SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., AND DEUTSCHE BANK NATIONAL TRUST COMPANY (as trustees under various Pooling and Servicing Agreements and indenture trustees under various Indentures), Petitioners, for an order, pursuant to CPLR § 7701, seeking judicial instruction.	Index No. 652382/2014

THE INSTITUTIONAL INVESTORS'
NOTICE OF SUPPLEMENTAL AUTHORITY

In further support of their Memorandum of Law on the Scope of Discovery (Doc. No. 230), the Institutional Investors file this Notice of Supplemental Authority to bring the Court's attention to the First Department's decision today in *In re The Bank of New York Mellon, etc., et al.* (No. 651786-11), attached hereto as Exhibit "A." In its decision, the court held that BNY Mellon "properly exercised its discretion" in settling claims on behalf of 530 RMBS trusts, including certain loan modification claims that had been carved out of the Supreme Court's order and judgment otherwise approving BNY Mellon's entry into the settlement. Slip Op. at 4. The decision has important implications for the resolution of this Article 77 Proceeding, in which the Trustees, aided by highly skilled counsel and advised by eminent experts, concluded that settlement was in the best interests of the Accepting Trusts and Loan Groups.

The decision includes a lengthy discussion of the "nature and extent of the scrutiny the court may properly apply to a trustee's settlement of claims on the part of the originator and

servicer of residential mortgage backed securities," and makes two holdings particularly relevant to the standard of review and scope of discovery in this Article 77 proceeding. First, the court states plainly that the ultimate issue for decision is: "whether the trustee's discretionary power was exercised reasonably and in good faith. It is not the task of the court to decide whether we agree with the Trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion." Slip Op. at 9. Second, the court emphasizes that "'if a trustee has selected trust counsel prudently and in good faith, and has relied on *plausible* advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence' .... *a party challenging* the decisions of a trustee who followed the advice of a highly-regarded specialist in the relevant area of law *can prevail only upon a showing that*, based on the particular circumstances, *the reliance on such counsel's assessment was unreasonable and in bad faith*. Court approval of the settlement does not require that the court agree with counsel's judgment or assessment; all that is required is a determination that it was reasonable for the Trustee to rely on counsel's expert judgment." Slip Op. at 9-10 (emphasis added) (quoting RESTATEMENT (THIRD) OF TRUSTS § 7, Comment b[2]).

Finally, the court rejects entirely the claim—made here by the Objectors—that the court must assess the fairness of the settlement itself: "In rejecting the portion of the settlement that released the loan modification repurchase claims, and in finding that the Trustee lacked the necessary basis for its assessment that the loan modification claims were too weak to warrant pursuing in negotiating the global settlement, Supreme Court disregarded the standard of deference due to a trustee's exercise of discretionary judgment. Indeed, in doing so the court was, in effect, *improperly imposing a stricter and far less deferential standard, one that allows a court to micromanage and second guess the reasoned, and reasonable, decisions of a Trustee.*

We therefore find that the Trustee did not abuse its discretion in deciding to release the claims based on the failure to repurchase the modified mortgages, and we approve the settlement in its entirety." Slip Op. at 13 (emphasis added).

Dated: New York, New York
March 5, 2015

WARNER PARTNERS, P.C.

By: 

Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS LLP
Kathy D. Patrick (*pro hac vice*)
Robert J. Madden (*pro hac vice*)
David Sheeren (*pro hac vice*)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for Intervenor-Petitioners, the Institutional Investors