1211 Avenue of the Americas
New York, New York 10036

212 755 0100
graisellsworth.com

GRAIS & ELLSWORTH LLP

Owen L. Cyrulnik
212 755 5690
ocyrulnik@graisellsworth.com

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By Fax

Honorable Barbara R. Kapnick
Supreme Court, New York County
60 Centre Street, Room 555
New York, New York 10007

In re: The Bank of New York Mellon, Index No. 651786/2011

Dear Justice Kapnick:

We write on behalf of the members of the Steering Committee of Intervenor-Respondents. Bank of America on May 2 submitted an untimely 25-page brief in response to our motion to compel production of loan files. Mindful of the Court's admonition that it does not expect lengthy briefing of discovery disputes, we respectfully submit this short letter for the Court's consideration.[1]

First, we told BofA and BNYM at a meet and confer that we intend to narrow our request for loan files from the 530,000 files that BofA refers to in its brief to no more than 10,000 loan files (less than 2% of the original request), to be selected by respondents. To put that number in context, 10,000 loan files across 530 trusts works out to less than 20 loan files for each trust. We believe that this proposal is fair, reasonable, and manageable.

Second, it is extraordinary that BofA seeks to convince this Court that it should evaluate this proposed settlement without ordering the production of even a single loan file. BofA argues that "Loan-file review will answer no questions." (BofA Br. at 1.) But the claims that the Trustee proposes to settle depend almost entirely on the contents of the loan files. When it decided that the settlement was reasonable, the Trustee made certain assumptions about how many loans in the Trusts breached representations and warranties. The only way to test the reasonableness of the Trustee's assumptions is to look at a statistically significant sample of those loan files. The precise number of loan files that must be produced may be subject to reasonable debate. But it is not reasonable for BofA to argue that not a single loan file should be produced. The fact that BofA inserted itelf in

[1] Most of BofA's arguments in its 25 page brief are duplicative of the arguments made by the Trustee. These arguments must be rejected for the reasons given in the papers that have already been filed with the Court.

this proceeding for the first time to make that argument strongly suggests that BofA and petitioners are desperate to keep respondents from testing the assumptions that underlie the settlement by reviewing the contents of those loan files.

Third, much of BofA's brief is devoted to the purported practical difficulties that respondents will encounter in reviewing the loan files that they are seeking. BofA argues that ordering the production of loan files will be overly burdensome, and will burden this court with "loan-by-loan-by-loan," "mini-trials," and "battles of experts." (BofA Br. 4.) And BofA argues that "the collection, review, and production of loan origination files is a burdensome task." (BofA Br. 18.) But BofA's speculation about expert testimony that might occur in a hearing months in the future is irrelevant to the burden that BofA faces in locating and producing loan files now. We represent to the Court based on personal knowledge that Countrywide and BofA have produced tens of thousands of loan files in litigation around the country and have agreed to produce tens of thousands more in the next few months.[2] They are trying to settle billions of dollars of liability in this proceeding. There is no reason why they should not be ordered to produce loan files for a tiny percentage of the loans in these 530 pools to give respondents an opportunity to test the reasonableness of the proposed settlement.

Moreover, it is well established that sampling loan files for reunderwriting is appropriate in litigation surrounding mortgage-backed securities. *MBIA Insurance Corporation v. Countrywide Home Loans, Inc., et al.* No. 602825/2008, Slip Op. (Sup. Ct. N.Y. Cnty. Aug. 13, 2010). Respondents have retained the same expert who developed the sampling protocol blessed by Justice Bransten in *MBIA Insurance* to select the loans they will request from BofA under their new proposal. Sampling will also result in an efficient reunderwriting process that will not take nearly as long as BofA claims it will. Indeed, BofA's own expert states that "a reunderwriter working full-time typically can review approximately five [or] six loan files per day." (Kempf Affid. 7.)[3] Under those assumptions, a team of 50 reviewers could review 10,000 loans in less than two months. If BofA produces loan files within a reasonable time, there will be more than enough time for Respondents to review the files in discovery. Finally, BofA assumes that an evidentiary hearing will devolve into a series of "mini-trials"; however, there is no need for "mini-trials" about each reviewed loan. Respondents can present the results of the review in the aggregate.

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[2] In *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, which involved the repurchase of loans in only 15 trusts, Justice Bransten ordered Countrywide to produce loan origination files for every loan in each securitization, which was over 100,000 files. *MBIA Insurance Corporation v. Countrywide Home Loans, Inc., et al.* No. 602825/2008, Slip Op. (Sup. Ct. N.Y. Cnty. Aug. 13, 2010); *see also Syncora Guarantee Inc. v. Countrywide Home Loans, Inc., et al.*, No. 650042/2009, Slip Op. (Sup. Ct. N.Y. Cnty. May 7, 2010). Respondents' proposal, which will be limited to no more than one-tenth of this amount, is clearly within the bounds of reasonableness.

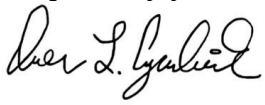
[3] BofA relies on an expert affidavit to support its arguments about the burdens that production of loan files would impose on the Court and the parties. Because of the Court's limited time to consider discovery disputes, respondents have not submitted an affidavit. If the Court would find it helpful, Respondents will file an expert affidavit that supports their claims in this letter.

Indeed, BofA's brief highlights precisely why the review of loan files is necessary to this case. BofA notes that BNYM relied on an "expert" report prepared by Brian Lin. (BofA Br. 6.) In forming his "expert" opinion, Mr. Lin did not look at any loan files, but instead relied on "Countrywide's actual repurchase experience with Fannie Mae and Freddie Mac" to estimate how many loans in the trusts breached representations and warranties. (BofA Br. 6-7; Lin Opinion Concerning Contemplated Settlement Amount for 530 Trusts.) BofA neglects to mention that many of the loans in the 530 trusts were underwritten using "Underwriting Guidelines [that] are less stringent than the standards generally acceptable to Fannie Mae and Freddie Mac with regard to: (1) the applicant's credit standing and repayment ability and (2) the mortgaged property offered as collateral."[4] Moreover, after assuming control over Freddie Mac as conservator, the Federal Housing Finance Agency further undermined the use of the "repurchase experience with Fannie and Freddie" as a model in this proceeding. The FHFA reported that Freddie Mac had a flawed loan review methodology and failed to review 300,000 loans that were potentially subject to repurchase by BofA.[5] And FHFA's Office of Inspector General concluded that "Freddie Mac management asserted the need to maintain relationships with loan sellers such as Bank of America was a factor weighing against implementing more expansive loan review and repurchase policies."[6] That too belies BofA's argument that the "repurchase experience with Fannie Mae and Freddie Mac" reflected "actual, arms-length, adversarial negotiations." (BofA Br. 7).

Thus, before putting its stamp of approval on the proposed settlement, this Court would benefit from permitting respondents to review loan files to test Mr. Lin's assumption that the repurchase experience for Fannie Mae and Freddie Mac loans would be the same as the repurchase experience for the non-Fannie Mae and Freddie Mac loans.

Respondents respectfully request that the Court reject BofA's and petitioners' attempt to prevent respondents from reviewing any loan files in this proceeding and instead order that a reasonable sampling of loan files be produced.

Respectfully yours,



Owen L. Cyrulnik

Copies to counsel of record by ECF

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[4] *See* CWALT 2005-J4 Prospectus Supplement at S-44 (available at http://www.sec.gov/Archives/edgar/data/1269518/000112528205002873/b406856_424b5.txt).

[5] Evaluation of the Federal Housing Finance Agency's Oversight of Freddie Mac's Repurchase Settlement at 18-20 (available at http://www.fhfaoig.gov/Content/Files/EVL-2011-006.pdf).

[6] *Id.* at 27.