between June 28, 2011 and the present" with any other "intervenor, proposed intervenor, or objector in the Article 77 proceeding," *id.* at Doc. Request No. 6, nor to a sneak preview of Intervenors' trial strategy through discovery. *Id.* at Doc. Request No. 7 (requesting "All Documents, information, witnesses, testimony, and analyses that You intend to present at the Hearing in support of your Objection to the Settlement").

The Steering Committee has always made clear to Petitioners its position that no discovery of objectors, other than holdings information that it has already produced, is relevant or appropriate in this proceeding. Intervenors expressly reserve the right to object to any of the Inside Institutional Investors' Discovery Demands, and to seek relief from the Court based upon the substance of those requests, if and when they are properly served on or after May 3, 2013 pursuant to the Court's Order.

CONCLUSION

The Inside Institutional Investors' Discovery Demands are improper. The Demands violate the Court's Order, prematurely seek information from parties who are not subject to discovery, and are unduly burdensome and prejudicial. In this important proceeding that impacts

the rights of all certificateholders of the 530 Trusts, the Inside Institutional Investors should not be allowed to harass and intimidate certificateholders who have stepped forward to seek more information about a settlement in which they had no say, and from which they have no ability to opt-out. Undersigned counsel respectfully requests that the Court vacate the Discovery Demands in their entirety.

DATED: April 1, 2013

REILLY POZNER LLP

By: *s/ Daniel M. Reilly*
Daniel Reilly
Michael Rollin
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
Telephone: (303) 893-6100
Fax: (303) 893-1500
dreilly@rplaw.com
mrollin@rplaw.com

Attorneys for AIG Entities

KELLER ROHRBACK LLP

By: *s/ Derek W. Loeser*
Derek W. Loeser
David J. Ko
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384
dloeser@kellerrohrback.com
dko@kellerrohrback.com

Gary A. Gotto
3101 North Central Avenue
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Fax: (602) 248-2822
ggotto@krplc.com

Attorneys for Federal Home Loan Banks of Boston, Chicago, and Indianapolis

MILLER & WRUBEL P.C.

By: *s/ John G. Moon*
John G. Moon
570 Lexington Avenue
New York, New York 10022
Telephone: (212) 336-3500
Fax: (212) 336-3555
jmoon@mw-law.com
chuene@mw-law.com

Attorneys for the Triaxx Entities

SCOTT+SCOTT,
ATTORNEYS AT LAW, LLP

By: *s/ David R. Scott*
David R. Scott
Beth A. Kaswan
Max R. Schwartz
The Chrysler Building
405 Lexington Avenue, 40th Floor
New York, NY 10174
Telephone: (212) 223-6444
Fax: (212) 223-6334
david.scott@scott-scott.com
bkaswan@scott-scott.com
mschwartz@scott-scott.com

Attorneys for the Public Pension Fund Committee

CIFG Assurance North America, Inc.:
SARAH E. LIEBER, ESQ.

By: *s/ Sarah E. Lieber*
Sarah E. Lieber (SL 2692)
CIFG Assurance North America, Inc.
850 Third Avenue, 10th Floor
New York, New York 10022
(212) 909-0425

ROBBINS GELLER RUDMAN
& DOWD LLP

By: *s/ THOMAS E. EGLER*
SPENCER A. BURKHOLZ
THOMAS E. EGLER
SCOTT H. SAHAM
NATHAN R. LINDELL
ASHLEY M. ROBINSON

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

KESSLER TOPAZ MELTZER
& CHECK, LLP
ANDREW L. ZIVITZ
SHARAN NIRMUL
KIMBERLY A. JUSTICE
JENNIFER L. JOOST
280 King of Prussia Road
Radnor, PA 19087
Telephone: 610/667-7706
610/667-7056 (fax)

Attorneys for Objectors Maine State Retirement System, Pension Trust Fund for Operating Engineers, Vermont Pension Investment Committee, and Washington State Plumbing & Pipefitting Pension Trust

FEDERMAN & SHERWOOD

By: *s/William B. Federman*
William B. Federman
10205 North Pennsylvania Ave.
Oklahoma City, OK 73120
Telephone: (405) 235-1560
Facsimile: (405) 239-2112
wbf@federmanlaw.com

Attorneys for American Fidelity Assurance Company

ROBINS, KAPLAN, MILLER & CIRESI
L.L.P.

By: *s/ Thomas B. Hatch*
Thomas B. Hatch (*admitted pro hac vice*)
Bruce D. Manning (*admitted pro hac vice*)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Tel: (612) 349-8500
Fax: (612) 339-4181

Counsel of Federal Home Loan Bank of Pittsburg

HALPERIN BATTAGLIA RAICHT,
LLP

By: *s/ Donna H. Lieberman*
Donna H. Lieberman, Esq.
Scott A. Ziluck, Esq.
40 Wall Street, 37th floor
New York, New York 10022
(212) 765-9100
dlieberman@halperinlaw.net
sziluck@halperinlaw.net

Attorneys for United States Debt Recovery, LLC VIII, L.P., and United States Debt Recovery X, L.P.

McCONNELL VALDÉS LLC

By: *s/ Roberto C. Quiñones-Rivera*
Roberto C. Quiñones-Rivera
New York Bar No. 2428373
PO Box 364225
San Juan, Puerto Rico 00936-4225
Telephone: (787) 250-2631
Fax: (787) 474-9201
rcq@mcvpr.com

Attorneys for ORIENTAL BANK AND TRUST

YANKWITT & McGUIRE, LLP

By: *s/ Kathy S. Marks*
Kathy S. Marks
140 Grand Street – Suite 501
White Plains, NY 10601
Tel: (914) 993-1500
Fax: (914) 801-5930
kathy@yankwitt.com

Attorneys for Good Hill Partners LP

THEGRANTLAWFIRM, PLLC

By: *s/Lynda J. Grant*
Lynda J. Grant
521 Fifth Avenue, 17th Floor
New York, NY 10175
t/212-292-4441
f/212-292-4442
Attorneys for Clayhill Investors LLC

SCHLAM STONE & DOLAN LLP

By: *s/ Bradley J. Nash*
Bradley J. Nash
26 Broadway
New York, NY 10004
Telephone: (212) 344-5400
Fax: (212) 344-7677
bnash@schlamstone.com

Attorneys for Liberty View LLC, Sun Life Assurance Company of Canada (U.S.), Platinum Underwriters Reinsurance, Inc., Platinum Underwriters Bermuda, Ltd., First Reliance Standard Life Insurance Company, Reliance Standard Life Insurance Company, and Safety National Casualty Corporation.

VANDENBERG & FELIU, LLP

By: *s/ John C. Ohman*
Bertrand C. Sellier
John C. Ohman
60 East 42nd Street, 51st Floor
New York, New York 10165
T: (212) 763-6800
F: (212) 763-6810
johman@vanfeliu.com
Attorneys for Objectors

Pine River Master Fund Ltd., Pine River Fixed Income Master Fund Ltd., Silver Sands Fund II LLC and Two Harbors Asset I, LLC

KOPELOWITZ OSTROW P.A.

By: *s/ Jason H. Alperstein*
Jason H. Alperstein
New York Bar No. 4904983
200 S.W. First Avenue, 12th Floor
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
Fax: (954) 525-4300
alperstein@kolawyers.com

Attorneys for Sterling Federal Bank, F.S.B., Bankers Insurance Company, Bankers Life Insurance Company, First Community Insurance Company, and Bankers Specialty Insurance Company

GRAIS & ELLSWORTH LLP

By: *s/Owen L. Cyrulnik*
Owen L. Cyrulnik
David J. Grais
Leanne M. Wilson
LWilson@graisellsworth.com
1211 Avenue of the Americas
New York, New York 10036
(212) 755-0100 telephone
(212) 755-0052 facsimile

Attorneys for the Federal Home Loan Bank of San Francisco, Cranberry Park I LLC, and Cranberry Park II LLC

WOLLMUTH MAHER & DEUTSCH LLP

By: *s/ Steven S. Fitzgerald*
Steven S. Fitzgerald
500 Fifth Avenue
New York, New York 10110
Tel: (212) 382-3300
sfitzgerald@wmd-law.com
Attorneys for Mortgage Bond Portfolio LLC

PETER N. TSAPATSARIS, LLC

By: *s/ Peter N. Tsapatsaris*
Peter N. Tsapatsaris
200 East 33rd Street
27th Floor, Suite D
New York, NY 10016
Office: (646) 490-7795
peter@pntlaw.com

Attorneys for Knights of Columbus, American Equity Investment Life Insurance Company et al., Blue Mountain Credit Alternatives Master Fund, LP, Stone Creek LLC

OF COUNSEL:

Talcott J. Franklin*
TALCOTT FRANKLIN P.C.
208 North Market Street
Suite 200
Dallas, Texas 75202
214.736.8730 phone
877.577.1356 facsimile
tal@talcottfranklin.com

* Licensed only in North Carolina, South Carolina (inactive), and Texas