WARNER PARTNERS, P.C.
ATTORNEYS AT LAW
950 THIRD AVENUE
NEW YORK, NEW YORK 10022

TELEPHONE
(212) 593-8000

TELECOPIER
(212) 593-9058

December 3, 2013

Hon. Barbara R. Kapnick
Justice
Supreme Court of the State of New York
60 Centre Street, Courtroom 208
New York, New York 10007

Re: Application of Bank of New York Mellon; Index No. 651786/11

Dear Justice Kapnick:

I write in response to the November 27, 2013 letter filed with the Court by Objector Triaxx (Doc. No. 1030). In its letter, Triaxx claims that: (i) the Institutional Investors raised the Second Circuit's recent *Wells Fargo* decision for the first time in closing argument;[1] (ii) the decision is entitled to no weight because it is not binding precedent; and (iii) there is no support for the proposition that the Trustee may conform the PSAs to the Prospectus Supplements if there is a discrepancy between the two. As discussed below, each of these assertions is incorrect.

First, Triaxx is wrong when it claims that the *Wells Fargo* decision – explaining that a RMBS PSA should be interpreted in accordance with the relevant Prospectus Supplement – was cited for the first time in closing arguments. Petitioners cited *Wells Fargo* in their brief responding to Triaxx's objection for the proposition that "[u]nder New York law, RMBS PSAs are interpreted in light of the relevant prospectus supplement." *See* Doc. No. 1023 at 26 n.14.

Second, Triaxx is wrong when it claims that, because the *Wells Fargo* decision is an unpublished opinion, it is entitled to no weight. The Institutional Investors offered the *Wells Fargo* decision for the Court's consideration as an example of a respected court, experienced in interpreting and applying New York law, explaining that RMBS PSAs controlled by New York law should be interpreted in accordance with Prospectus Supplements, under the well established rule that contracts are to be interpreted by considering all writings forming a single transaction.[2] While this decision is not binding precedent (and was never offered as such), it is persuasive authority on this issue, which the Court can appropriately consider.[3]

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[1] *Wells Fargo Bank, N.A. v. Fin. Sec. Assur., Inc.*, 2012 WL 6028908 (2d Cir. 2012).

[2] "Under New York law, all writings forming part of a single transaction are to be read together." *This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998), *cited in Wells Fargo*, 2012 WL 6028908, at *1.

[3] *See, e.g., Brault v. Social Sec. Admin., Com'r*, 683 F.3d 443, 450 n.5 (2d Cir. 2012) ("We are, of course, permitted to consider summary orders for their persuasive value, and often draw

Finally, Triaxx is wrong when it claims that "the Institutional Investors have cited no valid authority for the proposition that the Trustee may 'conform' the terms of a PSA to a Prospectus Supplement without investor consent." *See* Triaxx Letter at 1. Section 10.01 of the PSAs unambiguously contradicts Triaxx on this point: "This Agreement may be amended from time to time by the … Trustee without the consent of any of the Certificateholders … to conform this Agreement to the Prospectus and Prospectus Supplement provided to investors in connection with the initial offering of the Certificates."[4] *See, e.g.* R0013-117 (emphasis added).

Thank you for your continued attention to this matter.

Respectfully,

Kenneth E. Warner

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cc: All Counsel of Record (via e-filing)

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guidance from them in later cases."); *Wilberding v. Center Capital Group, LLC*, No. 6500046/12, 2013 WL 5912140, at*7-8 (N.Y. Sup. Ct., N.Y. Cnty. Oct. 30, 2013) (Kapnick, J.) (citing unpublished Second Circuit opinions as persuasive authority).

[4]Although it is permitted, there is no need for the Trustee to "conform" the PSAs at issue here to the Prospectus Supplements on the issue of loan modifications. As explained in the briefing and in closing argument, both the PSA and the Prospectus Supplements make clear that only "in lieu of refinancing" modifications, and not "loss mitigation" modifications, are subject to a purchase requirement. *See* Petitioner's Reply Brief in Support of Entry of Proposed Final Order and Judgment (Doc. No. 1023) at 23-27; Tr. (Madden Rebuttal) at 5875:6–5890:26.