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July 1, 2013

VIA E-FILING AND FACSIMILE

The Honorable Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, NY 10007

Re: *In re the application of The Bank of New York Mellon* (Index No. 651786/2011)

Dear Justice Kapnick:

I write on behalf of the Steering Committee to inform the Court of recent developments in the Residential Capital, LLC ("ResCap") bankruptcy proceedings with significant implications to this proceeding. The Trustee and the Institutional Investors have told the Court over and over again in this case that loan file review is impractical, unduly burdensome, and unnecessary. Yet in the ResCap proceedings, in response to objections to a proposed settlement, the proponents of the settlement—which include many of the same Institutional Investors and Bank of New York Mellon as trustee ("BNYM")—endorsed a re-underwriting of a statistically valid sample of loans in the ResCap Trusts in order to evaluate the ResCap settlement amount and allocate the settlement proceeds among the ResCap Trusts. (ResCap Dkt. No. 3940 ¶ 26; Doc. No. 3940-1 at ¶¶ 26-27; 33-36). This review – which entails identifying the breach rate for loans *in the trusts*, and the losses *in those trusts* caused by the breaches, provides a concrete basis on which to evaluate the ResCap settlement. The Court does not have the benefit of this same review in the Article 77 proceeding because the settlement proponents refused to conduct it even after objections were lodged to the settlement.

Given the importance of loan file review—or more aptly, the lack thereof—in the Article 77 proceeding, a brief summary of what it entailed and how it came to pass in the ResCap

proceedings is necessary. Prior to ResCap's May 2012 bankruptcy filing, the Institutional Investors in ResCap agreed to a settlement (the "RMBS Settlement") whereby the debtor agreed to an allowed claim in the bankruptcy of up to $8.7 billion, to be allocated among certificateholders in consenting trusts. The RMBS settlement was presented to the four trustees of the ResCap Trusts, one of which is Bank of New York Mellon ("BNYM").

As with the Bank of America settlement, the RMBS Settlement was reached and the allocation methodology determined without any loan file review by the Institutional Investors or the trustees. Yet, following objections to the RMBS Settlement, the trustees for the ResCap Trusts undertook to re-underwrite 6,500 loans, a statistically valid sample of the loans backing the 392 trusts, in order to establish that in agreeing to the settlement, the Trusts had acted in good faith. Coincidentally, the total number of loans backing the trusts is approximately 1.6 million – the same number that backs the 530 Covered Trusts in the Article 77 proceeding. The express purposes of the loan file re-underwriting included determining the breach rate for the trusts, by loan type, and estimating the realized and projected losses for each trust for purposes of verifying the settlement amount and determining the appropriate allocation.[1]

Taking into account the agreement to underwrite a statistically valid sample of loans, as well as other significant changes, on June 26, 2013, United States Bankruptcy Judge Martin Glenn approved a Plan Support Agreement that requires the signatories to support, among other things, implementation of the RMBS Settlement. In response to challenges to the loan file re-underwriting regime implemented by the trustees (including BNYM) Judge Glenn held that:

> The evidence establishes that the RMBS Trustees participated fully and actively in the mediation process. They obtained expert advice from Duff & Phelps, LLC, a firm experienced in evaluating mortgage loan servicing and origination issues, including representation and warranty ("R&W") claims. Duff & Phelps conducted substantial review of loan files, sampling over 6,500 mortgage loan files, and projecting the range of future losses and potential R&W claims that could be asserted. The methodology used by Duff & Phelps has been recognized and used in other cases asserting R&W claims, including for example in the recently tried case of *Assured Guaranty Municipal Corp. v. Flagstar Bank*, No. 11 Civ. 2375 (JSR), 2013 WL 440114, at *36.
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> * * *

[1] *See In re Residential Capital, LLC*, Case No. 12-12020 (Bankr. S.D.N.Y., June 24, 2013) (Omnibus Reply of Certain RMBS Trustees to Responses to the Debtors' Motion for an Order under the Bankruptcy Code Sections 105(a) and 363(b) Authorizing the Debtors to Enter into a perform under a plan support agreement with ally financial Inc., the Creditors' Committee, and Certain Consenting Claimants ("RMBS Trustee Reply")) (Dkt. No. 4061 at 7), attached hereto as Exhibit A. The Steering Committee requests that the Court take judicial notice of the RMBS Trustee Reply to the extent it sets forth BNYM's position on ResCap loan file re-underwriting.

> Based on the evidence in the record, the Court has no difficulty in concluding that the RMBS Trustees reached their decisions to sign and support the PSA in good faith and in what they believed was the best interests of the investors.[2]

The contrast between BNYM's conduct in the ResCap proceedings and this case is startling. The Trustee and the Institutional Investors have urged the Court to approve the Settlement effectively *in the dark.* Neither the Trustee nor the Institutional Investors have determined the actual breach rate of the loans in the Covered Trusts, or the losses caused by those breaches (relying instead on the "GSE experience"). But as their actions in the ResCap proceedings show, this information could be obtained in an efficient manner by employing the methodology that Judge Glenn noted has been recognized and used in other cases. That Bank of America does not want to allow a proper loan file review is all the more reason to insist that it occur since it is inconceivable that Bank of America would resist a loan file review that would show that losses are *lower* than the faulty estimates it prepared during the settlement negotiations in this case.

BNYM's unwillingness to insist on a loan file review in this proceeding despite *supporting* such a review in separate proceedings *following objection* is yet another example of its failure to pursue actions that are in the best interests of the certificateholders, and to take into account information that has come to light since the settlement was reached that undermines the purported bases for the pennies on the dollar settlement. Other examples include:

- Testimony from the Chief Risk Officer of Bank of America, Terry Laughlin, that Bank of America made capital infusions to Countrywide in order to maintain the capitalization of Countrywide and to "maintain Countrywide as a legal entity" (*see* June 10, 2013 Tr. at 796:25-800:23). Tom Scrivener of Bank of America further testified that these capital infusions have been used to pay settlements in private label securitization trusts such as the Covered Trusts. (June 14, 2013 Tr. at 1187:6-18). This testimony obliterates any notion that Countrywide lacked access to funds to pay a large settlement or that the threat of bankruptcy was credible;

- Judge Bransten's April 29, 2013 summary judgment ruling in *MBIA Ins. Co. v. Countrywide*, Index No. 602825/2008 (Doc No. 4092) contradicting several key bases for the Trustee's successor liability discount and reliance on Professor Daines' expert report; and

[2] *See In re Residential Capital, LLC*, Case No. 12-12020 (Bankr. S.D.N.Y., June 27, 2013) (Memorandum Opinion Approving the Plan Support Agreement) (Doc. No. 4102 at 44-45), attached hereto as Exhibit B. The Steering Committee requests that the Court take judicial notice of Judge Glenn's memorandum order.

- The series of opinions rejecting Bank of America's loss causation theory which the Trustee has adopted to discount the settlement. *See MBIA Ins. Corp. v. Countrywide*, 2013 WL 1296525 (1st Dep't April 2, 2013); *Syncora Guar. Inc. v. EMC Mortg. Corp.*, 874 F. Supp. 2d 328, 333-39 (S.D.N.Y. 2012); *Assured Guar. Mun. Corp. v. Flagstar Bank*, 892 F. Supp. 596, 601-03 (S.D.N.Y. 2012).

It is unreasonable for the Trustee to suggest that the Court ignore these developments given that the Trustee has come to this Court seeking approval of the settlement *now*. The Trustee was under no obligation to bring this settlement to the court for approval, and its only reason for doing so was to obtain broad releases for itself and Bank of America – releases that could not be obtained without court approval. But having made the decision to delay the settlement until it is approved by the Court, the Trustee is in no position to say the Court is not permitted to take into account new facts and circumstances that bear directly on the fairness and adequacy of the settlement.

Respectfully submitted,

/s/ Derek W. Loeser

Derek W. Loeser

Enclosures
cc: Counsel of record (via ECF)