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

Kapnick, J.

PETITIONERS' MEMORANDUM IN OPPOSITION TO THE POLICEMEN'S OBJECTORS' MEMORANDUM IN SUPPORT OF THE ADMISSIBILITY OF REPORTS ISSUED BY THE INSPECTOR GENERAL OF THE FEDERAL HOUSING FINANCE AGENCY

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Petitioners submit this memorandum in opposition to the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago's (the "Policemen's Objectors") attempt to enter into evidence two hearsay reports issued by the Office of the Inspector General of the Federal Housing Finance Agency (the "OIG Reports"). *See* Doc. 892.[1]

I. THE OIG REPORTS ARE IRRELEVANT.

Both of the OIG Reports were issued well after the Settlement—the first in late September 2011 and the second in September 2012. These reports did not exist at the time of the Settlement. Thus, they are irrelevant to the issue before the Court in this proceeding: whether the Trustee's June 2011 decision to enter into the Settlement was reasonable and made in good faith. The analysis could and should end there.

The Policemen's Objectors proffer the OIG Reports in an improper attempt to undermine Tom Scrivener's testimony concerning the GSE repurchase data used by Bank of America to formulate its negotiating position. *Cf. Parsons v. 218 E. Main St. Corp.*, 1 A.D.3d 420, 420 (2d Dep't 2003) ("It is well settled that extrinsic evidence may not be used to impeach the credibility of a witness on collateral matters."). Mr. Scrivener testified that the OIG Reports, even if accurate, would not affect the applicability of Bank of America's GSE data or the adjustments that he applied.[2] Moreover, the $8.5 billion settlement payment is *more than twice* the $4.02 billion "output calculation" that was Bank of America's negotiating position in its final presentation. *See* PTX 36 (in evidence) at 5. Admission of the OIG Reports—and hypothetical

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[1] On June 14, 2013, the Court expressly instructed that, if the Policemen's Objectors wished to brief this issue, it "would appreciate if you would do it like in three pages with some citations." 6/14/13 Tr. at 1308:9-10; *see also id.* at 1266:15-16 ("[Y]ou will give me a couple of page memo that I can look at."). Disregarding this instruction, the Policemen's Objectors have submitted nearly *eight* full pages of argument. Mindful of the Court's express direction, and so as to avoid undue burden on the Court, this opposition is limited to three pages.

[2] *See* 6/14/13 Tr. at 1266:22-1271:12. Mr. Scrivener explained that Freddie Mac loans were only about 20 percent of the loans in the GSE data, with the rest of the experience coming from Fannie Mae, which is not criticized in the OIG Reports; he further explained that the Bank of America data already contained an upward "adjustment factor" that assumed that there could be future claims for those with 24 or more payments (*i.e.*, the same loans that the Policemen's Objectors allege were overlooked). *See id*. at 1270:15-18.

arguments about how Freddie Mac's put-back process might have differed, how that might have affected the GSE repurchase rate, and how that in turn might have affected one element of Bank of America's calculations—would serve only to burden the Court with speculative and irrelevant "what if" issues.

II. THE OIG REPORTS ARE INADMISSIBLE HEARSAY.

As this Court has already ruled, *see* 6/11/13 Tr. at 939:3-13, the OIG Reports are inadmissible hearsay. There is no doubt that the out-of-court statements in the reports—offered for the truth—are hearsay. No exception applies.

The Policemen's Objectors assert that the OIG Reports are admissible under the exception to the hearsay rule contained in CPLR 4520. They are wrong. That exception applies only "[w]here a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed." Neither OIG Report is "a certificate or affidavit." Instead, each is a lengthy document containing (purported) facts, opinions, and conclusions. *See In re Eighth Judicial Dist. Asbestos Litig.*, 152 Misc. 2d 338, 341 (Sup. Ct. Erie Cnty. 1991) (CPLR 4520 inapplicable to EPA analysis because "no law authorizes or requires the EPA to file anything with the State" and "what is at issue is not a simple certificate or affidavit but a lengthy document containing facts, opinions, [and] conclusions"). As a result, CPLR 4520—which is to be "interpreted strictly" (*id.*)—is inapplicable.

The Policemen's Objectors' reliance on cases addressing the common law public documents exception to the hearsay rule is similarly unavailing. "The inability to put opinions or conclusions [in government investigative reports] to the test through cross-examination can be highly prejudicial and the admissibility of such reports must be considered with great care." *Bogdan v. Peekskill Cmty. Hosp.*, 168 Misc. 2d 856, 859 (Sup. Ct. Westchester Cnty. 1996).

Accordingly, such a report may be admitted *only* where the Court is satisfied that there are "sufficient independent indicia of reliability to justify its admission." *Cramer v. Kuhns*, 213 A.D.2d 131, 136 (3d Dep't 1995) (quotation marks omitted). The OIG Reports contain no such independent indicia. In fact, they contain hearsay within hearsay: They are purportedly based on a review of unidentified internal Freddie Mac e-mails, interviews with unidentified FHFA management and staff and similarly unidentified current and former Freddie Mac managers, and unspecified "publicly available data," and they contain extensive summary and opinion and are dotted with redactions—all of which Petitioners would be unable to test through cross-examination. *See, e.g.*, Doc. 893 at 24-28, 31, 34, 37.[3] Even FHFA itself "does not concur with all the inferences made and concerns raised in the report." *Id.* at 38. Under such circumstances, the admission of these reports is unwarranted. *See, e.g.*, *Cramer*, 213 A.D.2d at 136-37.[4]

CONCLUSION

Petitioners respectfully request that the Court deny the Policemen's Objectors' attempt to admit the OIG Reports into evidence.

Dated: New York, New York
June 25, 2013

[3] Accordingly, this case is unlike the one case cited by the Policemen's Objectors in which an Inspector General report—reflecting greater indicia of reliability—was admitted under the Federal Rules of Evidence (their only support for the claim that Inspector General's reports are "classic" admissible reports). *Cf. D'Olimpio v. Crisafi*, 718 F. Supp. 2d 357, 373-74 & n.12 (S.D.N.Y. 2010).

[4] *See also, e.g.*, *Stevens v. Kirby*, 86 A.D.2d 391, 395-96 (4th Dep't 1982) (New York State Liquor Authority report erroneously admitted where it "contained hearsay statements relevant to ultimate issues of fact" and "inadmissible conclusions and opinions"); *In re World Trade Ctr. Bombing Litig.*, 2007 WL 6882199 (Sup. Ct. N.Y. Cnty. Feb. 28, 2007) (9/11 Commission Report excerpts inadmissible under common law public document exception); *Kaiser v. Metro. Transit Auth.*, 170 Misc. 2d 321, 325-26 (Sup. Ct. Suffolk Cnty. 1996) (excluding State Public Transportation Safety Board reports based on "lack of trustworthiness"); *Bogdan*, 168 Misc. 2d at 861-62 (excluding findings of Public Health Council given "conclusory nature" and fact that "[n]o hearings were held").

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