WACHTELL, LIPTON, ROSEN & KATZ

MARTIN LIPTON
HERBERT M. WACHTELL
BERNARD W. NUSSBAUM
LAWRENCE B. PEDOWITZ
PAUL VIZCARRONDO, JR.
PETER C. HEIN
HAROLD S. NOVIKOFF
KENNETH B. FORREST
MEYER G. KOPLOW
THEODORE N. MIRVIS
EDWARD D. HERLIHY
DANIEL A. NEFF
ERIC M. ROTH
ANDREW R. BROWNSTEIN
MICHAEL H. BYOWITZ
PAUL K. ROWE
MARC WOLINSKY
DAVID GRUENSTEIN
STEPHEN G. GELLMAN
STEVEN A. ROSENBLUM

STEPHANIE J. SELIGMAN
JOHN F. SAVARESE
SCOTT K. CHARLES
DAVID S. NEILL
JODI J. SCHWARTZ
ADAM O. EMMERICH
GEORGE T. CONWAY III
RALPH M. LEVENE
RICHARD G. MASON
MICHAEL J. SEGAL
DAVID M. SILK
ROBIN PANOVKA
DAVID A. KATZ
ILENE KNABLE GOTTS
DAVID M. MURPHY
JEFFREY M. WINTNER
TREVOR S. NORWITZ
BEN M. GERMANA
ANDREW J. NUSSBAUM
RACHELLE SILVERBERG

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

GEORGE A. KATZ (1965-1989)
JAMES H. FOGELSON (1967-1991)

OF COUNSEL

WILLIAM T. ALLEN
PETER C. CANELLOS
DAVID M. EINHORN
THEODORE GEWERTZ
RICHARD D. KATCHER
THEODORE A. LEVINE
DOUGLAS K. MAYER
ROBERT B. MAZUR
PHILIP MINDLIN
ROBERT M. MORGENTHAU
ERIC S. ROBINSON
PATRICIA A. ROBINSON*
LEONARD M. ROSEN
MICHAEL W. SCHWARTZ
ELLIOTT V. STEIN
WARREN R. STERN
PATRICIA A. VLAHAKIS
J. BRYAN WHITWORTH
AMY R. WOLF

* ADMITTED IN THE DISTRICT OF COLUMBIA

COUNSEL

DAVID M. ADLERSTEIN
MICHELE J. ALEXANDER
LOUIS J. BARASH
DIANNA CHEN
ANDREW J.H. CHEUNG
PAMELA EHRENKRANZ
KATHRYN GETTLES-ATWA
PAULA N. GORDON
NANCY B. GREENBAUM
MAURA R. GROSSMAN
MARK A. KOENIG
J. AUSTIN LYONS
AMANDA N. PERSAUD
JEFFREY A. WATIKER

DAVID C. BRYAN
STEVEN A. COHEN
GAVIN D. SOLOTAR
DEBORAH L. PAUL
DAVID C. KARP
RICHARD K. KIM
JOSHUA R. CAMMAKER
MARK GORDON
JOSEPH D. LARSON
LAWRENCE S. MAKOW
JEANNEMARIE O'BRIEN
WAYNE M. CARLIN
STEPHEN R. DIPRIMA
NICHOLAS G. DEMMO
IGOR KIRMAN
JONATHAN M. MOSES
T. EIKO STANGE
DAVID A. SCHWARTZ
JOHN F. LYNCH
WILLIAM SAVITT

ERIC M. ROSOF
MARTIN J.E. ARMS
GREGORY E. OSTLING
DAVID B. ANDERS
ADAM J. SHAPIRO
NELSON O. FITTS
JEREMY L. GOLDSTEIN
JOSHUA M. HOLMES
DAVID E. SHAPIRO
DAMIAN G. DIDDEN
ANTE VUCIC
IAN BOCZKO
MATTHEW M. GUEST
DAVID E. KAHAN
DAVID K. LAM
BENJAMIN M. ROTH
JOSHUA A. FELTMAN
ELAINE P. GOLIN
EMIL A. KLEINHAUS
KARESSA L. CAIN

June 11, 2012

BY HAND AND FACSIMILE TO (212) 401-9154

Hon. Barbara R. Kapnick
Supreme Court of the State of New York
County of New York
60 Centre Street, Room 555
New York, NY 10007

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

Dear Justice Kapnick:

On behalf of non-parties Bank of America Corporation, Countrywide Financial Corporation, and Countrywide Home Loans, Inc., we respectfully submit this response to Objectors' June 4, 2012 letter to the Court revisiting their request for production of thousands of loan files. We submit that there is no reason for the Court to change course from the guidance provided at the May 8, 2012 hearing.

Objectors' reconsideration request. Bank of America has always been, and remains, ready and willing to produce loan files in the manner outlined by the Court. At the May 8th hearing, the Court suggested that we produce loan-file materials for approximately 150 loans for illustrative purposes and "not . . . a statistical sampling." Tr. 91. Contrary to the impression that Objectors seek to create, we have been *trying* to meet and confer in good faith to implement the Court's proposal. Objectors' letter to the Court arrived last Monday after we had most recently met and conferred on the previous Thursday. We were expecting to receive comments on our detailed proposal for the production and use of loan-file materials. Instead, we received Objectors' letter to the Court.

As we have explained to Objectors' counsel, there are two simple objectives that we have sought to address through good faith negotiations: 1) to ensure that — in keeping with accepted reunderwriting practices — we, the Trustee and the Institutional Investors have an opportunity to review and respond to Objectors' reunderwriting results, so as to avoid trial by ambush and to provide an orderly procedure for the Court to consider the parties' respective positions; and 2) to ensure that — given the unprecedented breadth of Objectors' definition of loan files and the significant complexity involved in retrieving the requested documents — there is a reasonable amount of time to complete production, which would be rolling and begin promptly.

Objectors' letter seeks to revisit the clear guidance provided by the Court at the May 8th hearing. Objectors revert to their previous demand that the Court compel the production of a "statistically significant sampling" of *thousands* of loan files — this time requesting *4,630 to 6,470* files — so that Objectors' experts can perform a statistically meaningful reunderwriting. Letter at 1, 4; Cowan Aff. ¶ 7. A reunderwriting of this magnitude would transform this settlement proceeding into a lengthy *litigation of the merits of the settled claims*. Objectors' demand comes in the face of (but ignores) the Court's comments at the May 8th hearing: "Obviously, if we looked at all of these loan files, it would take many, many years and . . . the whole settlement would fall apart . . . . I don't want this to go on forever, because I don't think that is the point of it and I don't think that will do good . . . ." Tr. 85.[1]

Bank of America respectfully submits that there is no basis for a reconsideration of the Court's prior direction. Of course, if the Court chooses to take up the issue at the June 14, 2012 conference, we will be prepared to argue, once again, that the production of loan files is inappropriate, as a matter of law, in the context of this settlement-approval proceeding. Objectors ignore the Court's guidance on May 8th that this is a "different case" than "a lawsuit" concerning the underlying settled claims: "This is an approval of a settlement where . . . they didn't look at loan files . . . ." Tr. 86; *see also* Tr. 69 (contrasting this settlement proceeding with the *MBIA* v. *Countrywide* fraud and repurchase litigation before Justice Bransten: "Judge Bransten's case is a different case . . . . a very different postured case than this case."), Tr. 90 (*MBIA* "is a different case, not this case").[2] Not only are loan files irrelevant to the question before the Court — whether the Trustee acted in good faith and within the bounds of its reasonable discretion — it is uniformly recognized that courts, in reviewing settlements, do not permit litigation of the merits of settled claims. As a legal matter, this principle completely disposes of Objectors' renewed demand.[3]

---

[1] Bank of America and Countrywide reserve all rights to challenge the propriety, methodology and probative value of statistical sampling at the appropriate time and "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." BAC Br. at 17, n. 12.

[2] Given the Court's clear guidance distinguishing this case from *MBIA* v. *Countrywide*, where discovery concerning the reunderwriting of a 6,000 loan sample is ongoing a year and a half following Justice Bransten's sampling order, it is surprising that Objectors request a similarly sized sample of 4,630 to 6,470 loans in an affidavit from MBIA's sampling expert, Charles D. Cowan. *See* discussion at p. 6, *infra*, regarding factual misstatements in Mr. Cowan's affidavit.

[3] Courts reviewing settlements — even in the context of class actions, where the settlement proponent is a self-selected class member and not, as here, a Trustee — will not entertain the litigation of the merits of the settled claims. *See* BAC Br. at 13-16; Tr. Std. Br. at 14-16; Tr. Opp. Br. at 5; *Robertson* v. *Nat'l Basketball Ass'n*, 72

As Objectors seek to relitigate their motion to compel loan files, we respectfully refer the Court to the prior briefing on the motion: (i) the Memorandum of Non-Parties Bank of America and Countrywide in Opposition to Objectors' Motion to Compel Production of Loan Files, dated May 2, 2012 ("BAC Br."), (ii) the Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery, dated April 3, 2012 ("Tr. Std. Br."), at 13-14, 16-17, and (iii) the Trustee's Memorandum of Law in Opposition to Motion to Compel Discovery, dated April 13, 2012 ("Tr. Opp. Br."), at 4-5.

The meet-and-confer process. Unfortunately, Objectors' letter is replete with misstatements about the meet-and-confer process, necessitating the following account of the chronology of our efforts to implement this Court's May 8th loan-file guidance. (In that regard, attached is an affirmation of Jasand Mock.) Specifically:

(a) On May 11, 2012, we met and conferred with Owen Cyrulnik and Daniel Reilly, Objectors' counsel. Messrs. Reilly and Cyrulnik represented that they would "not argue [the 150 loans] were a statistically adequate sample" and stated that they would give Bank of America "assurances" that Objectors would not "extrapolate" from the 150 loans produced. Mock Aff. ¶ 5.

(b) On May 17, 2012, we reiterated to Mr. Cyrulnik that the scope of the loan-file materials encompassed by Objectors' request, even as modified through negotiations, called for many more types of documents than have been included in loan-file productions in other litigations. Nonetheless, we advised Mr. Cyrulnik that production would be on a rolling basis, and that we were hopeful that production could be completed within 90 days of agreement on terms and identification of loans. Mr. Cyrulnik made no demand that production be completed in 30 days. *Id.* ¶ 7.

(c) On May 18, 2012, as we had previously discussed with Objectors, we sent Objectors a proposed draft stipulation and order governing the production and use of loan materials. Our draft proposed that there be a period of time to respond to Objectors' reunderwriting before any such information is presented to the Court (as Objectors note, to "avoid trial by ambush"). The draft also memorialized the negotiations on the scope and timing of production (with production being substantially complete within 90 days), as well as the representations Objectors' counsel had made at the May 11th meet-and-confer that they would not claim statistical significance or a basis for extrapolation. *Id.* ¶¶ 8-10, Ex. 3.

F.R.D. 64, 68-69 (S.D.N.Y. 1976) (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.") (internal quotations omitted), *aff'd*, 556 F.2d 682 (2d Cir. 1977); *City of Detroit* v. *Grinnell Corp., et al.*, 495 F.2d 448, 462 (2d Cir. 1974) ("It 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.") (second alteration in original, internal quotations omitted); *see also*, *Auerbach* v. *Bennett*, 47 N.Y.2d 619, 636 (1979) (in special litigation committee context, rejecting discovery into "the factual aspects of the underlying . . . activities of defendants").

In their June 4 letter, Objectors assert that Bank of America "demanded" the terms therein. Letter at 4. That is false. The cover e-mail accompanying the draft expressly stated that it was "for discussion purposes only" and was "provided on a 'without prejudice' basis for discussion." Mock Aff. ¶ 8, Ex. 3 (cover email, which Objectors omit from their filing); *see also* Letter at n. 1 (conceding that the Bank was willing to "discuss" the stipulation's terms). We heard nothing from Objectors in response to our proposal for *nearly two weeks*.

(d) On May 31, 2012, we held another meet-and-confer with Mr. Cyrulnik. We invited Objectors' comments and counterproposals on the draft stipulation, and reiterated that every term — in particular, the reunderwriting timelines set forth therein — was open to negotiation. Mr. Cyrulnik indicated that he viewed the meet-and-confer as an information-gathering exercise only and did not provide any comments or feedback on our proposal — which, at that point, Objectors had had for 13 days. Mock Aff. ¶¶ 11-12.

During the May 31st session, Mr. Cyrulnik demanded (for the first time) that production be complete within 30 days. That position was not only new but surprising: at the May 8th hearing, Objectors acknowledged that the production of the majority of the loan-file materials they requested could take as long as 60 days, and that certain types of loan materials "that are not part of the standard loan file or not in the same computer system . . . will take [Bank of America] more time. . . ." Tr. 74. As we had made clear throughout, we advised Mr. Cyrulnik that complete production in 30 days was simply not possible, given the breadth of the materials requested, but we reiterated that production would be on a rolling basis and that we would produce substantial materials in short order. Mock Aff. ¶ 11. We proposed that Objectors provide us with their list of 150 loans so that the collection could begin immediately, and time would not be lost as collateral issues were resolved. *Id.*

(e) On June 4, 2012, Objectors filed their letter. That day, we informed Mr. Cyrulnik that we were very surprised by the letter to the Court, but remained prepared to discuss any of the provisions in our proposed stipulation, and that our offer to begin collection "still stand[s]." *Id.* ¶ 13, Ex. 4. Objectors never responded.

Objectors' contentions regarding production and use of loan materials. Objectors contend that Bank of America "has in mind . . . a seven-month process that is pre-determined to yield no meaningful results." Letter at 3. This claim is inaccurate:

Production. Given the scope of the materials requested, the proposed 90-day time period to substantially complete production is not only reasonable, it is aggressive and expedited. As described in the accompanying Affirmation of Jasand Mock, Objectors have requested an enormous amount of information for each loan, requiring a search of at least 19 different sources, including materials that are not stored at Bank of America or Countrywide, and extending far beyond what has been produced in response to loan-file requests in other litigations. *See* Mock Aff. ¶¶ 14-22. Moreover, as we have repeatedly told Objectors, we will provide Objectors with the more accessible information as soon as possible. Finally, we offered to begin collection immediately, but Objectors have refused to identify the loans requested — including even as of **today**. Objectors are creating the very delay they complain about.

Objectors' report. Our proposal that Objectors provide us with the loan-file information Objectors intend to present to the Court, in advance, is standard procedure. The point here is simply that we be provided with Objectors' claims on the loans and be able to investigate and provide a response so that the Court can consider the opposing views — *i.e.*, that there be no "ambush" by Objectors filing a list of claimed deficiencies before we have a chance to know and address their contentions. The proposal is reciprocal: we would then provide Objectors with our responses in the hope that the issues to be presented to the Court could be fairly presented and better defined. Objectors offer no reason for why they should be entitled to depart from standard practice and present the Court with one-sided reunderwriting results, without any opportunity for Bank of America or the other parties to this proceeding to prepare a rebuttal.

Reunderwriting. We have never insisted on any particular timeframe to complete a responsive reunderwriting. We repeatedly informed Objectors' counsel that we simply wanted a reciprocal and balanced schedule. Mock Aff. ¶ 12. For example, during the May 31st meet and confer, we told Mr. Cyrulnik that if Objectors could do their reunderwriting in two weeks, we would seek to respond in the same amount of time. *Id.* Objectors themselves contend that their own reunderwriting exercise would "take several weeks" (Letter at 3). There is no legitimate reason for there not to be a reciprocal arrangement.

Statistical significance. The proposal that the draft stipulation recite that the reunderwriting of 150 loans would not be argued to be statistically significant simply reflects ***Objectors' own position*** at the May 11th meet-and-confer that they would not argue the loans were a statistically meaningful sample or a basis for extrapolation. In addition, Objectors' own expert agrees that a selection of 150 loans could not provide "statistically reliable" conclusions. Cowan Aff. ¶ 14. Objectors' complaint about this point is both puzzling, given that it reflects their own representations, and inexplicable given the Court's instruction at the May 8th hearing that the loan production contemplated was "not . . . statistical sampling." Tr. 91.

The affidavit of Charles D. Cowan. The affidavit of Charles D. Cowan, submitted by Objectors with their letter, provides no basis for ordering the production of thousands of loan files and contains serious factual misstatements.

Fundamentally, Mr. Cowan's claim that he "can develop highly reliable estimates of the total breach rate" for loans in the covered trusts rests on the inaccurate premise that reunderwriting is an objective exercise. Cowan Aff. ¶ 10. Objectors have never responded to Bank of America's and Countrywide's demonstration that "no objectively 'true' representation and warranty repurchase rate could result from loan-file review" given the inherently *subjective* nature of reunderwriting and the host of legal disputes attendant to any loan-file review. BAC Br. at 24; *see also* BAC Br. at 17-24; Affidavit of Peter S. Kempf, dated May 2, 2012, ¶¶ 21-29; Tr. 78-83. Nothing in Mr. Cowan's affidavit addresses that undeniable fact.

In addition, Mr. Cowan's affidavit contains a number of inaccuracies. For example, Mr. Cowan asserts that "Justice Bransten held that [his] proposal for statistical sampling was appropriate and acceptable for that case." Cowan Aff. ¶ 3. But, as this Court

noted at the May 8th hearing, Justice Bransten found only that the proposed methodology survived immediate preclusion under the *Frye* standard. *See* Tr. 85-86. Justice Bransten actually concluded that "Defendants will have the ability to contest Plaintiff's [sampling], and the trier of fact will decide the issues," that Defendants' challenges to sampling to extrapolate liability were "*not without merit,*" and that the "court makes *no finding* . . . that Plaintiff's method is without flaw or unsusceptible to challenge. Defendants have raised *significant valid challenges* to Plaintiff's methodology . . . ." Order at 6, 11-12, December 22, 2010, *MBIA Insurance Corp.* v. *Countrywide Home Loans Inc.*, Index No. 602825/2008 (N.Y. Sup. Ct. N.Y. Cnty) (emphasis added).[4]

* * *

Bank of America has made a good faith effort to participate in the meet-and-confer process with Objectors. We stand willing to implement the Court's May 8th loan-file guidance. There is no basis for Objectors' reversion to their demand for thousands of loan files. Loan-file production should proceed on the course previously set by the Court.

Of course, we are prepared to respond to any questions from the Court and, should the Court wish, will be prepared to address Objectors' recent demand letter at the June 14th hearing.

Respectfully submitted,

Theodore N. Mirvis
On behalf of Bank of America Corporation

Mark Holland
On behalf of Countrywide Financial Corporation and Countrywide Home Loans, Inc.

Attachments
cc: Counsel of Record (by e-mail and electronic filing)

---

[4] Additional misstatements in Mr. Cowan's affidavit include his assertions: (i) that a "central question in this proceeding is whether the settlement amount of $8.5 billion is reasonable" (Cowan Aff. ¶ 5), and (ii) that "Bank of America has proposed that it provide files for 150 loans that are not randomly selected" (Cowan Aff. ¶ 14). Regarding Cowan's first assertion, unlike a class-action settlement, the reasonableness of the settlement amount is *not* at issue in this case: "The question before the Court is whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement . . . . 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." BAC Br. at 12; *see also* Tr. Std. Br. at 7-11. Regarding Cowan's second assertion, it was *Objectors* (not Bank of America) that "proposed" they unilaterally select the 150 loans. Objectors can pick the 150 loans any way they want. In fact, Objectors repeatedly refused to provide Bank of America with the methodology they intended to use to select those loans. Mock Aff. ¶ 5.