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.

MEMORANDUM OF NON-PARTIES BANK OF AMERICA AND COUNTRYWIDE IN OPPOSITION TO OBJECTORS' MOTION TO COMPEL PRODUCTION OF LOAN FILES

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May 2, 2012

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Yesterday, certain of Objectors' counsel, at a "meet-and-confer," continued to demand the production of loan files in the 530 trusts covered by the Settlement, although they still would not make *any* proposal as to what "sample" of loan files they wanted. That discovery would — contrary to settled precedent — transform this special proceeding into a lengthy excursion into the merits of the settled claims, causing delay likely measured in *years*, and shed no light on the issue before the Court: whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement.

Bank of America and Countrywide — which have been subpoenaed by Objectors and would be obliged to produce the documents in question if the Court were to grant Objectors' request — respectfully submit this memorandum in opposition to Objectors' motion to compel loan-file discovery.

Loan-file review will answer no questions. It will lead only to interminable delay and unnecessary litigation, loan-by-loan-by-loan. It will bog down this proceeding for no good reason. Objectors' demand should not be granted.

Submitted herewith are the Affirmation of Elaine P. Golin, Esq., and a brief expert Affidavit of Peter S. Kempf describing the process of loan-file review that underlies Objectors' demand for loan-file production.

PRELIMINARY STATEMENT

The issue in this proceeding is whether the Trustee acted in good faith and within the bounds of its reasonable discretion. The Trustee has produced (or agreed to produce) all of the documents and information relevant to that question. It is undisputed that the Trustee did not review loan files in deciding to enter into the Settlement. Nonetheless, a small but vocal minority of certificateholders demand a "sampling" of loan files from the 530 trusts covered by

the Settlement — discovery into the merits of the underlying claims that is not appropriate under settled precedent.

Notably, the two Objectors leading the charge on loan-file production — AIG and Walnut Place — are both plaintiffs in their own separate, collateral RMBS litigation against Countrywide and Bank of America.[1] Both may well have their own motives for seeking document discovery that they know will cause enormous disruption and delay to this proceeding.

Objectors' motion should be denied on each of the following grounds.

First, loan files are irrelevant. All of the documents relevant to the reasonableness of the Trustee's exercise of discretion have already been or will be produced. Even before formal discovery, on November 1, 2011, the Trustee began voluntarily producing the documents it relied on in entering into the Settlement as well as the documents provided to its experts. That discovery, which already totals approximately 250,000 pages, is consistent with what is typically available in Article 77 proceedings as well as in analogous proceedings with similarly deferential standards of review.

There is no dispute: the Trustee did *not* review loan files in reaching its decision to enter into the Settlement. Instead, it relied on Countrywide's actual repurchase experience with Fannie Mae and Freddie Mac for approximately 100,000 loans that were originated during the same years and on the same platform as the loans in the covered trusts — real world adversarial experience over some four years that far exceeds whatever loan-by-loan litigation on loan files is

[1] *See Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. Cnty.) (appeal pending from dismissal by this Court), and *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, Index No. 652146/2011 (Sup. Ct. N.Y. Cnty.) (demanding repurchase of loans in three covered trusts); *Am. Int'l Grp., Inc.* v. *Bank of Am. Corp.*, No. 11-cv-6212 (S.D.N.Y.) (portion of case transferred to MDL panel, No. 11-cv-10549 (C.D. Cal.)) (alleging fraud, negligent misrepresentation and violation of securities laws based on purchases in residential mortgage-backed securitizations, some of which are also covered trusts).

conceivable in this or any other litigation. Accordingly, the only question is whether the Trustee's decision not to also review loan files rendered the Trustee's exercise of its discretion unreasonable. If the Trustee is correct that it was within the bounds of its discretion to approve the Settlement without reviewing loan files, then the Settlement should be approved. And Objectors are free to argue (as they already have) that it was unreasonable not to review loan files, and therefore the Settlement should not be approved. Either way, the actual contents of the loan files themselves are not relevant. *See* Point I, *infra*.

Second, production of loan files would transform this Article 77 proceeding into a litigation of the merits of the settled claims. As this Court stated at the April 24th hearing, consistent with the case law recognizing that merits discovery is inappropriate in the settlement-approval context, "[t]his is not about those underlying actions . . . . This is a settlement of a case . . . ." 4/24/12 Hearing Tr. 97. Although Objectors imply that production and review of a "sample" of loan files will be an easy task, they have *never* said what that "sample" would be. Even at a meet-and-confer yesterday, on May 1, 2012, after this Court's April 24th direction to "sit down and start working out some proposals for discovery" (*id*. at 102) and just one week before the conference that this Court has set to address these issues, Objectors ***refused*** to make any proposal with respect to the size or any other aspect of the "sample," and even ***refused*** to give a date certain for making such a proposal. Their only concrete request — in the subpoena to Bank of America — called for a "sample" of 1,000 loan files (500 performing loans, 500 non-performing) from each of the 530 covered trusts. That "sample" of ***530,000*** **loan files** would total over **200 million** pages, and require untold years to evaluate.

But a sample of *any* size would dramatically transform this proceeding. (1) First, there would be a battle of the experts on how to construct a meaningful sample. (2) Then, there would

follow the considerable task of gathering and producing the designated files.[2] (3) Then, the various parties' experts would engage in a highly complex and lengthy review of the loan files. This loan-file review, essentially a "reunderwriting" of each loan, would require each expert to make *subjective* determinations about whether each loan breached the particular representations and warranties made in the PSA governing each trust, including whether there had been a material breach of the applicable underwriting guidelines. (4) Then, as to those loans for which a representation and warranty breach is believed to exist, it would be necessary to determine whether that breach actually caused investor losses. (5) After all that, it is inevitable that there would be a host of disputes about the meaning and application of individual representations and warranties, as well as about the experts' subjective — and divergent — factual conclusions, all of which would have to be resolved by this Court in a series of loan-by-loan-by-loan mini-trials. *See* Point II, *infra*.

* * *

Objectors' demand for loan-file production is the latest in a series of efforts to distort and delay this proceeding. It began in August 2011, when Objectors requested an extension of the objection deadline and the creation of an opt-out procedure not appropriate for this trust-based Settlement. This Court denied those requests. Next, after that denial of their requests, Objectors removed this proceeding to federal court, causing six months of delay. Removal was squarely rejected by the Second Circuit. Nine months after the commencement of this proceeding, Objectors returned to this Court to argue for the first time, in the face of over a century of precedent, that Article 77 did not apply. This Court rejected that argument as well. Now,

[2] This is in itself no small task: All documents for a particular loan are not necessarily located in a single place and, in any event, each loan file is 200 to 600 pages, meaning that the production of just one loan file for each of the 530 trusts (a sample size no one would contend is meaningful) would run to hundreds of thousands of pages.

contrary to settled precedent, Objectors seek to inject litigation of the merits of the settled claims into this proceeding, even as they continue to ***refuse*** to say what they mean by a "sample" of loan files. This effort by Objectors is as meritless and tactical as their prior diversions. It should be rejected.

PROCEDURAL AND FACTUAL BACKGROUND

A. The Trustee has produced or will produce all information it relied on in entering into the Settlement.

At the April 24th hearing, Objectors argued that "[a]ll [they] want . . . is to find out what happened here." 4/24/12 Hearing Tr. 60. That is misleading, at best. *Both* of the lead objectors — AIG and Walnut Place — were offered the opportunity to know what was happening as it was happening: as the settlement discussions were underway in the winter of 2011, both were invited to be kept in the information loop on the discussions with the Trustee and the Institutional Investors, to receive reports on an ongoing basis about settlement discussions, and to provide input on those discussions. Both declined.[3]

Moreover, the course of this proceeding itself demonstrates that Objectors (despite their protestations to the contrary) *already know* "what happened here." On June 29, 2011, the Trustee filed its Verified Petition, outlining how and why it decided to enter into the Settlement. *See, e.g.*, Ver. Pet. ¶ 61. The Trustee set forth that it "weighed the legal and factual assertions of the Institutional Investors, Countrywide and Bank of America; considered and analyzed the

[3] As to Walnut Place, with whom the Trustee was directly involved, *see also* Bank of New York Mellon's Response to Walnut Place LLC's Petition To Intervene at 3-4 (July 11, 2011). In fact, counsel for Walnut Place even admitted to this Court that it filed the related (and now-dismissed) *Walnut Place* suit in February 2011 — months before the Settlement was announced — with the "express purpose" of "stop[ping] the settlement." Affirmation of Matthew D. Ingber in Support of the Trustee's Memorandum of Law in Opposition to Motion to Compel Discovery, Exhibit 6 (8/5/11 Hearing) at Tr. 33. AIG, too, was offered an opportunity to participate and chose not to. *See* Dworsky Decl. Ex. F at 4, *Am. Intl. Grp. Inc*. v. *Bank of Am. Corp.*, No. 11-cv-6212 (S.D.N.Y. Oct. 17, 2011) (Doc. #42-6).

competing methodologies for arriving at the Settlement Payment . . . and evaluated the reasonableness of the Settlement by, among other things, retaining and receiving opinions from independent experts in residential mortgage-backed securities and commercial finance, mortgage servicing, accounting and valuation." *Id*. In addition, the Trustee was "guided by counsel on the legal issues — including the viability of Countrywide's defenses and Bank of America's corporate separateness arguments — and received separate opinions from experts in corporate and contract law on these issues." *Id*.

In early July 2011, the Trustee posted the expert opinions referenced in the Verified Petition to a public website it created (*www.cwrmbssettlement.com*). *See* Tr. Std. Br. 12.[4] One of the Trustee's experts, Brian Lin of RRMS Advisors, opined that "the settlement range of approximately $8.8 billion to $11 billion is reasonable *without applying any legal haircuts*." Golin. Aff. Ex. 7 (Lin Report) at 7 (emphasis added). Mr. Lin reached this conclusion by estimating a repurchase rate for loans in the covered trusts and applying that rate to the estimated losses in the trusts. Thus, Objectors have long known precisely what analysis was undertaken to estimate a repurchase rate, and that this analysis did not include a review of loan files.

In their motion to compel addressed to the Trustee, Objectors contend that Mr. Lin relied on "publicly-available third party sources" in estimating a repurchase rate. Obj. Disc. Br. 15 n.9.[5] Objectors are wrong, as Mr. Lin's report makes evident. Mr. Lin relied on Countrywide's

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[4] The Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery is abbreviated as "Tr. Std. Br."; Objectors' Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery is abbreviated as "Obj. Disc. Br."; and the Trustee's Memorandum of Law in Opposition to Motion to Compel Discovery is abbreviated as "Tr. Disc. Opp."

[5] Contrary to Objectors' assertion, credible and independent third-party estimates of the repurchase rate are supportive of Mr. Lin's estimate of an approximately 14% repurchase rate for loans in the covered trusts. *See* Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections ¶ 33

(footnote continued)

"*actual repurchase experience*," not third-party data. Golin. Aff. Ex. 7 (Lin Report) at 4 (emphasis added). As Mr. Lin explains in detail, the parties used Countrywide's extensive prior repurchase experience with Fannie Mae and Freddie Mac (the "GSEs") as a basis for an indicative repurchase rate for loans in the covered trusts. *Id*. at 4-6. That real-world experience with the GSEs covered over *four years* of repurchase claims — actual arm's-length, adversarial negotiations at a loan-by-loan level with highly sophisticated repurchase counterparties on approximately *100,000 loans* that were originated during the same years and on the same platform as the loans in the covered trusts. That comprehensive *actual* experience provided a basis far superior to any conceivable post-hoc, made-for-litigation "sampling" of loan files. As Mr. Lin stated: "it would be reasonable to utilize BofA's percentages for both ["breach" and "success"] rates since they are based on the performance of a mortgage pool representing actual repurchase experience." Golin Aff. Ex. 7 (Lin Report) at 8. All of the information Mr. Lin considered — including all of the actual presentations and data on the GSE experience provided by Countrywide — has been or will be produced to Objectors.[6] Indeed, Objectors have had most of this information since November 1, 2011. *See* Golin Aff. ¶ 21.[7]

(footnote continued)
(Oct. 31, 2011) (noting that FHFA's Office of Inspector General reported a breach rate of 15% in a forensic review of loans purchased by Fannie Mae).

[6] *See, e.g.*, Golin. Aff. ¶¶ 16-21, Ex. 8 (Presentation to Gibbs & Bruns, Jan. 27, 2011, produced at BNYM_CW-00000271-77); Ex. 9 (Excerpts from Fourth Quarter 2010 Earnings Presentation, as distributed Jan. 27, 2011, produced at BNYM_CW-00000370-76); Ex. 10 (Presentation to Gibbs & Bruns, Feb. 10, 2011, produced at BNYM_CW-00000209-22); Ex. 11 (Excerpts from Fourth Quarter 2010 Earnings Presentation, as distributed Feb. 10, 2011, produced at BNYM_CW-00000377-84); Ex. 12 (Presentation to Gibbs & Bruns, Apr. 11, 2011, produced at BNYM_CW-00000165-70). These presentations also include Countrywide's attempt to quantify available legal arguments for reducing the indicative private-label repurchase rate based on less-stringent representations and available defenses; however, the Trustee's expert Mr. Lin instead posited a reasonable range of potential recovery "without applying any legal haircuts." Golin. Aff. Ex. 7 (Lin Report) at 7, 8. *See also* Golin Aff. ¶ 20, Exs. 13-14 (Consortium Deal Analyses, produced at BNYM_CW-00000206-07 and BNYM_CW-00000208).

(footnote continued)

B. Objectors demand the production of loan files.

In November 2011, Objectors served document demands on the Trustee, and a document subpoena on nonparties Bank of America and Countrywide. *See* Golin Aff. ¶¶ 2-3, Ex. 1, 2. Objectors' subpoena demanded a "sample" consisting of ***530,000*** loan files:

> A random sample of 500 loan files for performing loans and 500 loan files for non-performing loans in each of the Covered Trusts. For purposes of this request, the term "loan files" means (i) the complete loan originator, servicer, and master servicer file, including but not limited to origination credit reports, underwriting work sheets, underwriting exceptions granted, appraisal or valuation results, title commitment and policy, AUS findings, loan approval, loan application (Form 1008 and all supporting documents), mortgage note, mortgage or deed of trust, mortgage insurance certificate, HUD1, etc.; (ii) applicable underwriting guidelines; (iii) closing loan tapes and mortgage loan schedules; (iv) evidence of all conveyances and assignments; (v) all loan servicing records, including without limitation, call notes, foreclosure files and communications, loss mitigation files; (vi) all mortgage insurance rescission-related documents; (vii) all records concerning repurchase analysis, demands, investigations, communications; and (viii) servicing guidelines and procedures. For the purposes of this request, a "performing loan" is a mortgage loan where the borrower is less than 60 days delinquent in his or her payments, or not delinquent at all; a "non-performing loan" is a mortgage loan where the borrower is at least 60 days delinquent in his or her payments. Golin Aff. ¶ 2.

(footnote continued)

As Mr. Lin's report clearly explains, the public data that he utilized in his analysis was for collateral balances and historical loan performances for the very trusts covered by the Settlement — not for an estimate of the representation and warranty repurchase rates. *See* Golin Aff. Ex. 7 (Lin Report) at 7-8. Although not relevant to determining an estimated repurchase rate, this information was considered by Mr. Lin in ultimately reaching a reasonable range of recovery (before applying any legal haircuts). Along with additional nonpublic, proprietary Countrywide data, it too has been or will be produced. *See, e.g.*, Golin Aff. ¶ 20, Exs. 15-19 (produced at BNYM_CW-00000065-86, BNYM_CW-00000087-108, BNYM_CW-00033324-45, BNYM_CW-00033346-67, and BNYM_CW-00000278-369), and presentations cited above.

[7] The Institutional Investors' Steering Committee was made up of highly sophisticated investors such as Freddie Mac, MetLife, BlackRock and PIMCO. Over the course of negotiations, the investor representatives probed the Countrywide data, asked follow-up questions and requested additional analyses and information from Countrywide. The Trustee considered these exchanges, as well as the judgment of these sophisticated counterparties, in deciding to enter into the Settlement. *See* 4/24/12 Hearing Tr. 46; *see also* The Bank of New York Mellon's Consolidated Response to Objections at 6 (Oct. 31, 2011).

Objectors' so-called "sample" thus sought 1,000 files from each trust, *530,000 files in all* — approximately a third of the 1.6 million loans covered by the Settlement. *See id*.

On December 16, 2011, Bank of America and Countrywide served their response to the subpoena. The response objected to the loan-file request as irrelevant to the Trustee's decision to enter into the Settlement, and because, *inter alia*, it sought the production of "more than 200 million pages of documentary material." Golin Aff. ¶ 10.

In their motion to compel, Objectors represent that they have "significantly narrowed" their initial request for 530,000 loan files through meet-and-confers with Bank of America and the Trustee. Obj. Disc. Br. at 15 n.10. Objectors have done no such thing. The fact is, that even through the meet-and-confer on May 1, 2012, Objectors have *never* advanced any proposal limiting their initial (and, on its face, ridiculous) request. *See* Golin Aff. ¶¶ 4-14.

Specifically: As early as November 21, 2011, the Trustee informed Objectors that they should seek loan files directly from Bank of America as the Master Servicer, since the loan files were not in the Trustee's physical possession. In response to an inquiry from Objectors, counsel for Bank of America agreed that Bank of America was the relevant entity for purposes of loan-file production. *See* Golin Aff. ¶¶ 4, 9.

In follow-up phone and email conversations, Objectors (represented by counsel for AIG) acknowledged the need to narrow their 530,000 loan-file request, but made no actual proposal. Instead, they made the remarkably odd request that they first speak informally with a Bank of America representative, so that they might better understand what data they should be seeking. Golin Aff. ¶¶ 5-7. Counsel for Bank of America responded on December 14, 2011, noting that it would not be appropriate for Objectors' counsel to engage in informal conversations with Bank of America business personnel. Counsel for Bank of America requested that Objectors serve a

revised subpoena "when you [Objectors] have formulated a sufficiently concrete request for data." Objectors never responded. Golin Aff. ¶ 8.

On January 31, 2012, Objectors, now represented by Walnut Place's counsel, attended a meet-and-confer with Bank of America. Walnut Place's counsel suggested that loan-file production "begin" with the three trusts in which Walnut Place itself holds certificates (the same three trusts that are the subject of Walnut Place's individual litigation against Countrywide and Bank of America, *see* note 1, *supra*). Walnut Place's counsel made clear that this suggestion was only "step one" of their loan-file request. In response, Bank of America's counsel requested a complete proposal so that the issue of loan-file production could be addressed in toto, not piecemeal. Walnut Place's counsel indicated that Objectors would develop a complete proposal and put it in writing. But they never did. Indeed, Bank of America did not hear from Objectors for *three months* — and then it was *not* at Objectors' initiative. *See* Golin Aff. ¶¶ 11-13.

In their motion to compel addressed to the Trustee, Objectors continued to fail to define the requested "sample," asking the Court to accept blindly, presumably on faith, that the unspecified sample would be "manageable and relatively small." Obj. Disc. OSC at 2, Obj. Disc. Br. 15 n.10. Such an ill-defined and "blunderbuss" request is subject to being "denied in [its] entirety," as it is not the Court's task to "peruse [the request] to prune it or make it more manageable." *In re N.Y. Cnty. Data Entry Worker Prod. Liab. Litig.*, Index Nos. 21784/1992, 14003/1992, 1994 WL 87529, at *5 (Sup. Ct. N.Y. Cnty. Jan. 31, 1994).

On May 1, 2012, in advance of the discovery conference scheduled for May 8, 2012, counsel for the Trustee invited counsel for Bank of America to participate in the loan file-related portion of a meet-and-confer with counsel for the Trustee, counsel for the Institutional Investors and counsel for Objectors' Steering Committee. At the meet-and-confer, Objectors' counsel did

not have any proposal to make with respect to any aspect (*e.g.*, size or composition) of the loan file "sample." In fact, after all this time, Objectors' counsel refused even to commit to a date certain by which they would make such a proposal. *See* Golin Aff. ¶ 14.

ARGUMENT

I. LOAN FILES ARE IRRELEVANT.

As shown in the Trustee's memorandum, the standard of review should guide the scope of discovery — and requires that loan-file production be denied. *See* Tr. Std. Br. 11-14, 16-17. The CPLR limits discoverable documents to those "*material and necessary* in the prosecution or defense of an action." CPLR § 3101(a) (emphasis added). In Article 77 proceedings, as in other actions, courts routinely deny requests for discovery that, like loan files here, will "hardly aid in the resolution of the question" before the Court and, instead, will "unnecessarily broaden the scope of the litigation and invite extraneous inquiries." *See* Tr. Std. Br. 11-13, 17 (quoting, among other authorities, *Andon* v. *302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 (2000)).[8]

Objectors claim to need loan files to determine a repurchase rate for the covered trusts, because "[i]f the true breach rate is significantly higher than that assumed by BNYM, it would cast considerable doubt on the reasonableness of BNYM's decision to agree to the settlement amount and the process BNYM undertook in reaching that decision." Obj. Disc. Br. 15. They claim that "the loan files should be made available to Intervenors so that they may test whether the assumptions [BNYM's expert] Mr. Lin and BNYM made were reasonable." *Id*.

[8] *See also In re Matthews*, 266 A.D.2d 290, 290 (2d Dep't 1999) (reversing grant of motion to compel in trust proceeding where the information sought "is neither material nor relevant to the determination of whether the trustees behaved improperly"); *Brandes* v. *N. Shore Univ. Hosp.*, 1 A.D.3d 550, 551 (2d Dep't 2003) ("A plaintiff's motion to compel discovery should be denied where, as here, the document demands are overly broad, vexatious, and tend to confuse, rather than sharpen, the central issue of [the case]."); *Zohar* v. *Hair Club for Men Ltd.*, 200 A.D.2d 453, 454 (1st Dep't 1994) (protective order properly granted where requested disclosures were "irrelevant and overbroad" and had "no bearing" on claims at issue and thus were "neither material nor necessary, nor have the effect of sharpening the issues for trial," or were "irrelevant" to "necessary elements" of the claims).

Objectors' premise is a false one. The question before the Court is whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement. *See* Proposed Order and Final Judgment ¶¶ g, k; Tr. Std. OSC at 2; Tr. Std. Br. 1. As the PSAs, decades of case law, and the Restatements of Trusts make clear, the Court's already considerable task is to evaluate "whether the Trustee acted negligently in ascertaining the pertinent facts and whether its decision based on those facts was in bad faith or outside the bounds of the broad discretion conferred upon it by the PSAs." *Id*. 10-11; *see also id*. at 7-10, *Bluebird Partners* v. *Bank of New York*, Index No. 601016/1996, 2010 WL 2357834, at *4 (Sup. Ct. N.Y. Cnty., June 7, 2010) (concluding that a trustee's process for setting up a litigation reserve was reasonable and rejecting a bondholder's "post hoc complaints" about review processes the trustee did not undertake). The Court is *not* charged with assessing the merits of the settled claims, or presiding over an actual litigation of those claims, whether all of them or a "sample" of them, which is never the burden of a court reviewing a settlement in any context. Nor is it the Court's role to "test" the "assumptions" of the Trustee's experts. The PSAs make clear that the question to be answered with regard to experts is whether the Trustee's *process*, including its reliance on those experts, was reasonable. *See id*. at 9-10.

Unlike the materials that the Trustee actually considered, loan files are plainly irrelevant to determining whether the Trustee acted within its reasonable discretion. Objectors are free to argue that the Trustee's decision not to consider loan files renders its conduct unreasonable. If the Court agrees, then the Court will not approve the Trustee's decision to enter into the Settlement. The production and review of loan files themselves adds nothing to that analysis.

(Indeed, it is not uncommon for a trustee to enter into a settlement without undertaking formal discovery of the settled claims.[9])

Moreover, in other contexts with similarly deferential standards of review, the one constant and settled guideline is that courts do ***not*** permit discovery into the underlying merits of a claim that a party with discretion has determined to resolve. Rather, discovery is properly limited to inquiry into what that discretionary actor did or did not do. *See* Tr. Std. Br. 13 & n.5; *see also Scalisi* v. *Grills*, 501 F. Supp. 2d 356, 360 (E.D.N.Y. 2007) (in litigation challenging a board's business judgment to reject a shareholder demand, discovery is generally limited to "the nature and scope of the Committee's investigation"); *In re Boston Scientific Corp. S'holders Litig.*, No. 02 Civ. 247 (AKH), 2007 WL 1696995, at *5 (S.D.N.Y. June 13, 2007) (holding "no discovery is needed or warranted," because "the determination of whether or not to pursue litigation is a business decision entitled to deference under the business judgment rule"); *Carlton Invs.* v. *TLC Beatrice Int'l Holdings, Inc.*, C.A. No. 13950, 1997 WL 38130, at *2 (Del. Ch. Jan. 29, 1997).[10]

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[9] *See, e.g.*, *In re IBJ Schroder Bank & Trust Co.*, Index No. 101530/1998, Slip Op. at 5-6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (approving proposed settlement even though the trustee did not take any discovery in the underlying litigation) (attached as Golin Aff. Ex. 22); *see also D'Amato* v. *Deutsche Bank*, 236 F.3d 78, 87 (2d Cir. 2001) (holding that the lower court's approval of a class-action settlement was not an abuse of discretion when "although no formal discovery had taken place, the parties had engaged in an extensive exchange of documents and other information").

[10] In addition to the special litigation committee cases cited by the Trustee, when a debtor or trustee brings a motion to assume or reject a contract under 11 U.S.C. § 365, courts will not interfere with the debtor's business judgment "unless it is shown that [his] decision was one taken in bad faith or in gross abuse of the bankruptcy retained business discretion." *In re G Survivor Corp.*, 171 B.R. 755, 757-58 (Bankr. S.D.N.Y. 1994) (internal quotations omitted), *aff'd sub nom*. *John Forsyth Co*. v. *G Licensing, Ltd.*, 187 B.R. 111 (S.D.N.Y. 1995). In light of this deferential standard, the Second Circuit has stated that a motion to assume is a "summary proceeding" and "not the time or place for prolonged discovery or a lengthy trial with disputed issues." *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir. 1993).

Likewise, in the ERISA context, when a plan administrator is given discretionary authority to determine eligibility for benefits, a court's review of the administrator's decision "is limited to the evidence in the

(footnote continued)

The Court of Appeals decision in *Auerbach* v. *Bennett* is particularly instructive. In *Auerbach*, the Court held that "[w]hile the court may properly inquire as to the adequacy and appropriateness of the [special litigation] committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment." 47 N.Y.2d 619, 634 (1979). To that end, the Court specifically ***rejected*** discovery requests that "would go only to particulars as to the results of the committee's investigation and work, the factors bearing on its substantive decision not to prosecute the derivative actions and the factual aspects of the underlying first-tier activities of defendants[,] all matters falling within the ambit of the business judgment doctrine and thus excluded from judicial scrutiny." *Id.* at 636 (contrasting such requests with discovery into "the procedures followed by that committee"). Discovery on the underlying substantive claims ***rejected*** in *Auerbach* is precisely the kind of discovery Objectors seek in their request for loan files.

Objectors also argue that loan files are necessary to test the proposed finding in the Final Order and Judgment that the Trustee "appropriately evaluated . . . the strengths and weaknesses of the claims being settled." Obj. Disc. Br. 13 (quoting PFOJ ¶ i). Again, Objectors' argument is illogical. For the Court to assess whether the Trustee "appropriately evaluated" representation and warranty claims (a finding about the *process* it followed), the Court is not required to independently value those claims using a process that the Trustee consciously rejected, *i.e.*, a loan-file review.

(footnote continued)
administrative record," as "the standard of review . . . determines the scope of discovery in the case." *Courtney* v. *Zurich Am. Ins. Co.*, No. 8:07CV12, 2007 WL 2429137, at *3 (D. Neb. Aug. 22, 2007) (denying a motion to compel discovery on the basis of relevance).

II. PRODUCTION OF LOAN FILES WOULD TRANSFORM THIS SETTLEMENT PROCEEDING INTO A LENGTHY AND COMPLEX INQUIRY INTO THE MERITS OF THE UNDERLYING CLAIMS.

Not only are loan files irrelevant, their production and review would inevitably transform this proceeding into a trial of the merits of the settled claims, and cause delay measured in *years* — not months.

A. Discovery into the merits of settled claims is not appropriate.

Objectors' request for loan files is relevant only to the merits of the settled claims, and therefore should be denied. As the First Department has instructed, discovery requests that "will, instead of sharpening the issues, blunt them, and add to the delay and prolixity which normally inheres in trials" should be denied. *Stephen-Leedom Carpet Co.* v. *Arkwright-Boston Mfrs. Mut. Ins. Co.*, 101 A.D.2d 574, 577 (1st Dep't 1984) (internal quotations omitted).

As detailed in the Trustee's memorandum, even in class-action settlement hearings, which (unlike this proceeding) require searching judicial inquiry into the underlying fairness of a settlement, discovery into the merits of settled claims is routinely denied: the "settlement hearing is not a trial or a rehearsal of the trial. . . . [I]t does not attempt to decide the merits of the controversy." Tr. Std. Br. 14 & n.6 (quoting, among other authorities, *Robertson* v. *Nat'l Basketball Ass'n*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977)); *see also* Tr. Disc. Opp. 4-5. Courts recognize that discovery must be limited so as not to deprive settling parties of the benefits of settlement in the first place — *i.e.,* that parties settle precisely to avoid the burden and uncertainty of protracted discovery and litigation. In *City of Detroit* v. *Grinnell Corp.*, the Second Circuit refused to order discovery requested by a settlement objector, relying on the bedrock principle that "**[i]t is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement . . . .** ***Such procedure would emasculate the very purpose for***

which settlements are made." 495 F.2d 448, 462 (2d Cir. 1974) (emphasis added) (second alteration in original, internal quotations omitted), *abrogated on other grounds by Goldberger* v. *Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).[11] Indeed, "it would be inconsistent with the salutary purposes of settlement to conduct a full trial in order to avoid one." *Handschu* v. *Special Servs. Div.*, 787 F.2d 828, 834 (2d Cir. 1986). And protracted and expensive litigation over highly complex claims and defenses, including disputed issues of fact and law — of which there are many here — is one of the primary reasons Bank of America and the Trustee agreed to settle, just like all parties who settle.

Certainly, there should not be more discovery here than in a class-action settlement proceeding. In the class-action context, the party proposing the settlement, the class representative, is agreeing to settle *other* parties' claims in addition to its own. Here, the Trustee is settling claims that (as is undisputed) belong to it, *not* to certificateholders. *See* Tr. Std. Br. 4-7. That is the deal that certificateholders bought into. *See ASR Levensversekering NV* v. *Swiss Re Fin. Prods. Corp.*, Index No. 650557/2009, Slip Op. at 7 (Sup. Ct. N.Y. Cnty. Oct. 11, 2011) ("Plaintiffs are bound by the agreements that they made.") (attached as Golin Aff. Ex. 21).

This Court has recognized that this proceeding is not a litigation of the settled claims, stating at the April 24th hearing that "[t]his is not about those underlying actions . . . . This is a settlement of a case . . . ." 4/24/12 Hearing Tr. 97. The Second Circuit likewise rejected Walnut Place's attempts to "recast the . . . proceeding (which concerns a trustee's rights, duties and

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[11] *See also, e.g.*, *In re Bausch & Lomb, Inc. Sec. Litig.*, 183 F.R.D. 78, 81 (W.D.N.Y. 1998) ("[P]art of the reason that settlements are looked upon with favor is that they allow the parties to avoid engaging in protracted, costly discovery. . . . [I]t would be inconsistent with [this purpose] to find that extensive pre-trial discovery is a prerequisite to approval of a settlement.") (internal quotations omitted); *Ginsburg* v. *Phila. Stock Exch., Inc.*, C.A. No. 2202-CC, 2007 WL 2982238, at *2 (Del. Ch. Oct. 9, 2007) ("Settling — rather than fully litigating — a dispute offers both parties the distinct advantage of avoiding costly discovery. It would, therefore, *directly contravene that advantage* if the court permitted the full scope of discovery. . . .") (emphasis added).

obligations) into the underlying claim resolved in the Settlement Agreement." *BlackRock Fin. Mgmt., Inc.* v. *Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 179 (2d Cir. 2012). Accordingly, discovery which similarly attempts to recast this proceeding should be denied.

B. Loan-file production will result in a series of disputes over subjective findings by experts that will derail this settlement proceeding.

The Court of Appeals has recently highlighted the need to avoid "turning the fact-finding process into a series of mini-trials" on "extraneous" issues: "While open discovery is crucial to the search for the truth, equally important is the need to avoid undue delay created by battling experts." *Andon*, 94 N.Y.2d at 745, 747. Likewise, federal courts have rejected discovery where even "a small sampling of records" would "invite the Court into a swamp of tangential or irrelevant factfinding." *See, e.g.*, *Langley* v. *Coughlin*, No. 84 Civ. 5431 (LBS), 1989 WL 436675, at *3 (S.D.N.Y. June 19, 1989) (rejecting "sampling" of psychiatric files to determine professional psychiatric standards).

The production and evaluation of even a "sampling" of loan files (indeed, of any size) would have precisely the result that the Court of Appeals warned against in *Andon* — a series of mini-trials on extraneous issues, without being helpful to the Court:

First, determining a meaningful and appropriate sample would be time consuming and contested, likely involving a battle of experts.[12] Those disputes, which the Court would

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[12] Bank of America and Countrywide would vigorously contest that a "sample" of loan files could ever be probative of the value of the settled claims, since if the Trustee had litigated rather than settled these claims, Bank of America and Countrywide would have insisted on their contractual right to a loan-by-loan review of loan-repurchase requests. *See* Kempf Aff. Ex. A (PSA) § 2.03(c) ("Upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to *a* Mortgage Loan . . . which 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 its receipt of written notice from any party of a breach of any representation or warranty with respect to *a* Mortgage Loan . . . that materially and adversely affects the interests of Certificateholders in *that* Mortgage Loan, it shall cure *such* breach in all material respects, and if *such* breach is not so cured, shall . . . repurchase the *affected* Mortgage Loan or

(footnote continued)

ultimately need to resolve, would concern what assortment or combination of loans across the 530 covered trusts should be considered a representative sample.[13]

Second, the collection, review, and production of loan origination files is a burdensome task. The origination file for each loan contains approximately 200 to 600 pages. *See* Aff. of Elizabeth Chen ¶ 4, *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. Cnty. May 17, 2011) (Doc. #38). Just producing (let alone analyzing) loan files would take months (at a minimum). Recent litigation of actual claims against other loan originators indicates that it could take more than a year just to complete the requested document discovery.[14]

Third, once loan files are produced, Objectors apparently foresee attempting to determine whether and to what extent the sample loans would have been subject to repurchase, absent settlement. But contrary to Objectors' supposition that there is a "true breach rate" to be derived from loan files, loan-file review would *not* result in any objective "truth." Instead, each interested party would retain its own expert (supported by a team of reunderwriters) to review *each file* and make necessarily *subjective* determinations about whether each loan breached one or more applicable representations and warranties, including whether the loan materially

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Mortgage Loans . . . .) (emphasis added). (Unless otherwise indicated, all PSA citations are to the PSA for CWALT 2006-OA19.) *See also MASTR Asset Backed Sec. Trust 2006-HE3* v. *WMC Mortg. Corp.*, Civil No. 11-2542 (PAM/TNL), 2012 WL 539374, at *4 (D. Minn. Feb. 16, 2012) ("There is no dispute that U.S. Bank has never demanded that WMC or EquiFirst cure any defective loans other than the loans in the first sample. Thus, U.S. Bank's claims arising out of other loans . . . are not yet ripe. Those claims must be dismissed.").

[13] For example, issues that would arise would likely include disputes over the appropriate representation of different product types, vintages, loan-performance status, and a host of other factors.

[14] In *Deutsche Bank National Trust Co.* v. *FDIC*, a case involving representation and warranty breaches in 127 trusts, the court approved a year-long document discovery plan and held in abeyance ruling on additional phases of discovery until document production was complete. *See* Scheduling Order ¶ 1, No. 09-CV-1656-RMC (D.D.C. May 12, 2011) (Doc. #69).

complied with Countrywide's underwriting guidelines at the time (a process known as "reunderwriting"). The only certainty is that there would be a host of legal disputes about the meaning of individual representations and warranties in the relevant contracts, as well as a predictably huge percentage of loans on which the parties would disagree about the factual results of loan-file review.

At that point, only the Court would be able to resolve those disputes. Doing so would require reference to industry practice, as well as to the actual contractual language, which can vary across the 530 trusts.[15]

Moreover, as described in the affidavit of Peter S. Kempf, many of the representations and warranties incorporate *subjective* standards, often referring to a "material" breach or to

[15] To give but one example of a likely dispute about the interpretation of a representation and warranty, Countrywide typically represented that the information on a "Mortgage Loan Schedule" was accurate as of the "Closing Date." Kempf Aff. Ex. A (PSA) at S-III-A ¶ 1. However, despite the PSA's plain language that the Mortgage Loan Schedule contains only "the Loan-to-Value Ratio *at origination*" of the loans in the trust, *id*. at § 1.01 ("Mortgage Loan Schedule") (emphasis added), investors have claimed that the Loan-to-Value ratio of a particular loan should be judged as of the Closing Date. For some loans, whether this representation was breached may depend upon whether the measuring date is the date of origination or the Closing Date.

Two other examples are: (1) In the *Walnut Place* complaint, the plaintiffs have used automated valuation models ("AVMs") in an effort to call into question the appraisals used by Countrywide in originating loans. *See* Complaint at 8, *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. Cnty. Feb. 23, 2011) (Doc. #1). Countrywide and Bank of America have argued and will continue to argue that the use of after-the-fact AVMs cannot be used to impugn actual, contemporaneous appraisals in asserting representation and warranty breaches. *See* MOL in Support of Mot. to Dismiss at 22 (May 17, 2011) (Doc. #39); (2) The Mortgage Loan Schedule contains "a code indicating whether the residential dwelling at the time of origination was represented to be owner-occupied." Kempf Aff. Ex. A (PSA) § 1.01 ("Mortgage Loan Schedule"). In the mortgage-loan industry, this is understood to be a statement as to whether the borrower *intended* to occupy the property, not whether it was actually occupied at the date of origination. *See* Kempf Aff. Ex. B (Prospectus Supplement to CWALT 2006-OA19), attached Prospectus at 15 ("the sole basis for a representation that a given percentage of the loans is secured by Single Family Properties that are owner-occupied will be either (i) the making of a representation by the borrower at origination of the loan either that the underlying Property will be used by the borrower for a period of at least six months every year or that the borrower intends to use the Property as a primary residence or (ii) a finding that the address of the underlying Property is the borrower's mailing address.") Repurchase claimants have nonetheless asserted breach based solely on non-occupancy at origination, without regard to the borrower's intent. Countrywide and Bank of America have contested and will continue to contest such assertions. Again, in some cases, whether representations and warranties were breached may depend on which view prevails.

"prudent" or "customary" underwriting practices. Kempf Aff. ¶ 24. The representations and warranties that would undoubtedly be at issue include:

- "Each Mortgage Loan was underwritten *in all material respects* in accordance with the underwriting guidelines described in the Prospectus Supplement." Kempf Aff. Ex. A (PSA) at S-III-A ¶ 37 (emphasis added).

- "The origination, underwriting and collection practices used by Countrywide with respect to each Mortgage Loan have been in all respects *legal, prudent and customary in the mortgage lending and servicing business*." *Id*. at S-III-A ¶ 23 (emphasis added).

- "The Mortgage Loans, individually and in the aggregate, conform *in all material respects* to the descriptions thereof in the Prospectus Supplement." *Id*. at S-III-A ¶ 44 (emphasis added).

These representations and warranties require, in and of themselves, judgments incapable of bright-line resolution. *See* Kempf Aff. ¶¶ 24-26. As one industry observer, the Royal Bank of Scotland, stated in describing loan-file review: "there is no bright line definition of materiality." Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections Ex. 20 (the "RBS Report") at 3.[16]

The punch line is that underwriting — and reunderwriting — is at least as much an art, as a science. *See* Kempf Aff. ¶ 21. Determinations of a breach of underwriting guidelines, much less a "material" breach (as required by the representations and warranties), involve the application of subjective standards and discretionary judgments that reasonably can lead professional reunderwriters to reach different conclusions in assessing particular criteria. *Id*. Reunderwriting any meaningful sample of loans will lead to disputes, not answers. *Id.* at ¶¶ 5, 21, 22, 29.

[16] Not only is this process subjective, but it would be particularly complex because, for each loan subject to review, the reunderwriter must examine the underwriting guidelines of the originator in effect at the time of the loan's origination. *See* Kempf Aff. ¶ 14. These underwriting guidelines consist of thousands of pages of manuals, guides and other documents, which underwent frequent revisions. *Id*.

In addition, as was expressly disclosed in the offering documents for these securitizations, the underwriting guidelines (incorporated into certain of the most-cited representations and warranties) permitted "exceptions" to be made and "compensating factors" to be considered in the origination of a loan. Accordingly, even if reunderwriting revealed that a particular loan did not comply with a specific underwriting guideline, the reunderwriters would still have to assess "compensating factors" to determine if there was a breach of the underwriting representation and warranty. *See id*. ¶ 23. Such disclosures in the Prospectus Supplements include:

- "*Exceptions* to Countrywide Home Loans' underwriting guidelines may be made if *compensating factors* are demonstrated by a prospective borrower." Kempf Aff. Ex. B (Prospectus Supplement to CWALT 2006-OA19) at S-58 (emphasis added).

- "Countrywide Home Loans, Inc.'s credit blemished mortgage loan underwriting standards are more flexible than the standards generally used by banks for borrowers with non-blemished credit histories with regard to the borrower's credit standing and repayment ability. . . . ***On a case by case basis, Countrywide Home Loans, Inc. may determine that, based upon compensating factors, a prospective borrower not strictly qualifying under its applicable underwriting risk category guidelines warrants an underwriting exception. It is expected that a significant number of the mortgage loans will have been originated based on underwriting exceptions of these types.*** As a result of Countrywide Home Loans, Inc.'s underwriting standards, including the origination of mortgage loans based on underwriting exceptions, the mortgage loans in the mortgage pool are likely to experience rates of delinquency, foreclosure and bankruptcy that are higher, and that may be substantially higher, than those experienced by mortgage loans underwritten in a more traditional manner." Kempf Aff. Ex. C (Prospectus Supplement to CWABS 2006-13) at S-20 (emphasis added).[17]

In light of this need to weigh a variety of "compensating factors," reunderwriting requires — as did the original underwriting of the loans — substantial exercise of judgment and discretion, which results in considerable disagreement between reunderwriters. *See* Kempf Aff. ¶ 23.

[17] This language appears particular to prospectus supplements for subprime deals and is not included in the Prospectus Supplement to CWALT 2006-OA19.

And, even if a deviation from a particular underwriting guideline is thought to exist, the reunderwriter must then determine whether such deviations are "material" in the context of other information in the loan file, including any compensating factors. *Id*. ¶¶ 24-25. For example, professional reunderwriters reasonably can differ as to what amount of variance from a numerical ratio set forth in applicable guidelines, such as debt-to-income or loan-to-value, would be considered a material deviation. *Id*. ¶ 25.

And even if — after taking all of the above into account — an alleged breach of a representation and warranty is identified, yet a further step is required: whether the trusts would have been entitled to the repurchase of a given loan depends on whether the identified breach "materially and adversely affect[ed] the interests of the Certificateholders in that Mortgage Loan." Kempf Aff. Ex. A (PSA) § 2.03(c). The meaning of this phrase is hotly contested. It is Bank of America's and Countrywide's position that a party seeking repurchase must prove that the breach of a representation and warranty caused a material loss to the trust. *E.g.*, *MBIA Ins. Corp.* v. *Countrywide Home Loans, Inc.*, Index No. 602825/2008, Slip Op. at 21-22 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012); *Syncora Guarantee Inc.* v. *Countrywide Home Loans, Inc.*, Index No. 650042/2009, Slip Op. at 8 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012); *see also* Golin. Aff. Ex. 20 (Material and Adverse Opinion of Professor Barry E. Adler, the expert retained by the Trustee) at 13 (analyzing the strength of the competing arguments and opining that "it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders should turn on the harm caused by the breach"); *MBIA Ins. Corp.* v. *Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 296 (1st Dep't 2011) (fact-finder will be required to "determine which losses were proximately caused by [Countrywide's]

misrepresentations and which are due to [the] extrinsic force[ ]" of the mortgage market meltdown).

And whatever interpretation of the "material and adverse" requirement prevails, that step in the process would inevitably add an additional level of subjectivity. *See* Kempf Aff. ¶ 28. Thus, the interpretational issues surrounding the "material and adverse" effect requirement, as well as the factual issues as to whether each breach had such an effect, would be yet another layer of litigation unavoidably triggered by loan-file production.[18]

Two cases now pending in the Commercial Division bring the burdens of loan-file production and review — even of only "samples" — into stark relief: in *MBIA Insurance Corporation* v. *Countrywide Home Loans, Inc.*, Index No. 602825/2008 and *Syncora Guarantee Inc.* v. *Countrywide Home Loans, Inc.*, Index No. 650042/2009, two monoline insurers are litigating representation and warranty claims against Countrywide relating to a much smaller number of trusts than are at issue in this proceeding (only fifteen in the *MBIA* action and five in the *Syncora* action). Discovery in those cases, including production and review of loan files and related expert reunderwriting and analysis of a "sample" of the loan files, is ***well into its third year***, due in no small part to numerous disputes that loan-file review engenders.[19]

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[18] A recent report by the Royal Bank of Scotland estimated that, for approximately 78,200 loans in a subset of the covered trusts, *even in the non-litigation context* it "would take ***at least two years and could potentially take much longer***" to complete the full repurchase process from loan-file production to identified repurchases. RBS Report at 1 (emphasis added). Significantly, RBS's two-year estimate assumed only a one-sided repurchase review, with "0" months for the opposing party to offer a rebuttal. *Id.* at 2. In the litigation context, once Objectors' experts have performed their loan-file review, the other parties' expert(s) would be required to perform a responsive review, potentially doubling these time estimates. RBS also estimated that "without litigation, ***the cost could range from $24 million to $88 million***, and with litigation could be substantially higher." *Id.* at 1 (emphasis added).

[19] *See* Scheduling Stipulation, Feb. 24, 2010, *MBIA* Dkt. No. 103 (discussing production of loan files); Order Regarding Pretrial Schedule, Nov. 21, 2011, *MBIA* Dkt. No. 1185 (expert depositions to continue through June 1, 2012); Preliminary Conference Order, Feb. 2, 2010, *Syncora* Dkt. No. 32 (setting timeline for discovery); Stipulation and Scheduling Order, Nov. 7, 2011, *Syncora* Dkt. No. 422 (expert depositions to continue through April 24, 2012).

The bottom line is clear: no objectively "true" representation and warranty repurchase rate could result from loan-file review. *See* Kempf Aff. ¶ 29. That is why the Trustee, in evaluating the settlement, used the GSE repurchase data — a set of approximately 100,000 actual repurchase claims covering four years of real world adversarial experience — rather than embarking on this process. The only result of loan-file review will be a host of collateral issues, subjective determinations, and battles of the experts, all of which will have to be resolved by the Court. After all of this has been addressed, then the Court would have to return to the only issue in the proceeding: whether the Trustee reasonably exercised its discretion in entering into the Settlement. As one court put it: "To compel the production of the files sought here not only involves enormous inconvenience and management difficulties, but also entails a frightening potential for spawning unbearable side litigation which . . . defeats the purpose of [sic] spirit of the discovery rules themselves." *Rhone-Poulenc Rorer Inc.* v. *Home Indem. Co.*, C.A. No. 88-9752, 1991 WL 183842, at *4 (E.D. Pa. Sept. 16, 1991) (denying discovery where, as here, discovery was "not need[ed] . . . in order" for requesting party "to develop and prepare its case").

CONCLUSION

Bank of America and Countrywide respectfully submit that this Court should deny Objectors' motion to compel loan-file production.

Dated: New York, New York
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