SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Assigned to: Kapnick, J.

THE INSTITUTIONAL INVESTORS'
STATEMENT IN SUPPORT OF THE SETTLEMENT

[REDACTED VERSION]

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I. Introduction

The Institutional Investors support the Trustee's decision to settle repurchase and servicing claims for 530 Countrywide RMBS Trusts ("Trusts"). The Trustee's decision was within the bounds of the Trustee's reasonable discretion, the standard to be applied in this Article 77 Proceeding. The $8.5 billion settlement is the largest ever obtained in private litigation and is highly beneficial to the Trusts. The Settlement has received broad and deep support from the tens of thousands of investors who hold the Trusts' securities. These include not only the 22 Institutional Investors who helped to negotiate the settlement, but thousands of others who do not wish to have their $8.5 billion held hostage to the self-interested litigation strategy of a tiny minority of vocal opponents. For all Trusts, the $8.5 billion settlement eliminates the risks of costly, lengthy, and uncertain litigation, including the risk of an adverse decision on Bank of America's successor liability and protects them from the risks of a Countrywide bankruptcy.

Just yesterday, the Objectors' own expert on successor liability—Professor John C. Coates—gave dramatic testimony about the danger the Trusts faced if they chose to litigate this issue. He testified that, in his opinion, the likelihood of imposing successor liability on Bank of America is [redacted], being no more than [redacted] Moreover, he acknowledged that a reasonable person could well conclude [redacted] Coates Tr. at. 224-230, attached as Exhibit 1.[1] He also acknowledged [redacted] a proposition which remains highly uncertain. These facts, in themselves, establish the enormous benefits of the settlement and the Trustee's reasonable decision to settle the claims, even before the Court considers the additional fact that the comprehensive servicing reforms included in the settlement add an additional $3 billion in value to the settlement, have already begun to improve

[1] All exhibits are attached to the Affidavit of Kathy D. Patrick, filed herewith.

Bank of America's mortgage servicing, and have conferred enormous benefits on thousands of troubled borrowers. These servicing reforms could not have been achieved through contested litigation of the Trusts' servicing claims, even assuming those claims were actionable. Finally, the alternative to this settlement—years of expensive and uncertain litigation—was and is by no means the preferred option, given the value of this settlement.

New York law encourages settlement for a reason: it provides certainty and removes the risk and expense of litigation. Rejection of this landmark settlement would plunge thousands of innocent investors and hundreds of Trusts into decades of potentially fruitless litigation that could well end in Countrywide's bankruptcy and a resulting scramble among its creditors over assets which are far less than the $8.5 billion payment. The Objectors' preference to speculate on litigation is not the measure of the Trustee's duty here, nor is it the measure of this Court's Article 77 judgment. Though this *is* the largest settlement ever in private litigation, and though it *removes* the Trusts' extraordinary legal risks, the settlement does not have to be "the best thing in the whole world, it couldn't possibly be a better deal. It's whether it was fair and reasonable under all the circumstances." Tr. 6/14/2012 at 43-44. It is. For these reasons, and those stated in greater detail below, the Institutional Investors therefore urge the Court to approve the Trustee's exercise of judgment in entering into it.

A. The Institutional Investors

Perhaps because they are called "Institutional," it is hard to visualize the twenty-two investors that dedicated more than a year of time, hard work, and substantial resources to facilitate the settlement. These investors are a large, reputable and diverse group that includes two of the world's largest and most well-regarded bond fund managers, PIMCO and BlackRock, as well as seven other highly respected investment advisors: Invesco, Goldman Sachs Asset Management, Trust Company of the West, Western Asset Management, Neuberger Berman, ING Investment Management, and Prudential Investment Management. All of them are companies with sterling reputations that manage investments for individuals, pension funds and charities. Also included in the group are well-known insurers like MetLife, TIAA-CREF, Thrivent Financial for Lutherans, Nationwide Insurance, New York Life, AEGON Insurance, and ING Insurance. These insurers are not only among America's most well-known companies, they provide financial security to the millions of Americans who depend on them for retirement and annuity coverage.

The coalition was not limited to private parties. It also included Freddie Mac, the Maiden Lane portfolios of the Federal Reserve Bank of New York, and the Federal Home Loan Bank of Atlanta. Rounding out the coalition were other highly knowledgeable and skilled investors, including Kore Capital, Landesbank Baden-Wurttemburg (LBBW) and Bayerische Landesbank (Bayern LB). Collectively, these investors held more than $40 billion of securities issued by the settled Trusts. They are the largest and most diverse investor group in this action.

Though their efforts were coordinated through a steering committee of PIMCO, BlackRock, MetLife, ING, and Freddie Mac, all of these investors deserve considerable credit for the year-long effort required to obtain this extraordinary settlement. They invested enormous amounts of time and resources before the settlement was reached and have borne the burden of litigating the settlement for the two years since it was signed. For this effort, they will receive *exactly the same benefits* as all other investors in these Trusts. Their interests, like those of all certificateholders, must be weighed when the Court decides whether to accept the Objectors' invitation to jettison this $8.5 billion landmark settlement.

B. The Not So Silent Majority

With the Institutional Investors there now stand tens of thousands of other certificateholders whose support for the settlement is nearly unanimous.[2] Just this week, a large and independent investor—Fir Tree, Inc.—wrote a letter to the Court urging approval of the settlement. The reasons Fir Tree supports the settlement echo the reasons the Trustee decided to settle in the first place:

> Fir Tree supports the settlement and views the settlement as fair and reasonable after taking into account the risks and costs of obtaining a judgment for the benefit of holders of Securities against the Countrywide and Bank of America entities that are parties to the settlement....
>
> For the avoidance of any doubt, Fir Tree's support regarding this proposed settlement is based on the very particular facts and circumstances of this proceeding, including, without limitation, the staggering task and complexity of organizing a settlement of more than 530 trusts and the costs associated with having to potentially reunderwrite and investigate millions of mortgage loan files if the settlement were not approved.

See Ex. 2.

Recently, another large independent investor, Monarch Alternative Capital LP, wrote to the Court to express support for the settlement and disavow the Steering Committee's claim that it spoke for absent certificateholders like Monarch. As Monarch made clear:

> Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire Settlement based on the actions of what appears to be a small minority of objecting holders.

See Ex. 3.

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2 The Steering Committee's claim that the lack of an objection should not be taken as support for the settlement is absurd. As the Court has twice observed, "Well, okay, but the thing is the case has been around for almost a year, so by now, if they have not gotten on board to object, I don't know how much more we can look for them." Tr. 6/14/2012 at 67. "As I said, I think it's unlikely that someone we never heard of is going to come in that hasn't been here for the past two years." Tr. 4/12/2013 at 105. The law, of course, recognizes that silence *is* deemed to be assent in the face of notice that a party's rights may be affected by a settlement. *See infra.*

In the weeks leading up to the Objection deadline, there has been a steady stream of certificateholders—including one former member of the Steering Committee, the Federal Home Loan Bank of San Francisco, *see* Doc. No. 578—who have informed the Court that, despite their appearance in this Proceeding as potential objectors, they do not object to the settlement. Among these are the FHFA (Doc. No. 587), perhaps the largest single certificateholder in the Trusts, as well as RMBS Acquisition Co. (Doc. No. 630), the Maine State Retirement entities (Doc. No. 577), Goldman Sachs & Co. Securities Division (Doc. No. 560), and Clayhill Investors LLC (Doc. No. 585). And of course, one of the original leaders of the Steering Committee, Walnut Place, withdrew its objection over nine months ago.

Support for the settlement by those whom it affects is highly probative evidence that the settlement is reasonable and fair. *See In re Austrian and German Bank Holocaust Litig.*, 80 F.Supp.2d 164 (S.D.N.Y. 2000) (where only a small number of objections are received, "that fact can be viewed as indicative of adequacy of the settlement."); *Maley v. Del Global West Virginia v. Chas. Pfizer & Cor.*, 314 F.Supp. 710, 734 (S.D.N.Y. 1970) (noting significance of the fact that "the proposed compromise is supported by a very high percentage of all the plaintiffs to which it was offered."). Though the Objectors may seek to wave away the interests of this "silent majority" of Certificateholders, in this Article 77 Proceeding the Court has "a responsibility to silent class members, despite vociferous opposition to settlement by other members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20 (2nd Cir. 1987). The existence of this overwhelming majority is particularly important where, as here, the Objectors represent only a *very small* percentage of all the Certificateholders. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998). In plainer terms, elevating the interests of this tiny minority over the interests of all other certificateholders "would put too much power in a wishful thinker to thwart a result that is in the best interest of others." *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243 (S.D.N.Y. 1998).

C. The Objectors are a Vocal Minority.

As of the filing of this brief, out of the tens of thousands of investors that hold the Trusts' certificates, only *ten* have filed actual objections to the Settlement.[3] They are: AIG, Triaxx, three Federal Home Loan Banks, American Fidelity Assurance, US Debt Recovery, Vertical Capital, LLC, Ballantyne Re plc, Sterling Federal Bank, The Western and Southern Life Insurance companies, and the Federal Home Loan Bank of Pittsburgh. Though we do not yet have a complete report of holdings,[4] the holdings we have indicate this is only a very *tiny* minority of the Certificateholders. Also important is that many of them are pursuing separate lawsuits against Bank of America, BNYMellon, or both. Their holdings are aggregated in the table below:

Category	**Other Litigation Pending Against BofA or BNYMellon?**	**Unpaid Principal Balance (UPB)**	**% of Total UPB**
Total UPB Across All 530 Covered Trusts		$144.7 billion	100%
Total Holdings of Known Objectors		**$5.4 billion**	**4.2%**
AIG	Yes	[redacted]	[redacted]
Triaxx Entities		[redacted]	[redacted]
FHLBs of Boston, Chicago, and Indianapolis	Yes	[redacted]	[redacted]
Western & Southern	Yes	[redacted]	[redacted]
FHLB Pittsburgh	Yes	[redacted]	[redacted]

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3 Objector CIFG Assurance does not claim to hold certificates of the Trusts. Instead, CIFG asserts that they "may have an interest in the subject matter" of this proceeding by virtue of their providing financial guaranty insurance for certain tranches of Re-Remic securities collateralized by certain Remic securities issued by certain Trusts. *See* Notice of Intention to Appear (Doc. No. 155) (Aug. 24, 2011).

4 No holdings information is available for Sterling Federal Bank, Vertical Capital, LLC, or Ballantyne Re plc.

Sterling Federal Bank	Yes	[redacted]	[redacted]
American Fidelity	Yes	[redacted]	[redacted]
US Debt Recovery		[redacted]	[redacted]
Vertical Capital, LLC		[redacted]	[redacted]
Ballantyne Re plc		[redacted]	[redacted]
Note: All unpaid principal balances have been pegged to July 31, 2012.			

It is highly significant that the majority of known objectors are pursuing independent lawsuits against either Bank of America or BNYMellon. The separate litigation agenda of each of these objectors is highly relevant to the *bona fides* of their objections. *See, e.g., In re Talley Indus., Inc. Shareholders Litig.*, 1998 WL 191939, at *6 (Del. Ch. 1998) (rejecting complaints of settlement objector where "the record … strongly suggests that the decision to lodge objections to the Settlement was related to [the objector's] efforts to force the payment or settlement of [a separate] claim."); *In re Prodigy Comm'n Corp. Shareholders Litig.*, 2002 WL 1767543, at *5 (Del. Ch. 2002) (rejecting complaints of a settlement objector whose objections were made "as part of a campaign to force [the settling defendant] to pay him sums on account of" an unrelated employment claim).

The Court is familiar with the evidence that AIG sought to exploit its settlement objection to extract a securities settlement from Bank of America. AIG is by no means alone in employing that tactic. The Court is also aware that counsel for the "Public Pension Funds," Ms. Kaswan, whose clients collectively hold [redacted] of the Certificates, has frequently sought to use (or thwart) discovery in this proceeding as leverage in her clients' separate lawsuit against BNYMellon in federal court. This conduct, which was emphatically not "in the best interests of Certificateholders," is relevant to the Court's assessment of whether this minority should be permitted to thwart a settlement that the vast majority of other Certificateholders want and support.

D. No Improper Benefit or Collusion

Though this case began with allegations of collusion against the Institutional Investors, or conflict on the part of BNYMellon, there was and is no evidence to support them. Neither the Institutional Investors nor BNYMellon received any benefit from the settlement at the expense of the Certificateholders.[5] Equally untrue were the early claims that the negotiators colluded with Bank of America. The negotiations were the subject of *numerous* public disclosures by the negotiators,[6] so much so that the group of investors supporting the effort began to grow rapidly *while* negotiations toward a settlement were ongoing:

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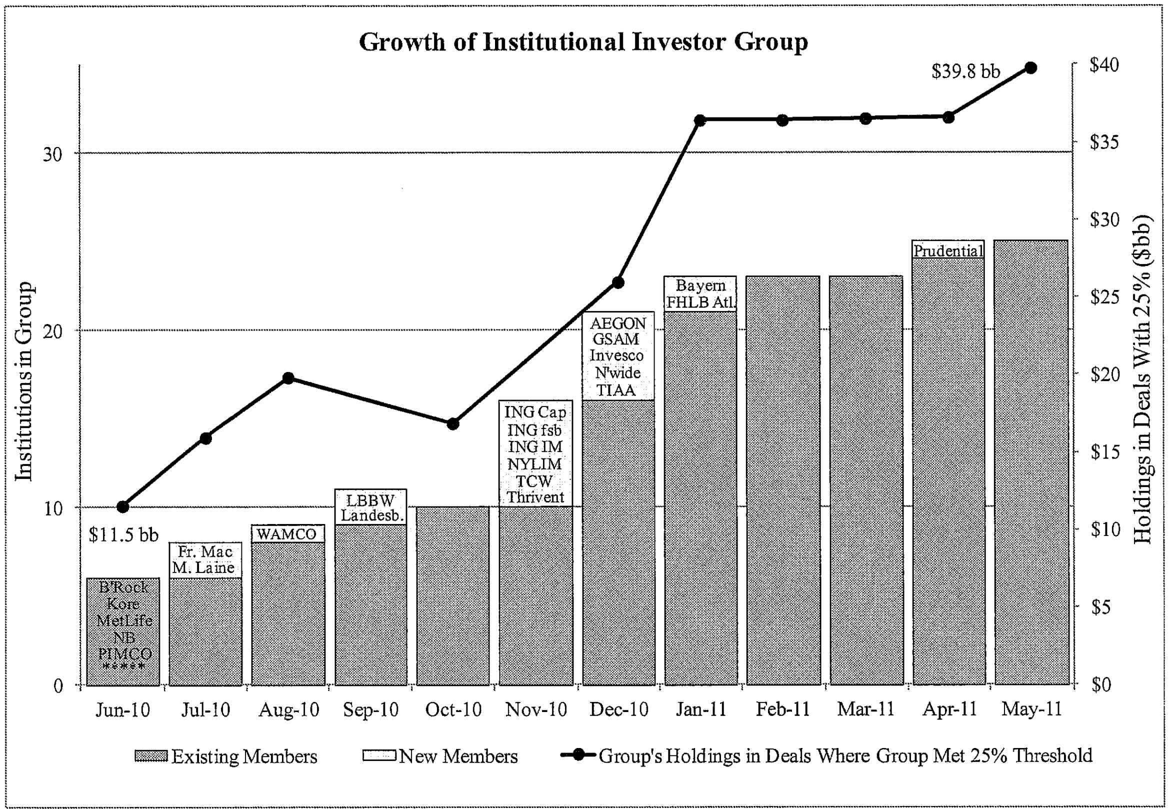
5 The sole "benefit" the Objectors have alleged as to BNYMellon was Bank of America's acknowledgement of BNYMellon's *existing* indemnity from the Master Servicer under the PSAs. As the Court has observed, the PSA *provided* for this indemnity. Tr. 4/12/2013 at 109; PSA § 8.05. Though they have had an overwhelming amount of discovery, the Objectors remain unable to cite even a shred of evidence "in all the documents and all the depositions and everything that you looked at [that showed] any indication that the indemnity caused the settlement amount to be less, that there was ever *anything*, like if, someone had said, well, there's $10 billion out there but if you want the indemnity you are going to take 8.5 and that's it. I mean 8.5, it seems like was very, very heavily negotiated, you finally got that, that's it, take or leave it. *But it wasn't based on the indemnity*, …" Tr. 4/12/2013 at 110-11 (emphasis added).

Equally unavailing are the allegations that the business relationship between BNYMellon and Bank of America created a conflict for BNYMellon. *Compare Knights of Columbus v. The Bank of New York Mellon*, Index No. 651442/2011, Slip Op. at 16-17 (allegations that BNYMellon serves as a "bank for banks" or that "the lion's share of their business is dedicated to helping other financial institutions around the world," fail to allege that BNYM acted to advance its own interests at the expense of Certificateholders).

6 *See Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections,* Doc. No. 124, 11-cv-05988 (S.D.N.Y. 2011) ¶¶63-74, http://www.cwrmbssettlement.com/docs/No.%20124%20Institutional%20Investors_%20Statement%20in%20Support%20of%20Settlement%20and%20Consolidated%20Response%20to%20Se.PDF.



AIG has claimed that the settlement was "clandestine" or "exclusive," *see* AIG Objection, Doc. No. 131 at 5-6. Disclosures in AIG's securities lawsuit against Bank of America (filed on the same day as AIG's objection to this settlement) confirm this claim is false. AIG claims *here* that it was "kept in the dark by BoNY and the Inside Institutional Investors," *id.* at 6, but in its securities case against Bank of America, it has admitted the truth: Bank of America invited AIG to participate in the negotiations of this settlement, but AIG refused.[7] In a letter filed in that proceeding, AIG revealed that "in March or April [2011], AIG rejected [Bank of America's] express request that AIG stop seeking advice from Quinn Emanuel as a condition of ***allowing AIG access to settlement talks between [Bank of America] and certain institutional investors.***" *Id.* at Ex. F to Dworsky Declaration, p. 4 (emphasis added) (Doc. No. 42). This

7 *See* Defendants' Motion to Disqualify Quinn Emmanuel as Counsel For Plaintiffs, Doc. No. 37, No. 11-cv-06212 (S.D.N.Y.).

letter establishes two facts that refute AIG's claim of clandestine negotiation. First, by its own admission, AIG knew about the ongoing "settlement talks." Second, again by its own admission, *if* AIG was excluded from settlement discussions, it was excluded by *Bank of America*, due to an alleged conflict on the part of AIG's counsel. Neither the Institutional Investors nor the Trustee ever limited AIG's access to the settlement talks and AIG has never claimed it sought—or was refused—any information by the Institutional Investors.[8]

Given the evidence refuting any claim of collusion or benefit, it is no surprise the Objectors have abandoned virtually all of them. In their place, the Objectors resort to even more speculative arguments, claiming that some other negotiating strategy, or some other piece of information, might have yielded a different result. That, however, is not the test for determining whether the settlement was reasonable. As a New York Supreme Court judge explained in a similar Article 77 proceeding seeking approval of a securitization trustee's decision to settle trust claims over the objections of a minority of trust beneficiaries: "[t]he Court will not invalidate the proposed settlement merely because certain beneficiaries believe a greater recovery might be obtained if the [disputed claim] is submitted to an expensive and unpredictable litigation. *In re IBJ Schroder Bank & Trust Co.*, No. 101530198/1998 (N.Y. Sup. Ct. at 6) (Ex. 7). We discuss the relevant standard, and the clear evidence the Trustee has met its burden of proof, in the next section.

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8 To reiterate, AIG has not alleged that it ever contacted either the Institutional Investors' counsel or counsel for BNY Mellon to ask to participate in the ongoing settlement discussion with Bank of America.

II. Standard of Review.

A. The Law Strongly Favors Settlement.

"As an initial consideration, it is the strong policy of our courts to encourage settlement of disputes." *Childs v. Levitt*, 543 N.Y.S.2d 51, 53, 151 A.D.2d 318 (1st Dep't. 1989). This strong policy is one courts are "bound to encourage." *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004). "Stipulations of settlement are favored by the courts and not lightly cast aside." *Hillcrest Realty Co. v. Gottlieb*, 234 A.D.2d 270, 651 N.Y.S.2d 5, 56 (2nd Dep't. 1996).

Consistent with the policy of encouraging settlements, their reasonableness is judged not with the benefit of hindsight but rather based on the information reasonably known at the time of settlement. *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 204 (2d Cir. 2006) *citing Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1306 (11th Cir. 2003). This "time of decision" rule recognizes that "No one entering into a settlement … is a soothsayer," *U.S. v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994). This is particularly true when evaluating an exercise of discretion by a trustee. *See LNC Inv., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169, 176 (2d Cir. 2002), cert. denied 538 U.S. 1033 (2003) ("With regard to [the trustee's] prudence, . . . the question is not what appears to be prudent in light of our current understanding . . . , but rather what was prudent in light of what could reasonably have been known to the Trustees at the time . . . ."); *Katsaros v Cody*, 744 F.2d 270, 279 (2d Cir. 1984) (prudence of the trustee must be evaluated "from the perspective of the time of the . . . decision rather than from the vantage point of hindsight"). Thus, in deciding this Article 77 case, this Court must therefore apply "a standard long relied on, that is, [it] must 'look at the facts as they exist at the time of their occurrence, not aided or enlightened by those which subsequently take place. The situation is to be adjudged not in retrospect but in prospect.'" *Estate of Balch*, 847 N.Y.S.2d 841, 845 (N.Y. Sup. Ct. 1947) *quoting Purdy v. Lynch*, 100 Sickels 462, 145 N.Y. 462 (N.Y. 1895). "A wisdom developed after an event, and having it and its consequence as a source, is a standard by which no person should be judged." *In re Chase Manhattan Bank*, 26 A.D.3d 824, 809 N.Y.S.2d 360, 364 (4th Dep't. 2006) (overturning Surrogate's determination that Trustee acted improperly in failing to sell stock because it was "impermissibly based on nothing more than hindsight.").

In this Article 77 Proceeding, the sole inquiry concerns the reasonableness of BNYMellon's settlement decision based on the information known to it as of the date of the settlement. This Court has repeatedly recognized that the reasonableness of the Trustee's actions is the issue to be decided. *Compare* Tr. 6/14/2012 at 42-43 ("Here, it's whether what *was done* is fair and reasonable. It doesn't mean this is the best thing in the whole world, it couldn't possibly be a better deal. It's whether it *was* fair and reasonable under all the circumstances.") (emphasis added) and Tr. 2/7/2013 at 64 ("I certainly think it *was* reasonable for them to hire experts in areas where they don't have expertise. We have that in cases all the time. That's why you have an expert.") (emphasis added). The Trustee's decision making can only be evaluated based on what it knew at the time. The law "does not exact prescience of a trustee." *Matter of Flint's Will*, 266 N.Y. 607, 269 N.Y.S. 470, 480-481 (1st Dep't. 1934); *see also* Langbein Tr. 299-300 ("The normal standard is that you review Trustee conduct on the basis of the information known to the Trustee at the time of the decision."). Accordingly, the Objectors' recent arguments concerning court decisions issued after the settlement are wrong—even if those decisions supported the legal propositions that the Objectors claim, which they do not.

Even the judgments of full blown fiduciaries, which this Court has held BNYMellon is not, *Knights of Columbus v. The Bank of New York Mellon*, Index No. 651442/2011, Slip Op. at 15, n. 6, are not judged with the benefit of hindsight. *Estate of Shubert*, 110 Misc.2d 635, 442 N.Y.S.2d 703, 709 (N.Y. Sur. 1981) ("Clearly, such judgment cannot be reviewed from the vantage point of hindsight and must be considered within the context of the facts and circumstances then existing."). A "change in the law occurring after a settlement for a sum of money is not a basis for vacating the settlement…." *Bank of New York*, 14 F.3d at 759 (denying Rule 60(b) motion to vacate settlement based on subsequent change in the law). The Objectors are thus barred from arguing the Trustee's settlement decision should be rejected based on *later* developments in the law. *Compare Del Noce v. Delyar Corp.*, 78 F.R.D. 325, 328 (S.D.N.Y. 1978) ("It is not a breach of fiduciary duty to act in a fashion which tested by hindsight now appears improvident."). With these principles in mind, we now turn to the specific findings at issue in the Article 77 Proposed Final Order and Judgment.

III. The Negotiations Were at Arms' Length.

One finding in the proposed final order and judgment has been the subject of considerable discovery in this case: "The arms'-length negotiations that led to the Settlement Agreement and the Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the Settlement." PFOJ, ¶ (j). AIG and the other objectors invoked this finding to obtain considerable discovery of settlement negotiations, claiming they needed to know "…whose arms were in those negotiations [and]…was there any duplicity…" Tr. 8/2/2012 at 10. Though the Court recognized that "[i]n most cases, settlement communications are off limits," Tr. 8/2/2012 at 28, extensive discovery of settlement negotiations went forward including: a) production of all tri-party and binary settlement communications among the parties to the negotiations, b) production of all communications between the Institutional Investors and BNYMellon, as Trustee, and c) depositions of the key negotiators for all three parties to the negotiations. More than 30 depositions have been taken to date, and several more will occur before the trial.

This evidence confirms the settlement was the product of "arms'-length negotiations…." PFOJ, ¶ (j). The Court will hear this evidence from the witnesses at the trial, but it includes these facts:

- **The result itself**: This is the largest settlement *ever*, in private litigation, a result wholly inconsistent with any claimed collusion among the parties. In addition to an $8.5 billion cash payment to the Trusts, the settlement includes servicing reforms with teeth that exceed anything the contract required, as discussed further in Section V, below.
- **The negotiators**: The settlement was negotiated by BNYMellon, acting on behalf of Certificateholders, and by a large group of Institutional Investors led by a five-institution Steering Committee—PIMCO, BlackRock, MetLife, ING, and Freddie Mac—who are deeply knowledgeable about mortgage underwriting, securitization and repurchase claims and who were motivated solely by a desire to maximize the recovery for themselves and their own clients and shareholders.
- **The Trustee's role**: BNYMellon's lead negotiator, Jason Kravitt, participated actively in the negotiations, not only helping to drive the settlement amount upward, Tr. 10/12/2012 at 73-74, Kravitt Tr. 510 (Kravitt testifying "B of A offered something on the order of $4.5 billion and they were told it was inadequate…. Kathy told him, but I would have told him if she didn't."), but also helping to shape the landmark servicing reforms that added billions in value to the settlement.[9] *See also* Kravitt Tr. 322-23 ("We participated in negotiating [the Settlement], so it wasn't a set of terms that was given to

[9] The Objectors have not focused their discovery on these servicing reforms. At the trial, however, the Court will hear extensive evidence about these reforms, their value, and why they are far *better* than anything that could have been achieved through contested litigation of servicing claims. *See infra* Part V.

us in a take it or leave it fashion. It was a set of terms that we had a role in formulating.").

- **The support for the settlement**: Despite the claims of the Objectors, the settlement has received broad and deep support from those most affected by it, the Trusts' Certificateholders, more than 95% of whom support the settlement.

- **The back and forth of the negotiations**: [redacted] to the eventual $8.5 billion cash payment, which was obtained only by a "take it or leave it" demand [redacted]

[redacted] **The amount of information analyzed by the parties:** The parties produced and evaluated a tremendous amount of information in assessing the strength and weaknesses of the claims to be settled and the terms of the settlement agreement. [redacted]

10 *See, e.g.,* [redacted]

[redacted] The Institutional Investors shared with the Trustee their analysis, which was based on reports of loan data gathered by Digital Risk on other PLS loans from other trusts, as well as whole loan repurchase information, and the investors' own extensive experience with the Trusts' collateral and Countrywide's origination practices.[11] The Trustee, working with Bank of America as the Master Servicer, generated hundreds of comprehensive exception reports with loan-level data indicating potentially missing documents in loan files that could pose difficulty in foreclosure in order to determine an appropriate resolution for these issues.[12] Bank of America also shared extensive information related [redacted]

- **The time and effort required to hammer it out**: The settlement took more than six months, nearly two dozen meetings and nearly daily phone conferences to negotiate. Kravitt Tr. 325; Golin Tr. 214. The negotiations involved counsel, experts, and internal

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11 *See, e.g.,* [redacted]

12 *See, e.g.,* [redacted]

13 *See, e.g.,* [redacted]

business personnel from all parties with deep subject matter experience. The parties negotiated and circulated more than 25 drafts of the Settlement Agreement and countless provisions under discussion.

- **The difficult and sometimes heated nature of the negotiations**: On one occasion [redacted] At the eleventh hour, the Institutional Investors threatened to blow the settlement up and walk away over Bank of America's request to add a release of investors' securities claims to the settlement. *See* BNYM_CW-00255278 (June 7, 2011 letter from Gibbs & Bruns to Bank of America and BNYM.).
- **The support for the settlement**: Despite the claims of the Objectors, the settlement has received broad and deep support from those most affected by it, the Trusts' Certificateholders, more than 95% of whom support the settlement.

Armed with this unprecedented and extensive discovery of settlement negotiations, the Objectors are unable to cite *any* evidence there was a better deal to be had or that Bank of America "dangled something [in front of BNYMellon] and they [BNYMellon] grabbed at that to your [Certificateholders'] expense." Tr. 8/2/2012 at 30. Instead, this discovery—and the testimony to be presented from the witnesses at the trial—proves this mammoth, $8.5 billion cash settlement and its multi-billion dollar above-market servicing reforms were obtained as a result of negotiations that were hard fought, tense, and tough. They were the very definition of "at arms'-length," PFOJ ¶(j), so the Court has before it abundant evidence to support entry of the Article 77 judgment.

IV. The Settlement Terms are Fair and Reasonable Under the Circumstances.

Though the reasonableness of the Settlement is evident from Certificateholders' reaction to it, there is abundant evidence the Settlement and its terms are fair and reasonable. We address separately in Section V, *infra*, the fairness of the servicing terms. In this section, we discuss the $8.5 billion cash payment.

A. The Settlement Amount is *Per Se* Evidence of Reasonableness and Arms' Length Negotiations.

First, it must be said again: ***this is an $8.5 billion dollar settlement***. It is the largest private litigation settlement in history, in any case, of any kind, anywhere. Courts routinely look to the terms of a proposed settlement to assess its reasonableness. Here, the staggering *size* of the settlement refutes any claim the settlement is unreasonably low. The history of the negotiations, and their adversarial character, also refutes any claim the amount is other than robust. *See supra* Section III.

Yet, the Objectors continue to claim the settlement is low. What evidence do they offer that it could have been or should have been higher? None. Their sole "settlement amount" expert, Charles Cowan, pointedly did *not* opine that the settlement could or would have been higher had the Trustee employed some other method to estimate the size of the Trusts' claims. Cowan Rep. at 2-3. Mr. Cowan simply observed that loan files might have shed additional light on the size of the Trusts' claims. *Id.* This observation was notably unaccompanied by *any* claim that a review of loan files would have led to a higher settlement. *Id.*

Though this is the largest private settlement in history, the Trustee is not required to demonstrate "this is the best thing in the whole world," Tr. 6/14/2012 at 42-43, or that "it couldn't possibly be a better deal. It's whether it was fair and reasonable under all the circumstances." *Id.* at 43-44. Reviewing loan files was not without its own risks, including costs, delay, and the protraction (or perhaps, impossibility) of any timely resolution of the Trusts' claims. These are all facts the Trustee could reasonably consider in deciding whether to settle its claims.

B. The Settlement Amount Was Premised on Reasonable Evidence.

Also relevant to the Trustee and to the Court is this key fact: the large group of Institutional Investors who negotiated the settlement believed the Trusts' repurchase claims were *larger* than the amount estimated by the Trustee's expert, yet they still favored the $8.5 billion settlement. The evidence at the trial will show that when the Institutional Investors decided to support the settlement, they were unaware that the Trustee's expert, Brian Lin, had estimated the reasonable value of the Trusts' repurchase claims to be between $8.8 and $11.0 billion before litigation discounts. Lin Report at 7. The Institutional Investors learned of this estimate only *after* the settlement was signed, when Mr. Lin's report was filed with the Court.

The Institutional Investors based their decision to support the settlement on their own analysis—which they shared with the Trustee during negotiations. This analysis, which has been produced in discovery and has been the subject of lengthy examination in dozens of depositions, used GSE data, reports of defect rates in other PLS pools from Digital Risk, whole loan repurchase information, and the investors' own extensive experience and knowledge of the Trusts' collateral and Countrywide's origination practices to derive a 30% defect rate and an estimated claim size of approximately **$32.1 billion**. Yet they still supported the settlement, because they concluded that recovering **26 cents on the dollar**[14] of the *potential* repurchase claims through a *certain* settlement with a *solvent* obligor, Bank of America, was vastly

[14] This calculation is $8.5 billion / $32.1 billion.

preferable to uncertain, lengthy and extremely costly litigation of repurchase claims on hundreds of thousands of mortgage loans against the nearly insolvent Countrywide.

We address elsewhere the reasonableness of Mr. Lin's judgment, *see infra* Part VI(A)(1), but this evidence establishes independently the reasonableness of the Trustee's decision to settle the Trusts' claims, as does the fact that thousands of other Certificateholders chose not to object to the settlement.

C. Additional Circumstances Confirm the Reasonableness of the Settlement.

We have elsewhere detailed the many reasons why the circumstances supported the Trustee's decision to settle the Trusts' claims.[15] We discuss them briefly, here, to give the Court an overview of the evidence and testimony to be presented at trial.

1. Uncertain Litigation Alternatives.

First, the Trustee was entitled to consider—and the Court must consider—whether litigation was a viable alternative for the Trusts given the rigid and unyielding nature of the PSAs. Under the PSAs, the contract claims resolved in the settlement belong to the Trustee. *See* PSA §§ 2.01(b), 2.04. The Trustee holds those contract claims for the ultimate benefit of the Certificateholders, but the claims do not belong to Certificateholders. The Trustee has the power to pursue the claims, *see* PSA §§ 2.03(c), 2.04, and 3.03[16]; but it is not required to investigate them, *see* PSA § 8.02(iv), or to expend its own funds to do so, *see* PSA § 8.02(vi). These provisions significantly limited the litigation options for the Trustee—and for the Certificateholders that stood to benefit if the Trusts' claims were pursued or settled.

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15 *See* Institutional Investors Statement in Support of Settlement at *passim*.

16 We address in Part VII *infra* the authority establishing that the Trustee not only owned the Trusts' claims but had the power to settle them.

The circumstances under which Certificateholders could pursue these claims were narrow at the time; they may be even less so now, given the *Walnut Place* ruling. The Court can and should (and the Trustee did) consider what would happen to the Trusts' claims in litigation or in the unlikely event the court rejected a settlement. The PSAs require Certificateholders to aggregate 25% of the Voting Rights, to provide a financial indemnity to the Trustee, and to give two consecutive sixty day notice periods. *See* PSA §§ 7.01, 8.01, 8.02 and 10.08; *see also Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863 (Sup. Ct. 2012) (*Walnut Place I*) *aff'd* 3 A.D.3d 684, 948 N.Y.S.2d 580, 581 (1st Dep't 2012). Only then can Certificateholders file suit: but they must sue derivatively, on behalf of the Trusts, for the common benefit of Certificateholders. Though they have made much of the fact that the Institutional Investors sent the initial Notice of Non-Performance starting one notice period ticking, none of the Objectors *ever* sent any notice of non-performance to the Trustee or the Master Servicer, nor did any of them step forward to shoulder the burden of pursuing a remedy for the Trusts, nor did they ever seek to join the Institutional Investor coalition to lend a hand to their efforts to enforce these rights.

Consideration of the litigation alternatives is also relevant to evaluating the Trustee's settlement decision. Though the Institutional Investors hold 25% of the Voting Rights in 216 of the Trusts, they did not (and still do not) believe litigation would achieve a better—or more certain—result than the settlement the Trustee has in hand. There are, however, 300 Trusts[17] where *no other* group of investors collectively holds 25% of the Voting Rights. If the settlement is not approved, these Trusts will have no prospect for remedy at all. Rejection of the settlement

[17] Some of these are trusts where no objections have been lodged, but these Trusts would nonetheless have to find a way to pursue their claims if the settlement were rejected despite the lack of objections to it.

would be devastating for these Trusts and their investors. The Court should press the objectors carefully at the trial to determine whether they have any plan, at all, to obtain relief for these Trusts if the settlement is not approved. It will quickly become clear they have no plan.

2. Uncertainty About Successor Liability.

Even this high level overview of the settlement demonstrates it was fair and reasonable at the time the Trustee entered into it. Recent developments confirm the Trustee acted more than reasonably in deciding to substitute a solvent obligor, Bank of America, for the nearly insolvent Countrywide. This was an extraordinary benefit to the Trusts at the time of the settlement, particularly given Countrywide's desperate financial straits; it is an equally compelling reason to uphold the settlement today. Even the Objectors' own expert, Professor John C. Coates, testified yesterday under oath that [redacted] chance of success on the claim that Bank of America is liable as a successor to Countrywide, and admitted that [redacted] *See* Coates Tr. at 231-235 (Ex. 1).

The Trustee was certainly entitled to conclude, in these circumstances, that a certain recovery from Bank of America by way of settlement was vastly to be preferred over litigating an issue that was at best a 50/50 proposition. The settlement also effected a complete reform of mortgage servicing, at Bank of America's expense, in a manner that is favorable not only to investors, but to borrowers. Finally, it provides the Trusts with a complete, and automatic, indemnity for losses they suffer as a result of unrecorded mortgages and defective and missing title policies. These remedies were largely unavailable outside the context of a consensual settlement; if the settlement is rejected, they may not be obtained again.

The litigation alternative to the settlement was a difficult path. The experience of MBIA, which has litigated repurchase claims against Bank of America for five years without obtaining the repurchase of even *one* mortgage loan through judgment, is a stark example of the difficulties these claims faced if the Trustee elected to reject the $8.5 billion settlement in favor of litigation. It is a truism, and also true, that litigation is inherently uncertain. The Objectors' assertions that there are "billions of dollars in toxic mortgage claims" in the pools do little to establish that those claims would succeed if pursued in litigation. Claims that the settlement is "pennies on the dollar" are equally flawed, when measured against any *reasonable* estimate of the size of the Trusts' repurchase claims. Speculative claims that Bank of America is liable as a successor in interest for contracts with the Countrywide Mortgage Sellers do little to assure investors that years of contested litigation would not end with only an insolvent Countrywide to respond to their claims. The Trustee was not required to speculate on the Pollyannish scenario the Objectors now urge on the Court. It was entitled to, and did, conclude that the best interests of Certificateholders were served by settling the Trusts' claims based on all the circumstances known to it at the time.

V. The Servicing Improvements Add Billions in Value to the Settlement.

The Objectors to a large extent ignore the additional value added to the settlement by the servicing reforms, estimated by the Trustee's expert to exceed $3 billion. These thorough prospective reforms are highly beneficial to the Trusts and their Certificateholders, but they were only achieved as the result of extensive negotiations between knowledgeable counterparties; they almost certainly could not have been obtained through contested litigation of the Trusts' servicing claims, even assuming those claims were actionable.

Mortgage loan servicing is a fraught and difficult process, particularly as it pertains to dealing with troubled borrowers. At the time of the settlement, virtually every servicer in the industry was experiencing difficulties in collecting mortgage payments, modifying loans, or foreclosing on collateral. Bank of America was no exception. The table below compares Bank of America's performance to that of other major mortgage loan servicers at the time.

Key Pool Statistics by Servicers – May 2011[18]

Alt-A	Total Loans/# of Loans 90+ Delinquent	Percentage of Loans 90+ Delinquent	Roll Rate 30 to 60 Days DQ	Roll Rate 60 to 90 Days DQ	Number of Modifications Granted as % of UPB	6 Mo Mod Redefault Rate
BofA	503,000/56,900	11.3%	43.2%	52.1%	11.2%	12.3%
JPM Chase	72,000/4,790	6.6%	42.3%	49.1%	7.1%	9.9%
CitiMortgage	49,000/1,709	3.4%	38.0%	34.6%	16.1%	5.1%
Wells Fargo	195,593/9,906	5.1%	40.7%	34.6%	15.4%	12.6%
Option ARM	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA	153,604/36,876	24%	44.3%	57.0%	15.6%	17.2%
JPM Chase	51,199/4,949	9.6%	40.8%	49.0%	6.3%	11.5%
Prime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA	131,568/10,163	7.7%	43.5%	54.3%	5.3%	9.3%
JPMorgan Chase	105,688/5,582	5.2%	49.2%	53.5%	3.8%	8.2%
Wells Fargo	184,341/3,947	2.1%	36.1%	44.3%	3.5%	6.8%
Subprime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA	426,616/117,472	27.5%	35.9%	42.5%	38.8%	18.9%
JPMorgan Chase	193,714/25,194	13%	29.4%	40.1%	41.7%	14.7%
Wells Fargo	155,681/14,391	9.2%	34.4%	33.0%	43.3%	16.5%

Mortgage loan servicing is governed by a "prudent servicing" standard, which the PSAs measure by reference to the standard of care of other mortgage servicers in the industry. *See* PSA §3.01 ("Master Servicer shall service and administer the Mortgage Loans in accordance with customary and usual standards of practice of prudent mortgage loan servicers."). The PSA's make clear that the servicer is not liable for breach of this servicing standard for "any action in good faith … or for errors of judgment," *id.* at §6.03, unless it acted with "willful

[18] Source: RBS My Final Look as of May 2011 Remittance, using data from CoreLogic Loan Performance, CoreLogic Home Price Index and RMBS 2000-2010 Vintages.

misfeasance, bad faith or gross negligence in the performance of its duties or by reason of reckless disregard of obligations and duties hereunder." *Id.* This limitation required the Trusts to prove not merely that the servicer was "not as good as" the other servicers, but instead that it acted with "willful misfeasance, bad faith, or gross negligence." *Assured Gty. Mun. Corp. v. Flagstar Bank, FSB (Flagstar I)*, 892 F.Supp.2d 596, 606-07 (S.D.N.Y. 2012); *accord* Index No. 602825/08 *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Supreme Court of New York, (Bransten, J.) Order on Motions of Summary Judgment on Liability (MBIA Liability Order), Doc. No. 4093, at 32 ("the Agreements at issue limit the Trusts' ability to recover to 'misfeasance, bad faith, or gross negligence in the performance of the duties of the Master Servicer or for reckless disregard of the obligations of the Master Servicer…."). Gross negligence is an onerous standard: it "differs in kind, not only degree, from claims of ordinary negligence. "It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, U.S.A. Ltd. v. Jewelers Protection Svc. Ltd.*, 81 N.Y.2d 821, 823-24, 595 N.Y.S.2d 381 (1993).

The statistics above, which compared Bank of America's performance to that of other servicers at the time of the settlement, created significant uncertainty that the Trusts could prove or prevail on a claim that Bank of America violated the servicing standard. Equally uncertain was whether proof of any violation would yield a substantial recovery for the Trusts. A few months' difference in foreclosure dates, here or there, could be the result of actionable misconduct by the servicer, or could instead be the result of judicial backlogs in a particular state, an extended effort to provide loan modifications to deserving borrowers, the flood tide of defaults that resulted from the worst economic crisis since the Great Depression, or any number of other reasons that would not give rise to liability. Whether a particular loan should have been modified differently, or at all, is a highly fact-specific inquiry dependent on the borrowers' circumstance. The reasons a modified loan fell back into default are equally difficult to demonstrate with precision. Tellingly, when faced with the requirement to prove "reckless disregard" in support of its servicing claims, *Flagstar I*, 892 F.Supp.2d at 606-07, Flagstar Bank simply abandoned those claims prior to trial. *Assured Gty. Mun. Corp. v. Flagstar Bank, FSB*, 2013 WL 440114 at *40 (S.D.N.Y. February 5, 2013).

Against this backdrop, the servicing reforms the Trustee obtained should be seen for what they are: a superb result that is *better* than anything that could have been obtained through litigation. As a result of the settlement, Bank of America agreed to transfer—at its own expense—the servicing of High Risk defaulted mortgage loans to high-touch, specialty subservicers. At the trial, the Court will hear evidence that these servicing reforms "go beyond the industry norm for servicers and would not have been available without the benefits of the Settlement Agreement." Expert Report of Phillip Burnaman, II at 7. The PSAs did not require Bank of America to subservice any mortgage loans, PSA §3.02(a) ("The Master Servicer *may* arrange for the subservicing of any Mortgage Loan by a Subservicer pursuant to a subservicing agreement…") (emphasis added), much less provide that a court could order subservicing as a remedy for breach of the prudent servicing obligation. *Id.* That remedy was obtained as affirmative relief in the Settlement. *See* Settlement Agreement at §5(a) (Subservicer selection, assignment and compensation structure) and §5(b) (Subservicing Implementation for High Risk Loans).

The PSAs also did not require Bank of America to underwrite all available requests for loan modifications at the same time, or hold Bank of America accountable to modify loans based on standards it applied to its own loan portfolio, test those modifications by reference to independent, third party broker price opinions, or impose penalties for foreclosure delays in excess of stated time limits. PSA §3.01. All of these reforms, however, were obtained by the Trusts as a result of the Settlement Agreement. *Compare* PSA §3.01 (generic prudent servicing standard) *with* Settlement Agreement §5(d) (requiring underwriting all requested loan modifications at the same time), *and id.* §5(e) (defining criteria that Bank of America must use in evaluating loans for modifications, including "the policies or practices that the Master Servicer is then applying to its or any of its affiliates' 'held for investment' portfolios"; requiring that "no principal modification by the Master Servicer or any Subservicer shall reduce the principal amount due on any Mortgage Loan below the current market value of the property, as determined by a third party broker price opinion, using a fair market value method, applying normal marketing time criteria and excluding REO or short sale comparative sales in the valuation calculation."), *and id.* §5(c) (requiring benchmarking of servicing performance for loans not in subservicing to Industry Standards and reducing of servicer's advance liens as an automatic, compensatory fee for sub-Industry Standard performance, a significant improvement over the gross negligence standard in the PSAs).

The implementation of this massive restructuring of the servicing of the Trusts' mortgage loans promised to achieve concrete and measurable benefits through improved loan performance, returning loans to performing status, and more efficient liquidation of mortgage collateral. *See* Burnaman Report at 40-45. To date, more than 86,000 mortgage loans have been transferred to six subservicers, with transfers ongoing on a regular basis.[19] *See* BNY Transfer Overview as of

[19] The list of subservicers was agreed on schedule, with some approved subservicers subjected to initial caps on the number of loans they could receive. *See* Settlement Agreement at ¶5(a)(ii) (Trustee may "reduce the maximum number of Mortgage Loans from the Covered Trust that such proposed subservicer may service at any one time to less than 30,000") *and* Approved List of Subservicers at fn. 1 ("While all Subservicers are approved for up to 30,000 loans, some

April 10, 2013, attached as Ex. 4. Furthermore, the Trustee's expert determined that from operations of just a single quarter, the subservicing queue created $216 million in benefits for the Trusts. Burnaman Report at 44. The imposition of foreclosure timeline penalties, another remedy not available under the contract, could be worth as much as $750 million, *id.* at 49, but the key benefit of this penalty structure is that it creates "a monetary incentive for BANA to transfer many of the loans that would be subject to the [penalty] to Subservicers and/or improve its performance as servicer with respect to delinquent or defaulted loans." *Id.* at 49. That this incentive is working is evident from a review of servicing statistics from nearly one year *after* execution of the settlement agreement. These statistics, also published by RBS[20], demonstrate Bank of America's servicing has improved in the key product areas of Subprime, Option ARM, and Alt-A, where the bulk of investors' losses were concentrated. Borrowers have also benefitted from these improvements through increased, and *better*, loan modifications that have reduced overall re-default rates:

Subservicers are temporarily subject to an initial cap on the number of loans they can service at any one time. The associated cap will be lifted as the affected Subservicer meets identified targets and successfully passes one or more subsequent reviews.").

[20] *Source*: RBS My First Look as of March 2012 Remittance, using data from CoreLogic LoanPerformance as of March 2012 Remittance, CoreLogic Home Price Index as of January 2012, and RBS.

Comparison of BofA Servicing Statistics May 2011 to March 2012

Alt-A	Total Loans/# of Loans 90+ Delinquent	Percentage of Loans 90+ Delinquent	Roll Rate 30 to 60 Days DQ	Roll Rate 60 to 90 Days DQ	Number of Modifications Granted as % of UPB	6 Mo Mod Redefault Rate
BofA – May '11	503,000/56,900	11.3%	43.2%	52.1%	11.2%	12.3%
BofA – Mar '12	455,788/42,478	9.3%	39.6%	52.9%	14.2%	6.8%
Option ARM	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA – May '11	153,604/36,876	24%	44.3%	57.0%	15.6%	17.2%
BofA March '12	119,653/23,463	19.6%	41.7%	58.6%	18.6%	10.0%
Prime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA – May '11	131,568/10,163	7.7%	43.5%	54.3%	5.3%	9.3%
BofA – March '12	113,147/8,249	7.2%	43.4%	57.5%	7.7%	8.0%
Subprime	**Total Loans/# of Loans 90+ Delinquent**	**Percentage of Loans 90+ Delinquent**	**Roll Rate 30 to 60**	**Roll Rate 60 to 90**	**Number of Modifications Granted as % of UPB**	**6 Month Redefault Rate**
BofA – May '11	426,616/117,472	27.5%	35.9%	42.5%	38.8%	18.9%
BofA – March '12	303,026/60,480	19.9%	30.8%	42.8%	44.3%	10.8%

As the Court considers whether the settlement was "fair and reasonable under all the circumstances," Tr. 6/14/2012 at 42-43, the above-market and above industry norm servicing improvements, worth billions of dollars, are of pivotal importance. This evidence, which the Objectors largely ignore, establishes that the Trustee "appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled," PFOJ at ¶ (i), that its "deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries," *id.* at (j) and that the "terms of the Settlement," *id.*, were "in the best interests of the Covered Trusts." *Id.* at (k). To reject the settlement and its landmark benefits, based on the Objectors' speculation that some other (unspecified) servicing outcome *might* have been achieved through litigation, would not be in the best interest of the Certificateholders or the Trusts.

VI. The Trustee Appropriately Evaluated the Strengths and Weaknesses of the Trust Released Claims.

Two findings in the PFOJ ask the Court to find that the Trustee gave appropriate consideration to the strengths and weaknesses of the claims being settled. *See* PFOJ §(i) and §(j). The Trusts settled two categories of claims against Countrywide: repurchase claims and servicing claims. The Objectors have largely ignored the servicing claims in their discovery, and instead attacked the Trustee's evaluation of the repurchase claims. The PSAs govern what the Trustee must do to "reasonably inform" itself before it acts. It is against this backdrop that the Court must evaluate the Objectors' three complaints: a) the Trustee's decision to use GSE repurchase data as part of its settlement analysis, b) the Trustee's decision not to review loan files, and c) the Trustee's evaluation of the risk of future, allegedly favorable developments in the case law.

A. The Trustee Was Reasonably Informed When It Decided to Settle.

The PSAs afford the Trustee with discretion concerning how it informs itself before making decisions on behalf of the Trusts. *See* PSA §§8.01 and 8.02. The PSAs, for example, encourage the Trustee to retain and rely on experts. *Id.* at §8.02(ii). The Trustee's good faith reliance on the advice of experts "shall be full and complete authorization and protection in any action taken or suffered or omitted by it hereunder."[21] *Id.* Here, the Trustee retained five

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[21] The Trustee's ability to rely on experts for this purpose is not unique. In the context of derivative claims, for example, courts have held that special litigation committees are entitled to rely on advisors in deciding whether to dismiss such claims. *See, e.g., Lichtenberg v. Zinn*, 260 A.d.2d 741, 744 (N.Y. 3d Dep't 1999) (affirming SLC's dismissal of derivative suit; concluding that SLC's investigation was appropriate because "SLC retained experienced independent counsel and three unaffiliated experts to assist it in evaluating the specific allegations set forth in the complaint, and, further, in reviewing the multitude of documents requested by the SLC"); *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, 1997 WL 305829, at *18 (Del. Ch. 1997) (affirming SLC's decision to approve proposed settlement of derivative action brought against Delaware corporation, noting that SLC had exercised "a right to justifiably rely on an expert report"). Similarly, courts have held that bankruptcy trustees are entitled to rely on the

separate experts to advise it on key aspects of its settlement decision. This is, in itself, evidence the Trustee was reasonably informed before it made its decision—even if the Objectors later claim the expert's opinion was (or allegedly proved to be) incorrect in some manner: "Nor is the Trustees' good faith put in question merely by virtue of the fact that the opinion relied upon may have been wrong; to so hold would eviscerate the opinion of counsel defense." *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992). The law precluding hindsight attacks on a Trustee's decisions, like the law permitting the Trustee to rely on advice of experts, refutes the Objectors' claim that the Trustee failed reasonably to inform itself before entering into the Settlement. Likewise, to approve a proposed settlement, "the Court need not find that parties have engaged in extensive discovery. Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligently make...an appraisal' of the settlement." *In re Austrian and German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 177 (S.D.N.Y. 2000) *citing Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982). With these principles firmly in mind, we turn now to the information the Trustee considered in deciding to settle its claims.

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advice of advisors in deciding whether to settle claims. *See, e.g., JAS Partners, Ltd. v. Boyer*, No. 1:10-CV-303-TLS, 2011 U.S. Dist. LEXIS 42414, at *17-*18 (N.D. Ind. Apr. 19, 2011) (rejecting argument that bankruptcy trustee failed to properly investigate claim where trustee consulted experts in assessing value of claims); *In re Adler*, No. 09-34791-BKC-RBR, Chapter 11, 2010 Bankr. LEXIS 3001, at *10-*11 (Bktcy. S.D. Fla. Sept. 16, 2010) (in finding that trustee acted in good faith in entering into settlement agreement, citing trustee's familiarity with claims and his extensive work with estate's counsel and forensic experts in evaluating such claims); *Santos v. Elder (In re Macadam Computer, Inc.)*, No. C 06-4889 SI, 2007 U.S. Dist. LEXIS 49848, at *13-*16 (N.D. Cal. June 28, 2007) (affirming bankruptcy court's approval of settlement where trustee had hired expert to opine on reasonableness of offer, and after thorough investigation, expert opined that settlement was reasonable); *Desmond v. ASR Acquisition Corp. (In re Desmond)*, Bk. No. 03-13878-MWV, Ch. 7, Adv. No. 04-1107-MWV, Adv. No. 04-1112-MWV, 2006 BNH 20, 2006 Bankr. LEXIS 1021 (Bktcy. D.N.H. 2006) (finding that bankruptcy trustee competently and fairly assessed costs, merits, and possible outcomes in deciding to accept settlement offer, where trustee based estimates on opinions of accounting and lending experts he had hired).

1. Expert Opinions

The Trustee had before it five expert reports, each of which addressed a key area of the settlement decision.

- **Professor Robert Daines** addressed the central issue of whether Bank of America could be held liable for Countrywide's repurchase obligations under theories of successor liability or veil piercing. Based on an extensive analysis, he concluded it would be very difficult to impose liability on Bank of America: "A veil piercing claim would likely fail" and "BAC has a reasonable argument that any successor liability claim would be defeated." Daines Rep. at 5, 6.
- **Capstone Valuation Services LLC** demonstrated that, in the absence of successor liability, Countrywide lacked sufficient assets to respond to the Trusts' claims. If the Trusts had to look solely to Countrywide Financial Corporation to satisfy their repurchase claims, their maximum potential recovery ***would not exceed $4.8 billion***, assuming essentially that the Trustee was Countrywide's only unsecured creditor to recover against its assets. Capstone Report at 3, 11.
- **Professor Adler** concluded 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." Adler Report at 13.
- **Brian Lin** issued a report concerning the value of the overall settlement amount, in which he concluded that a "settlement range of approximately $8.8 to $11 billion is reasonable ***without applying any legal haircuts.***" Lin Rep. at 7 (emphasis added).

- **Brian Lin** issued a second report concerning the servicing improvements in which he found the servicing improvements "to be reasonable and in accordance with or exceeding customary and usual standards of practice for prudent mortgage loan servicing and administration." Lin Servicing Rep. at 1.

The Objectors' have seized on subsequent developments in the law to argue these opinions should not be considered as evidence of the Trustee's reasonableness, ostensibly because they were in error. As discussed above, court decisions issued after the settlement are irrelevant to the Court's task. Even were such arguments permitted, it is far from clear that the law has eliminated the uncertainties and risks identified by the Trustee's experts. Evidence at the trial will show the expert's opinions were *not* in error: they adequately predicted that protracted and uncertain litigation on key aspects of the Trusts' claims would be required should the Trustee elect not to settle.

a. Professor Daines' Opinion

Professor Daines' opinion that successor liability would be exceedingly difficult to prove against Bank of America was scholarly and exhaustive. AIG's expert on successor liability, Professor John C. Coates, agreed yesterday in his testimony that the outcome of this issue was [redacted]: Professor Coates places no more than [redacted] chance of success on the claim that Bank of America is liable as a successor to Countrywide, and admitted that [redacted] *See* Coates Tr. at 224-30, attached as Ex. 1. He further acknowledged that [redacted] *Id.* at 229-230.

Professor Daines' analysis has also been borne out in thirteen decisions rejecting successor liability since the settlement.[22] Justice Bransten—on a full factual record—recently *denied* MBIA's Motion for Summary Judgment that Bank of America was obligated, as a successor, to fulfill Countrywide's repurchase obligations. *See MBIA Ins. Co. v Countrywide Home Loans Inc. et al.*, Index No. 602825/2008, in the Supreme Court of the State of New York, April 29, 2013, Doc. No. 4092, Slip Op. at 53 (Ex. 5). Though Justice Bransten's decision applied different governing law than did Professor Daines, Justice Bransten—like Professor Daines—nonetheless found this issue to be too fact-intensive and uncertain to be resolved without a full blown trial on the merits. *Id.* The fact that Justice Bransten was not able to resolve the question of Bank of America's successor liability after five years of full blown

[22] *See Fed. Housing Fin. Agency v. Countrywide Fin. Corp.*, 12-cv-01059-MRP-MAN (C.D. Cal. Mar. 15, 2013) (dismissing all successor liability claims against Bank of America with prejudice, except intentional and constructive fraudulent conveyance claims for which plaintiff was permitted to file a motion to amend); *F.D.I.C.* v. *Countrywide Fin. Corp.*, No. 11-ML-02265-MRP, 2013 WL 49727, at *4 (C.D. Cal. Jan. 3, 2013) ; *Bank Hapoalim B.M.*, v. *Bank of America Corp.*, No. 12 Civ. 4316 (MRP), 2012 WL 6814194, at *10 (C.D. Cal. Dec. 21, 2012); *Minnesota Life Insurance Co., et al., v. Countrywide Fin. Corp., et al.*, No. 12 Civ. 6149 (MRP), 2012 WL 6742119, at *7-8 (C.D. Cal. Dec 6, 2012); *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, No. 11 Civ. 10414 (MRP), 2012 WL 3578666, at *3-4 (C.D. Cal. Aug. 17, 2012); *Nat'l Integrity Life Ins. Co.* v. *Countrywide Fin. Corp.*, 2012 U.S. Dist. LEXIS 184429 (C.D. Cal. June 29, 2012); *Thrivent Fin. For Lutherans, et al.,* v. *Countrywide Fin. Corp., et al.*, No. 11 Civ. 7154 (MRP), 2012 WL 2161002, at *1 (C.D. Cal. June 1, 2012); *Dexia Holdings, Inc.* v. *Countrywide Fin. Corp.*, 2012 WL 2161498 (C.D. Cal. June 1, 2012); *Thrivent Fin. For Lutherans, et al.,* v. *Countrywide Fin. Corp.*, et al., No. 11 Civ. 7154 (MRP), 2012 WL 1799028, at *7-8 (C.D. Cal. Feb. 17, 2012); *Dexia Holdings, Inc.* v. *Countrywide Fin. Corp.*, No. 11 Civ. 7165 (MRP), 2012 WL 1798997, at *8 (C.D. Cal. Feb. 17, 2012); *Allstate Ins. Co.* v. *Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1224-34 (C.D. Cal. 2012); *Allstate Ins. Co.* v. *Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1192-93 (C.D. Cal. 2011). To our knowledge, in the non-MBS context, post-settlement, two courts have also granted Bank of America's motion to dismiss successor liability claims, *see Serna* v. *Bank of America, N.A.*, 2012 WL 2030705 (C.D. Cal. June 4, 2012); *Rodenhurst v. Bank of America*, 2011 WL 4625696, at *13 (D. Haw. Sept. 30, 2011).

litigation, including significant discovery, bolsters Professor Daines's conclusion that such a case is difficult to win.[23]

b. Capstone Valuation.

The Objectors have not offered any opinion that Countrywide had a concrete value greater than the maximum value of $4.8 billion assessed by Capstone—nor have Objectors offered an opinion that Bank of America *was* liable as Countrywide's successor. Instead, they have argued only that the Trustee "has not offered evidence that it considered or took a number of steps that it *could have taken* to adequately evaluate the Settlement." *See* Coates Rep. at 1. The Objectors have no evidence that these or any other steps *would have* yielded more assets at Countrywide, or a greater recovery from Countrywide in the midst of competing claims, than the $8.5 billion the Trustee recovered by way of the settlement. Given that the Trustee was faced with the considerable risk of Countrywide's insolvency, and the prospect that "maybe one day you will find out this was a good settlement and it won't be available to your clients or anybody else," Tr. 5/8/2012 at 91, the Objectors' argument that the Trustee *might* have made other inquiries does not refute the reasonableness of the extensive inquiries it *actually made* into Countrywide's assets or issues of successor liability.

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23 Justice Bransten's recent decision denying summary judgment does not undermine Daines' report. As Daines himself explained in his report "[b]oth veil piercing and successor liability are fact-intensive legal theories; any ultimate judicial determination may turn on documents or testimony that would be produced at trial . . . ." Daines Report at 1 (June 7, 2011). Justice Bransten's refusal to grant summary judgment on successor liability is consistent with this view. In addition to Justice Bransten's decision denying summary judgment, another court denied Bank of America's motion to dismiss because—at the pleading stage—there was "no record *evidence* as to the nature of Bank of America's alleged acquisition or merger with Countrywide," *Marino v. Bank of America Home Loans*, 2013 WL 715611 at *8 (D. Vt. Feb. 27, 2013). Here, there is such evidence, and it demonstrates the Trustee was reasonable in concluding successor liability was by no means a certain outcome.

c. Professor Adler's Opinion.

Professor Adler's opinion concerning the viability of Bank of America's causation defense evaluated what the Trusts would have to prove to demonstrate the defects in the representations and warranties were "material and adverse" to the "interest of Certificateholders in that Mortgage Loan." *See* PSA §2.03(c). After evaluating the two competing interpretations of "materially and adversely affects," Professor Adler concluded 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." Adler Rep. at 13.

At the time of the settlement several courts had already found that a "material and adverse effect" must entail both a breach that is material and a harmful financial effect.[24] Since then, the "material and adverse" requirement has been the subject of significant ongoing litigation brought by many monoline insurers. Justice Bransten, for example, denied MBIA's motion for summary judgment, holding that the term "material and adverse" was inherently ambiguous and therefore requiring MBIA to demonstrate adversity individually, as to each Mortgage Loan. *See MBIA v. Countrywide Home Loans, Inc.*, Index. No. 602825/08, in the Supreme Court of the State of New York, April 29, 2013, Slip Op. at 72 (Ex. 6) ("...the Court cannot find that the inaccuracies material and adversely affect MBIAs interest in the loans, given

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24 *See, e.g., Wells Fargo Bank, N.A. v. LaSalle Bank, N.A.*, No. 3:07-cv-449, slip op. at 2 (S.D. Ohio Oct. 27, 2009) ("[T]he fact that an investor might have made a different decision had he or she had different information may make that information material to the investor's decision, but it does not make the omission of that information cause a material and adverse effect on the loan. "Material information" and "material effect" are not the same thing.); *LaSalle Bank N.A.* v. *Citicorp Real Estate, Inc.*, No. 01-cv-4389, 2002 WL 181703, *3-4 (S.D.N.Y. Feb. 5, 2002) (requiring plaintiff to demonstrate that each of its alleged breaches contributed causally to a default on the loan in question, in order to satisfy the "materially and adversely affects" standard); *Lehman Bros. Holdings, Inc. v. Laureate Realty Serv., Inc.*, No. 1:04-cv- 1432, 2007 WL 2904591, *13 (S.D. Ind. Sept. 28, 2007) (the fact that an investor might have made a different decision had it had different information may make that information material, but it does not mean that the omission of that information caused a material and adverse effect).

the ambiguities identified by the Court in the relevant Agreements...Thus, the materiality of the inaccuracies is the sole issue remaining for trial as to these 360 loans, as well as the seventeen missing title report loans discussed above. Accordingly, MBIA's motion for summary judgment is denied.").

The Objectors seize on the fact that decisions in monoline cases issued after the settlement have pared back aspects of the causation defense Countrywide could have asserted against the Trusts' repurchase claims. The First Department, in *MBIA Ins. Corp. v. Countrywide*, 2013 WL 1296525 at * 2 (1st Dep't. 2013), held that performing loans could be subject to a repurchase demand. ("The clause requires only that the 'inaccuracy [underlying the repurchase request] materially and adversely affect[] the interest of' plaintiff. Thus, to the extent plaintiff can prove that a loan which continues to perform 'materially and adversely affect[ed]' its interest, it is entitled to have defendants repurchase that loan....Whether or not such proof is actually possible is irrelevant..."). Judge Rakoff, in another case, held that adversity must be evaluated only at the time the mortgage is sold to the Trusts, *see Assured Gty. Municipal Corp. v. Flagstar Bank, FSB*, 892 F.Supp.2d 596, 601-02 (S.D.N.Y. 2012), while another decision held that "adversity" does not require proof that the defect caused the loan to default, *see Syncora Guar. Inc. v. EMC Mortg. Corp.*, 874 F.Supp.2d 328, 333-39 (S.D.N.Y. 2012). Yet even as these cases have developed, no court has relieved RMBS Trusts of the pivotal requirement to prove the defect in the loan was "adverse" to the Certificateholders' interest in that Mortgage Loan. *Id.*; *see also Syncora*, 874 F.Supp.2d at 333-39; *Assured Gty.*, 892 F.Supp.2d at 601-03.

Thus, Professor Adler was not merely accurate in his observation—at the time of the settlement—that there were competing views of the "adversity" requirement, *see* Adler Report at 4 (discussing holding in *Lehman Brothers Holdings, Inc. v. Laureate Realty Svcs., Inc.*, 2007 WL

2904591 (S.D.Ind. Sept. 28, 2007), which held that adversity is demonstrated if the defect would have affected the purchaser's decision to buy the note) and 6 (discussing *Wells Fargo Bank. N.A. v. LaSalle Bank N.A.*, Case No. 3:07-cf-0049, Slip Op. at 2 (S.D. Ohio Oct. 27, 2009), which held that while information must be material to the purchasers decision, demonstrating a "material effect [is] not the same thing."), he was equally accurate in his observation that litigation of these issues was likely to prove quite difficult and uncertain:

> The few cases cited here as examples suggest that an inquiry into the consequences of a breach of a representation or warranty may require case-by-case analysis regardless of how one interprets 'material and adverse' … it is not possible to conclude with any confidence how a court would interpret a provision such as §2.03(c) of the Pooling and Servicing Agreement. And I make no such prediction.

Adler Rep. at 12. MBIA, which has litigated now for five years without obtaining the repurchase of a single mortgage loan, is a powerful testament to the prescience of Professor Adler's opinion that litigation of adversity would likely prove highly uncertain. This court has likewise noted the deep uncertainty that loan file review would ever have led to a successful or timely resolution of the Trusts' repurchase claims. *Compare* Tr. 4/12/2013 at 119-120 (rejecting suggestion that the Trustee should have reviewed individual loan files because "That's exactly what they are trying to avoid doing, [because] that will take forever. That's exactly why they settled it, because otherwise you—have you been part of those put back cases; do you know what's going on with all those litigations? Have they ended?") and Tr. 5/8/2012 at 85 ("Obviously, if we looked at all these loan files, it would take many, many years….").

d. Brian Lin's Report

The Objectors have focused the bulk of their pretrial complaints on Brian Lin's decision to rely on reported repurchase data concerning GSE repurchases and his failure to insist on a review of loan files. Neither complaint has merit.

It was more than reasonable for the Trustee to rely on the GSE data as *one* part of its settlement decision. The GSE data set was a robust set of data concerning more than 100,000 *actual* repurchases involving *analogous* loans that provided insight into the potential size and scope of the Trusts' repurchase claims. [redacted] Kravitt 627-629. [redacted]

In contrast to this, the Objectors' insistence that loan file reviews are the sole *sine qua non* for analyzing repurchase claims is ludicrous. The Court has been rightly skeptical of this claim from the outset of the case. *See* Tr. at 5/8/2012 at 69-70, 85 ("Judge Bransten's case is a different case… If we were going to look through all of these underlying … loan files, what was the point of settling this case?... Obviously, if we looked at all these loan files, it would take many, many years … ."); Tr. 6/14/2012 at 54-55 (responding to the suggestion of Walnut Place's counsel that "They put 530 trusts in one little package and submit it. There's a ton of loans they're trying to settle, thousands upon thousands of loans," the Court responded, "I understand, but the ultimate alternative is to litigate all of them forever, which, you know, is never going to happen, and it's going to be a problem, and may never be enough."); Tr. 4/12/2013 at 118-119 (responding to Mr. Loeser's question "why didn't the trustee reunderwrite loans like everybody

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25 [redacted]

else does," by observing "That's not in this kind of case, that's in a different kind of case.... That's what they're trying to avoid doing, that will take forever. That's exactly why they settled it.").

The Court was skeptical with good reason: loan file re-underwriting resolves nothing; it simply generates an *argument* about *whether* a loan breached a representation and warranty. If anything, MBIA's experience in its litigation with Bank of America is a cautionary tale about the limits of loan file reviews: though MBIA has now reviewed thousands of loan files, spanning nearly five years of litigation, it has yet to prevail on even one contested loan repurchase claim. Yes, it has identified breaches. Yes, some of them are potentially serious. And yet, after five years—and tens of millions of dollars of litigation costs and legal fees—MBIA has not recovered on even *one* loan repurchase claim. The Court asked the right question at the last hearing, "[D]o you know what's going on with all of those litigations? Have they ended?" Tr. 4/12/2013 at 119. The answer is that only one case, *Assured Guaranty*, has made it through trial and obtained an order compelling repurchase—and that case is now on appeal. All of the other representation and warranty cases, which number in the dozens, remain pending—and unresolved.

2. Other Information Known to the Trustee.

In addition to its expert reports, the Trustee had available to it the obvious benefits of settlement, in terms of reduced risks, reduced costs, and concrete assurance of recovery. The Trustee was also entitled to and did consider the potential length and expense of the litigation, including whether it could ever be resolved. This court has noted that insistence on loan-by-loan litigation could well amount to nothing more than justice denied for the Trusts. There was good reason for this concern.[26]

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[26] Assuming there are 260 court days per year (52 weeks x 5 days a week) and eight hours of court time in each day, there are only 2,080 hours per year of court time available to resolve

Separate from the practical barriers to effective litigation of the Trusts' claims, the Trustee was also entitled to—and did—consider the fact that a large and diverse group of investors favored settlement and believed it was in the best interests of the Trusts. Since they—and the thousands of certificateholders like them—hold the ultimate financial risk in these Trusts, the Trustee was certainly entitled to consider whether it was in their best interest to *reject* \$8.5 billion in cash, \$3 billion in servicing improvements and a document cure in favor of litigation that might, in the end, result *only* in a judgment against an insolvent Countrywide.

That the Objectors argue the Trustee should have pursued this course does nothing to refute the reasonableness of the Trustee's decision to prefer not one but *billions* of birds in the hand over birds (i.e. loan repurchases) that might not be there at all, in a bush (Countrywide) that might starve and die. *Compare West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, (S.D.N.Y. 1970) ("In considering the proposed compromise, it seems also to be of importance that (if approved) the substantial amounts of money are available for class members now, and not at some distant time in the future. The nature of these actions is such that a final judgment, assuming it to be favorable, could only be obtained after years of expensive litigation. It ha[s] been held proper 'to take the bird in hand instead of a prospective flock in the bush.'") *citing*

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cases of any kind in the Supreme Court of New York. At the time of the settlement, there were at least 770,000 loans held as collateral by these Trusts. The Institutional Investors concluded that *at least* 30% of the loans were eligible for repurchase; the Trustee's expert used a much lower, 14.4% defect rate. Even if one used the Trustee's calculation, it would mean that 110,880 loans would be the likely subject of repurchase litigation. At a mere thirty minutes per loan, it would take a court—working full time on nothing but repurchase claims—***26.6 years*** to process and decide all of these potential repurchase claims, without considering time for appeal. Even if the cases were spread among a number of courts, and shorter processing and longer trial days were assumed (neither of which is likely realistic), the litigation of these repurchase claims could easily drag on for more than a decade, if not longer.

Ladd v. Brickley, 158 F.2d 212, 220 (1st Cir. 1946), cert. denied 330 U.S. 819, 67 S.Ct. 675, 91 L.Ed. 1271 (1947).

VII. The Trustee Had Authority to Settle the Claims.

Finding (f) in the PFOJ asks the Court to find that the Trustee "has the authority, pursuant to the Governing Agreements and applicable law: (i) to assert, abandon, or compromise the Trust Released Claims, and (ii) to enter into the Settlement Agreement on behalf of all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts under the Governing Agreements."

The PSAs plainly authorize the Trustee both to assert the Trusts' claims, *see* PSA §§ 2.01, 2.03(c), 2.04, and 3.03, and to settle them. *LaSalle Bank, N.A. v. Nomura Asset Capital Corp.*, 180 F.Supp.2d 465, 471 (S.D.N.Y. 2001) ("the plain meaning" of a conveyance of "all right, title, and interest in the mortgages to LaSalle as Trustee . . . ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted."); *Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 784 N.Y.S.2d 513, 514 (N.Y.A.D. 1st Dep't. 2004) (under PSA, authority to sue "is committed solely to the trustee of the pooled loans").

The Trustee's power to sue is further confirmed by this Court's decision in *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863 (Sup. Ct. 2012) (*Walnut Place I*) *aff'd* 3 A.D.3d 684, 948 N.Y.S.2d 580, 581 (1st Dep't 2012), which held that certificateholders were precluded from bringing repurchase claims by the PSAs' "no-action" clause (§ 10.08); only the Trustee can bring such claims. *Id.* at *6. Furthermore, in finding an absence of "Trustee refus[al] to sue," one of several prerequisites to certificateholder suits, this Court explained that "the Trustee did, in fact, act upon plaintiffs' complaints, as demonstrated by the settlement agreement reached with the defendants and submitted to this Court" in this proceeding. *Id.* The

First Department unanimously affirmed this Court's decision. *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, 948 N.Y.S.2d 580, 581 (2012) ("The court correctly held that plaintiff certificate holders' action is barred by the 'no-action' clause in the PSAs. . . ."). There can be no doubt that the PSAs' conferral upon the Trustee of the power to sue also invests the Trustee with the authority to settle.

Despite the express terms of the PSAs and this clear law, the Objectors have made two extraordinary arguments that demonstrate the deep disconnect between the Objectors' self-interested securities litigation strategies and the best interests of the Trusts and their certificateholders. First, they argue the settlement should be rejected because the Trustee allegedly had no power to settle *any* of the claims that belonged to it. *See* Frankel Report. Next, they argue that permitting the Trustee to *enforce* the repurchase claims through litigation or settlement will somehow *impede* the recovery of the housing market. These propositions are not merely absurd on their face: if accepted, they would destroy tens of billions of dollars' worth of mortgage repurchase claims.

Professor Frankel's opinion rests on a deeply impractical premise that though the Trustee is authorized by the contract to hold mortgages and to demand their repurchase, it is powerless to enforce those remedies through litigation unless (apparently) it litigates each and every mortgage through every stage of the judicial process. *See* Frankel Rep. at 8. She makes no effort to reconcile this "millions for prosecution, not a penny for settlement" with the PSA's requirement that the Trustee act "in the best interest of Certificateholders," because she rejects the PSAs entirely.[27] In Professor Frankel's world, the Certificateholders would be left with Sisyphus for

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27 Professor Frankel, in fact, rejects the "best interests of certificateholders" standard because "it smacks of contract." *See* Frankel Rep. at 7 n.14. But that, of course, is precisely what the PSAs are: they are *contracts* and Bank of America is *not* a full-fledged fiduciary of the

their Trustee: BNYMellon would have no option but to roll litigation up the hill, unable to compromise, unable to stop, until the last case is tried, the last appeal ruled on, and the last dime has been paid to the last lawyer. The world of the PSAs is far different and far more practical. In the real world of the PSAs, all certificateholders are bound by their agreement that the Trustee can and should act on their behalf. *Walnut Place I*, 2012 WL 1138863 at *6; PSA § 10.08. In this real world, the Trustee has not only the power to sue on its claims, *LaSalle Bank,* 180 F.Supp.2d at 471; *Orix Capital Mkts., LLC*, 784 N.Y.S.2d at 514; *Walnut Place* LLC, 948 N.Y.S.2d at 580, it has the power to settle them, as well. *See* PSA §§ 2.01, 2.03(c), 2.04, and 3.03; *In re IBJ Schroder Bank & Trust Co.*, 706 N.Y.S.2d 114 (1st Dep't 2000) (finding, in an Article 77 proceeding involving a securitization trustee, that "the same provision of the trust agreement which, the parties do not dispute, gave the trustee the power to commence the underlying action … includes the power to settle the action.").

The opinion of Professor Levitin is equally breathtaking. He argues the PSAs should not be enforced by way of this settlement, because BofA's *payment* of $8.5 billion plus servicing improvements "will further undermine investor confidence in the mortgage securities market." Levitin Rep. at 52. Evidently, Professor Levitin believes *no remedy* is preferable to a multi-

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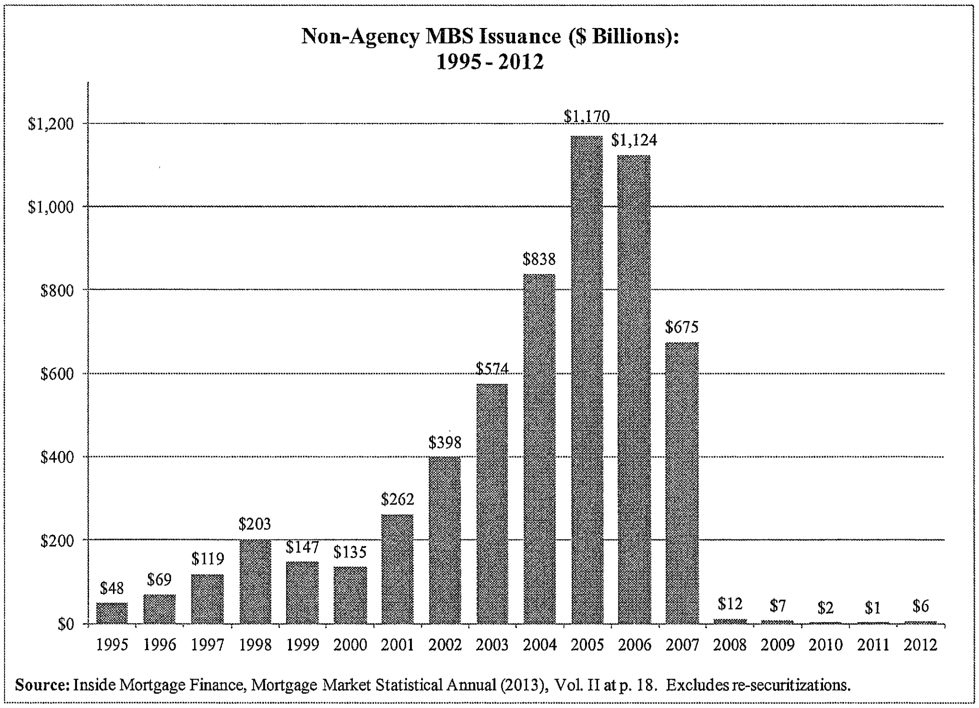
type Professor Frankel posits in her opinion. *Compare Knights of Columbus v. The Bank of New York Mellon*, Index No. 651442/2011, Slip Op. at 15, n. 6 ("This Court has already found in the related Article 77 Proceeding…that …BNYM is not a 'full fledged fiduciary.'"). Professor Frankel's rejection of the PSAs is also impossible to square with her acknowledgment that "[a] trustee's functions and powers are enumerated in a document, which constitutes the basis of the legitimacy of the trustee's actions" and "powers can be implied from express powers." Frankel Rep. at 6; Frankel Reply Rep. at 3.

billion dollar remedy, because only a complete collapse of the current PSA structures will prompt reform in the securitization market.[28]

The securitization market has, indeed, collapsed since the financial crisis. The chart below illustrates the magnitude of the decline.



But the solution to this market crisis is not—as Professor Levitin suggests—to deny innocent Certificateholders enforcement of the PSAs, or to destroy the benefits of this settlement, in the hope that Certificateholders will collectively rise up and demand the reform of a system the professor believes is broken. Levitin Rep. at 52. With all due respect to Professor Levitin, the Certificateholders *have* risen up: against extraordinary odds, a broadly diverse coalition of Certificateholders banded together to make these contracts work as they were supposed to work. The results they obtained are nothing short of spectacular: an $8.5 billion payment that is the

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28 Remarkably, Professor Levitin goes as far as to suggest that the actions of BNYMellon—the only RMBS trustee to reach a settlement of claims on behalf of certificateholders (much less the largest private settlement in American history)—are akin to that of "do-nothing, pocket trustees" during the Great Depression. Levitin Rep. at 55.

largest private litigation settlement in history and billions in servicing reforms that could not have been obtained without the settlement. So extraordinary is this result that it is now supported by over 95% of *all* Certificateholders in the Trusts.

Professor Levitin's extreme view that the cause of "market reform" will be served by rejecting this settlement is irrelevant to this Article 77 Proceeding. If he is even permitted to testify at trial, his position will be shown to be lawless. We make here the obvious point: The Trustee is not a "market reformer." The Court is not, either. The Trustee is a contract party obligated to act in the best interests of certificateholders in these trusts. The Court is required to enforce those contracts, as written. These contracts cannot—and they certainly should not—be abrogated for the sake of "market reform."

VIII. Conclusion

For all the foregoing reasons, the Institutional Investors respectfully request that the Court approve the Settlement.

Dated: New York, New York
May 3, 2013

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