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

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), *et al.* 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: Hon. Saliann Scarpulla.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO REARGUE PURSUANT TO CPLR § 2221(d)

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Respondent American International Group, Inc.[1] ("AIG" or "Respondents") respectfully submits this memorandum of law in support of its Motion for Leave to Reargue pursuant to CPLR § 2221(d) and requests that, on reargument, the Court vacate the January 31, 2014 summary judgment Decision & Order (Doc. No. 1036) (the "Order") (Attached as Ex. A to Zauderer Aff., filed herewith) to the extent it approved the Settlement Agreement, and proceed to trial in this matter. Reargument is warranted because, in granting summary judgment without providing any explanation or analysis, the Court (1) overlooked numerous disputed issues of fact material to the standard of care that The Bank of New York Mellon ("BNYM" or "Trustee") owed to AIG and other certificateholders and whether BNYM violated that standard by entering into the Settlement Agreement; (2) misapprehended New York law by applying an unduly narrow standard of review to the Trustee's actions; (3) misapprehended New York law by wrongly placing the burden on Respondents; (4) overlooked the requirement in New York law that judicial decisions be supported by analysis or explanation; and (5) overlooked unresolved issues that presently preclude entry of final judgment.

INTRODUCTION AND BACKGROUND

This Article 77 proceeding concerns the efforts of BNYM, serving as Trustee for 530 mortgage-backed securitization trusts, to seek judicial blessing of the many conflicted and self-interested decisions it made when negotiating and entering into a proposed settlement behind closed doors with Bank of America (which is ultimately responsible for payment of any

[1] This Motion is being made on behalf of all of the Respondent American International Group, Inc. entities, including American International Group, Inc., American General Assurance Company, American General Life and Accident Insurance Company, American General Life Insurance Company, American General Life Insurance Company of Delaware, American Home Assurance Company, American International Life Assurance Company of New York, Chartis Property Casualty Company, Chartis Select Insurance Company, Commerce and Industry Insurance Company, First SunAmerica Life Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, New Hampshire Insurance Company, SunAmerica Annuity and Life Assurance Company, SunAmerica Life Insurance Company, The Insurance Company of The State of Pennsylvania, The United States Life Insurance Company in The City of New York, The Variable Annuity Life Insurance Company, and Western National Life Insurance Company.

settlement amount) and a select group of certificateholders (the "Institutional Investors" and, with BNYM, "Petitioners"). The Trustee, in concert with Bank of America and the Institutional Investors, not only took many actions to keep the other certificateholders, such as AIG, out of the settlement process, but also engaged in a settlement process so conflicted that it allowed Bank of America to pay the lowest amount possible to settle these claims—$8.5 billion on losses that have been valued at over $100 billion and that the Institutional Investors at one time thought should be settled for more than $30 billion. Most notably, the Trustee hired counsel that was contractually prevented from litigating against Bank of America, entered into a Forbearance Agreement that prevented Bank of America from being sued, and took actions to avoid the declaration of an Event of Default under the Governing Agreements in order to ensure that only the conflicted and self-serving Trustee (and not other certificateholders) could bring an action to recover for the loan repurchase, successor liability, documentation, servicing, and loan modification claims.[2] As a condition for the Forbearance Agreement, moreover, the Trustee extracted indemnification from Bank of America against claims that could have arisen from the Trustee's failure to give notice to absent certificateholders of its forbearance on the Event of Default. And Bank of America likewise assured the Institutional Investors that they would not be liable for any legal fees and costs incurred by the Trustee and later agreed to pay the Institutional Investors' counsel $85 million.

[2] An Event of Default occurs under the Governing Agreements when the Master Servicer (Bank of America) receives notice of its own failures to perform its obligations under those agreements. When an Event of Default occurs, certificateholders receive additional protections: the Trustee's duties rise to those of a prudent person; certificateholders receive notice of the Event of Default; and certificateholders can demand that the Trustee take action against the Master Servicer, and if the Trustee fails to do so, can sue the Master Servicer themselves. In this case, the Institutional Investors provided notice of the Master Servicer's failure to perform on October 18, 2010, but they contend that an unprecedented "Forbearance Agreement" prevented an Event of Default from occurring. R-13 §§ 7.03(b), 8.01, and 10.08; R-17; R-46 (All citations to R-___ and PTX ___ are references to hearing exhibits and are attached as exhibits to the Zauderer Aff., filed herewith).

Over thirty-six days last year, the Court held what it characterized as a hearing pursuant to CPLR § 409(a). *See* Order at 22 n.12 (stating that "hearing was held in accordance with CPLR § 409(a)"); Ex. B to Zauderer Aff. at 5186:23-5187:12 ("[T]his really isn't a trial. It's really a hearing, an evidentiary hearing on the - - on whether or not I should approve the settlement."). The Court was asked to determine (1) whether BNYM acted in good faith, in accordance with its duties, reasonably, and within its discretion, during its negotiation and entry into the proposed settlement; and (2) whether the proposed settlement is fair and reasonable. The proof presented during the hearing revealed at least a triable issue as to whether, in pursuing settlement, BNYM conducted a sufficient factual and legal investigation, negotiated the settlement at arm's length, and evaluated the terms, benefits, and consequences of the settlement and the claims being released, as well as a triable issue regarding the credibility and reliability of witnesses and experts upon which the Trustee relied throughout the settlement process.

The evidence presented during the hearing also revealed at least a triable issue as to whether the *outcome* of the backroom negotiations was unreasonable—a standard the Court erroneously failed to consider or apply. The settlement amount, $8.5 billion, is but a fraction of the $32-52 billion repurchase liability estimated by the Institutional Investors. And, contrary to industry standards, the breach rate that serves as the predicate for the $8.5 billion amount is not supported by any analysis of the actual loan files in the trusts. BNYM relied on Bank of America's unverified assumptions to determine the number, and then sought reports from a group of purported advisors to rubber stamp BNYM's decision. BNYM gave these Bank of America-funded advisors limiting assumptions and asked them to evaluate the reasonableness of Bank of America's arguments—not to determine how BNYM could maximize recovery for its

beneficiaries or to verify Bank of America's self-serving statements—undercutting the reasonableness of the opinions and BNYM's reliance on them.

Following the hearing, the Court issued its Order, purporting to apply a summary judgment standard pursuant to CPLR § 409(b), Order at 25, but providing no analysis or explanation of its decision to grant summary judgment to Petitioners. While the Order recites some of the parties' positions, the Court never explains why it largely accepts Petitioners' arguments over Respondents' arguments, instead simply stating that, as to the bulk of the Settlement Agreement, BNYM "did not abuse its discretion … and did not act in bad faith or outside the bounds of reasonableness." Order at 52-53. The Order also overlooks many issues of material fact concerning the Trustee's conduct and the substantive fairness of the settlement.

The Court, however, did conclude that the Trustee abused its discretion in settling the loan modification claims and acted "unreasonably or beyond the bounds of reasonable judgment" "without investigating the[] potential worth or strength" of those claims. *Id*. at 53.[3] Yet, the Court narrowly cabined that abuse of discretion, never considering whether it affected the deference owed to the Trustee with respect to other portions of the Settlement Agreement, which had been negotiated as a unitary settlement, or the burden of proof. Nor, contrary to established New York law, did the Court consider the substantive reasonableness of the settlement amount. Reargument under CPLR § 2221(d) is therefore warranted so that the case may proceed to trial.[4]

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[3] The Court's conclusion rested on the undisputed fact that the Trustee completely failed to assess the worth and strength of the loan modification claims. In so ruling, the Court recited a number of arguments that had been made to demonstrate the Trustee's abuse of discretion: (1) the Pooling and Servicing Agreements (the "PSAs") in 49 of the Covered Trusts require immediate repurchase of modified mortgage loans regardless of whether the modifications were "in lieu of refinance" or "loss mitigation" modifications; (2) the PSAs in approximately 392 of the Covered Trusts require the repurchase of loans modified in lieu of refinance; and (3) only the PSAs in 62 of the Covered Trusts allow the Master Servicer to modify mortgage loans without repurchasing them.

[4] While it is AIG's position that a jury should resolve these disputed issues of fact, AIG recognizes that the Court previously denied its demand for a jury trial (Doc. No. 826). AIG filed an immediate appeal of that order, but in light of the timing of the Court's January 31, 2014 decision, AIG has filed a motion to withdraw that interlocutory

LEGAL STANDARD

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR § 2221(d). Reargument "is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision … even in situations where the criteria for granting a reconsideration motion are not technically met." *In re Wellington Trusts*, 41 Misc. 3d 1221(A), 2013 WL 5813670, at *3 (N.Y. Sur. 2013) (internal citations omitted). Where, as here, a court grants summary judgment despite the existence of disputed issues of material fact, reargument and trial on those issues is warranted. *See Unterman v. Kaufman*, 57 A.D.2d 745 (1st Dep't 1977) (upholding trial court's granting of CPLR 2221 motion to direct a trial in a special proceeding where factual issues were raised relating to the petitioner's alleged negligence and misfeasance); *cf. Zhang v. Advanced Med. Rehab. of N.Y.*, 1 A.D.3d 568, 568 (2d Dep't 2003) (trial court "providently exercised its discretion" in granting leave to reargue where, upon reargument, motion for summary judgment was denied because triable issues of fact existed); *Picarello v. Zilberman*, 309 A.D.2d 912, 912 (2d Dep't 2003) (affirming trial court's granting of reargument and holding that trial court "properly concluded that issues of fact existed which preclude[d] summary judgment").

ARGUMENT

I. REARGUMENT IS WARRANTED BECAUSE NUMEROUS DISPUTED ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT UNDER CPLR § 409(B)

CPLR § 409 authorizes summary adjudication in a special proceeding *only* "to the extent that no triable issues of fact are raised." Where triable issues of fact exist, they "*shall* be tried

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appeal without prejudice and thereby preserve its right to appeal the jury trial issue following entry of final judgment.

forthwith and the court *shall* make a final determination thereon." CPLR § 410 (emphasis added). This "shall" language is mandatory, not permissive. *E.g.*, *Cohen v. Romanoff*, 27 Misc. 3d 1208(A), 2010 WL 1444594, at *4 (N.Y. Sup. Kings Cnty. Apr. 13, 2010).

A. Even Accepting The Court's Deferential Standard Of Review, The Court Overlooked Disputed Issues Of Fact Material To Whether The Trustee Abused Its Discretion

In its Order, the Court acknowledged that the Trustee was required to exercise its discretion "with absolute singleness of purpose." Order at 26. Indeed, it is black-letter law that "an abuse of discretion occurs when a trustee, even in good faith, exercises a power in a manner that is inconsistent with the duty of loyalty or the duty of impartiality." RESTATEMENT (3D) TRUSTS § 87 cmt. c (internal citations omitted); *accord In re Stillman*, 107 Misc. 2d 102, 110-11 (Sur. Ct. Oct. 28, 1980). While AIG respectfully suggests that the Court's standard was unduly narrow (*see infra*, Part I.B.1), at the very least the Court should not have granted summary judgment where there existed factual disputes bearing directly on the determinations that it was making. *See* Order at 27-33, 52-53.

1. The Trustee's Decision To Hire Conflicted Counsel To Negotiate Against Its Own "Good Client" Without Hiring Separate Counsel For The Trusts Or Certificateholders

One critical factual dispute that the Court noted, but ultimately overlooked in granting summary judgment, was whether BNYM's decision to hire Mayer Brown as its counsel without hiring separate counsel for the Covered Trusts or the certificateholders created a conflict of interest or was otherwise unreasonable *See* Order at 27-30. Respondents presented evidence that, at the time BNYM hired Mayer Brown, Mayer Brown separately represented Bank of America (plus 10 or 12 of the Institutional Investors), had to obtain a conflict waiver from Bank of America before representing BNYM, and could not zealously represent BNYM because the waiver Mayer Brown received prevented the firm from pursuing litigation against Bank of

America. Ex. B at 1561:8-1562:5, 1573:19-1574:26, 1575:2-24, 1582:19-1583:25 (Kravitt); R-724; R-725; R-1072. Respondents also presented evidence that BNYM hired Mayer Brown to represent *BNYM* "full stop," not to represent the interests of certificateholders, Ex. B at 1655:17-19 (Kravitt); 2465:10-15 (Bailey), and that Mayer Brown understood its job was to protect *BNYM* from liability, including lawsuits by certificateholders to whom it owed fiduciary duties. *Id.* at 1654:3-15, 1675:26-1676:14, 1676:26-1677:4, 1680:18-24 (Kravitt). And other evidence revealed that certificateholders outside the Gibbs and Bruns Institutional Investor group (*see* Order at 16) were unrepresented during settlement negotiations. Ex. B at 1655:20-1656:5 (Kravitt).

Petitioners offered contrary evidence in an effort to establish that BNYM did not violate its duties to certificateholders by hiring Mayer Brown, including that Mayer Brown treated Bank of America no differently than "the Bank of Mars." Ex. B at 1647:8-9 (Kravitt); 2404:3-11 (Bailey). Petitioners further contended that the PSAs do not themselves contemplate a trustee having to hire separate counsel for certificateholders, and the hiring of separate counsel was not part of industry practice. *Id.* at 2609:4-11 (Landau).

While the Order states that Mayer Brown had not "violated any duties under the New York Rules of Professional Conduct" (Order at 28), the Court provided no explanation of how it evaluated the parties' conflicting evidence about Mayer Brown's ability to zealously represent BNYM and certificateholders' interests in settlement negotiations. Since there were numerous disputed facts material to whether Mayer Brown labored under a conflict and whether BNYM's selection of counsel was unreasonable, the Court should not have granted summary judgment.

2. The Trustee's Entry Into The Forbearance Agreement

Another key disputed issue of fact the Court noted, but ultimately overlooked in granting summary judgment, was whether BNYM's decision to enter into the Forbearance Agreement

was conflicted and unreasonable. *See* Order at 29-30. Specifically, Respondents presented evidence showing that BNYM agreed to the Forbearance Agreement to avoid giving certificateholders notice of the settlement negotiations and to avoid being subject to heightened duties to certificateholders. Ex. B at 1504:4-7, 1683:3-10 (Kravitt); 4609:10-14 (Lundberg); 4988:22-4989:12 (McCarthy). Petitioners, on the other hand, presented evidence they contended showed that BNYM entered the Forbearance Agreement to avoid litigation over whether an Event of Default occurred, which would have delayed any prospect of the settlement. Ex. B at 1333:17-24, 1335:22-1336:7 (Kravitt); *see also* Doc. No. 1023 at 8. Petitioners also presented evidence purporting to show that BNYM's action did not harm certificateholders, since any group that met the PSAs' requirements could have declared its own Event of Default and triggered the subsequent remedies. Doc. No. 1023 at 9. Again, however, the Court did not grapple with the parties' facially inconsistent evidence, and instead only repeated the parties' arguments without any analysis or explanation. Order at 29-30

The Court also referenced, but engaged in no discussion about, whether BNYM's entry into the Forbearance Agreement deprived certificateholders of certain contractual rights. Order at 29. Respondents presented evidence that, absent the Forbearance Agreement, the Event of Default would have provided benefits to Certificateholders under the PSAs, including (1) imposing a higher standard of care on the Trustee, (2) requiring BNYM to provide notice of the Event of Default to all certificateholders, and (3) requiring BNYM to determine whether to replace the Master Servicer. Ex. B at 1335:17-1336:15, 1504:4-7, 1683:3-10 (Kravitt); 4609:10-14 (Lundberg); Doc. No. 953 at 36. Furthermore, Respondents presented evidence that if the Trustee had failed to cure the Event of Default, then any group of certificateholders could sue the Master Servicer (a Bank of America entity) directly under the PSAs. *See* R-13 §§ 7.03(b), 8.01,

10.08; Doc. No. 953 at 36. The Order's recitation of some of these arguments is untethered to, and inconsistent with, its subsequent conclusion that the Trustee did not abuse its discretion.

In addition, the Court overlooked numerous other key disputed issues of fact relating to BNYM's efforts to avoid an Event of Default. Because the Trustee's duties increase after an Event of Default, and certificateholders receive additional protections and benefits, Respondents have maintained that BNYM's efforts to avoid an Event of Default were self-interested and to the detriment of certificateholders. The overlooked, disputed facts include whether an Event of Default was triggered, occurred, or was cured by BNYM's entry into the Forbearance Agreement (*see* R-1458 at 020; Ex. B at 4991:26-4992:8 (McCarthy)); whether BNYM had the power to enter into the Forbearance Agreement (Ex. B at 1570:2-11 (Kravitt)); whether BNYM acted in its own self-interest when it "worked hard to AVOID" an Event of Default (*see* R-1444 at 001; R-1445 at 001; Ex. B at 1505:2-11 (Kravitt)); and, ultimately, whether BNYM breached its duties to certificateholders by failing to give notice to Certificateholders of an alleged Event of Default.

Both individually and cumulatively, the Trustee's self-interested and conflicted decisions significantly restricted the action that the Trustee (and certificateholders) could take to maximize the settlement amount in the interests of all certificateholders and doomed the settlement to an artificially low amount. Yet the Order provides no explanation or analysis for the Court's apparent conclusion that this evidence did not present a triable issue of fact. The Court should not have granted summary judgment given the existence of these key disputed facts.

3. The Trustee's Receipt Of Indemnity In Exchange For Not Giving Notice Of The Forbearance Agreement

The Court also overlooked in granting summary judgment factual disputes regarding the meaning, scope, and implications of a December 2010 indemnity agreement and June 2011 side

letter between BNYM and Bank of America. Again, the Order merely recites the parties' arguments without explaining why there are no material issues of fact. Order at 31-32. Specifically, Respondents argued that BNYM acted in its own self-interest by agreeing with Bank of America not to give certificateholders notice of the negotiations and Forbearance Agreement based, at least in part, on Bank of America's agreement to provide BNYM with an indemnity. R-53. Although the Order states that "the December Indemnity Agreement did not raise a 'colorable claim of conflict or self-dealing,'" Order at 32, the Court overlooked the factual dispute as to whether the Trustee's desire for indemnity influenced its decision to forego notice, Order at 31, or whether the indemnity granted BNYM greater rights than it was entitled under the PSAs, *see, e.g.*, Doc. No. 953 at 16-18; Ex. B at 1637:5-21 (Kravitt) (without indemnity, BNYM had no assurance that Bank of America would pay for its settlement activities); *id.* at 1776:7-19 (indemnity agreement provided comfort and benefit to BNYM).

The Court also overlooked disputed issues of fact related to the June 2011 side letter—another indemnity agreement between BNYM and Bank of America that Respondents argued created a conflict of interest for the Trustee. Respondents presented evidence that the letter significantly expanded BNYM's indemnity rights by containing a new guaranty from Bank of America to cover the original indemnity. Doc. No. 953 at 17. Petitioners responded that the June 2011 side letter merely confirmed the pre-existing December Indemnity Agreement, which benefited certificateholders. *See, e.g.*, Ex. B at 1370:15-23 (Kravitt) (indemnity agreement was a "confirmation" of the pre-existing agreement in the PSAs); 2556:17-19 (Landau) (indemnity agreement benefits certificateholders). The Court should not have granted summary judgment given these disputed issues of facts, and it is impossible to discern from the Order why the Court ruled otherwise.

4. The Trustee's Agreement To The Further Assurances Clause

The Court also overlooked the disputed issue whether BNYM breached its duties to certificateholders when it agreed to the Further Assurances clause in the Settlement Agreement. *See* Order at 32-33. The Court did little more than cite this clause, emphasizing the following language: "in the absence of an intentional violation of a representation or warranty contained herein, [the Parties to the Settlement Agreement agree] to perform these obligations even if they discover facts that are additional to, inconsistent with, or different from those which they know or believe to be true regarding the Covered Trusts." *Id*. at 33. Yet, Respondents presented evidence that, by agreeing to the Further Assurances clause, BNYM placed Bank of America's interests ahead of certificateholders' interests because it locked BNYM into the settlement regardless of any information that might subsequently come to light. Ex. B at 1548:7-14 (Kravitt). Respondents also presented evidence that the Further Assurances clause "chang[ed] [BNYM's] duties" and "is more limiting than a typical such clause." *Id.* at 1535:6-11; 2415:22-2416:11 (Bailey).[5] Petitioners countered by seeking to show that, rather than creating a conflict, the Further Assurances clause benefited the certificateholders by locking Bank of America into the settlement and that no settlement would have been possible without such a clause. Ex. B at 1537:26-1538:14, 1554:14-26 (Kravitt); 3538:3-3539:18 (Fischel). The Order does not analyze or evaluate these evidentiary disputes, and the Court should not have granted summary judgment on this record.

[5] Commentators have expressed concern that were the Court to bless this type of behavior, "the standard for acceptable behavior by a trustee on behalf of investors will be low indeed" and that any such ruling "will undoubtedly be cited as a precedent for other similar mortgage matters waiting to be heard." Gretchen Morgenson, *Who Has Your Back? Hard to Tell*, N.Y. TIMES, Nov. 16, 2013 (Ex. C).

5. The Trustee's Delegation Of Settlement Negotiations To The Institutional Investors

The Court also overlooked the disputed facts concerning whether the Trustee improperly delegated the settlement negotiations to the Institutional Investors. Respondents relied on testimony that BNYM allowed the Institutional Investors to negotiate the settlement, even for the trusts in which the Institutional Investors did not have 25% of the voting rights, and that BNYM representatives were "more observers than participators." Ex. B at 1496:13-19 (Kravitt); R-4142 at 17:14-18:5, 260:17-23 (Bostrom Dep.). Respondents also noted that *no* BNYM representative was present when the $8.5 billion settlement amount was negotiated. Ex. B at 1848:15-1851:19 (Kravitt). By contrast, Petitioners asserted that BNYM "actively participated in all aspects of the lengthy settlement discussions and often took the lead." Doc. No. 942 (citing Tr. 318:21-25, 411:6-412:3 (Smith); 809:22-26 (Laughlin); 1388:12-1390:19, 1399:9-1400:25, 1421:3-9 (Kravitt); 1862; 3173:2-15 (Stanley) (excerpts contained within Ex. B). The Order cites the parties' arguments (Order at 18 and 37), but does not evaluate these disputed factual issues; summary judgment was premature since the parties' evidence regarding settlement negotiations is almost entirely at odds.

6. The Trust Committee's Cursory Evaluation Of The Settlement

The Court also overlooked other disputes concerning the Trustee's evaluation of the proposed settlement. Most notably, the nature and purpose of the Trustee's "final check" on the process, the Trust Committee, were in significant dispute during the hearing. Respondents contended that the Trust Committee was a rubber stamp, relying on testimony that the Trust Committee met for *less than an hour*, the Trust Committee *always* voted to approve the matters that came before it, and the Committee *failed* to discuss numerous fundamental issues related to the settlement. Doc. No. 953 at 31. Petitioners responded that this limited review was consistent

with the Trustee's duties, as the Committee only needed to act as a "management check" rather than a "check on detail." Ex. B at 2660:23-2663:24 (Landau); 3104:16-3105:9 (Stanley).[6] Again, the Order does not seek to explain why summary judgment was appropriate in the face of these disputed issues of fact and credibility.

B. The Court Overlooked Additional Issues Of Fact Material To The Reasonableness Of The Settlement Agreement

1. The Court Was Required To Review The Reasonableness Of The Settlement Agreement, Not Merely Whether The Trustee Abused Its Discretion In Entering Into Settlement

In addition to reviewing the Trustee's conduct for abuse of discretion, the Court should have considered whether there were triable issues of fact material to the reasonableness of the proposed settlement agreement itself. Specifically, where, as here, a proposed settlement seeks to bind parties that were unrepresented during settlement negotiations, courts must independently determine whether the settlement is "fair, reasonable, and adequate." *See e.g.*, *Goldsholl v. Shapiro*, 417 F. Supp. 1291, 1295-96 (S.D.N.Y. 1976) (collecting cases); *Geltzer v. Andersen Worldwide, S.C.*, No. 05 Civ. 3339 (GEL), 2007 WL 273526, at *1 (S.D.N.Y. Jan. 30, 2007). The Court overlooked these authorities despite the uncontroverted evidence that BNYM did not represent the certificateholders' interests during the closed-door settlement negotiations and that only those certificateholders in the Institutional Investor group were represented by counsel during those negotiations. *See, e.g.*, Ex. B at 1655:17-1656:5 (Kravitt). The Court should apply this standard on reargument and determine whether the settlement is substantively reasonable.

[6] There is also conflicting testimony *among the settlement proponents* as to whether the Trust Committee reviewed one of the expert reports when approving the settlement. BNYM's lead in-house counsel testified that the Trust Committee reviewed a draft of Brian Lin's servicing report, Ex. B at 2210:3-2211:22 (Bailey), while Brian Lin himself testified that he never provided BNYM with a draft, *id.* at 3808:17-20; 3812:18-3813:9 (Lin).

2. There Are Several Disputed Issues Of Fact Material To The Reasonableness Of The Settlement Terms And Preceding Investigation

Had the Court applied the correct standard, it could not have resolved this proceeding on summary judgment because there are disputed issues of fact concerning whether the Trustee failed to conduct an adequate investigation into the trusts' losses that are at issue in claims released by the Settlement Agreement; whether the Trustee sought to maximize recovery for its beneficiaries; and whether the settlement itself fails to compensate certificateholders adequately for their losses. Those disputed issues are discussed below.

(a) The Trustee's Use Of The GSE Experience As A Proxy For Loan File Review

In defending the reasonableness of the settlement amount, the Trustee has relied heavily on the report of its expert, Brian Lin, which "found that a settlement amount of approximately $8.8 to $11 billion was reasonable without applying any adjustments for litigation risk." Order at 37. That conclusion was based on several limiting assumptions and data provided by Bank of America that reflected the repurchase of Countrywide loans from Government-Sponsored Enterprises (the "GSEs"), rather than distinct private label securitization information. *Id*. at 37.

The Court acknowledged that "the GSE repurchase experience was central to the negotiations," Order at 38, and identified several disputed issues of fact concerning the GSE experience,[7] but in granting summary judgment overlooked disputed facts concerning whether the GSE repurchase experience was an adequate proxy for loan file review. *Id.* at 36-43. The Court also overlooked disputed facts concerning whether the settlement amount was or could be

[7] These disputed issues included whether the GSE repurchase data was applicable to the loans in the Covered Trusts. While "Petitioners argue[d] that … the GSE repurchase rate … was a reasonable estimate of the defect rate in the Covered Trusts," Order at 38, the "Respondents argue[d] that the GSE repurchase data [was] completely inapplicable to the Covered Trusts," *id.* at 39, and "that the adjustments made to the data to account for the differences between GSE and private label loans were not adequate because they were based on assumptions and judgmental quantifications," *id.* at 40 (citations omitted).

reasonable without a loan file review, even though the Court identified some of the competing factual arguments on that issue as well. *See id.* at 41-42 (noting Respondents presented evidence that "the Trustee should have obtained loan files and conducted a loan file review, which would have been at no cost to it," while Trustee presented evidence that it "decided to forego loan file review because it was too uncertain and subjective"). The Order's recitation of these arguments is wholly detached from its later conclusion approving much of the settlement. Both of these disputed issues are critical to assessing the substantive reasonableness of the settlement and should be resolved in further proceedings.

(b) The Trustee's Reliance On The Brian Lin Report To Support The Settlement Amount

The Court also acknowledged Respondents' arguments concerning the "flawed methodologies" of the Trustee's expert, Brian Lin, as well as the Petitioners' arguments to the contrary, Order at 42-43, but in granting summary judgment overlooked disputed facts about whether Mr. Lin's methodology was indeed flawed or whether his metrics for determining repurchase liability were proper. Specifically, in its silence, the Court overlooked disputed issues concerning: (1) whether Mr. Lin's failure to capture losses on non-defaulted loans rendered his methodology unreliable; (2) whether applying Bank of America's 36% breach rate instead of the Institutional Investors' higher 50%-65% breach rate rendered Mr. Lin's methodology unreliable; and (3) whether application of a 40% success rate rendered Mr. Lin's methodology unreliable. *See id.* at 42. It is again unclear from the Order's recitation of a few arguments and omission of so many other disputed facts how the Court reached its conclusion.

The Court also overlooked competing evidence as to each variable that would inform a reasonable settlement amount. For example, the evidence presented at the hearing showed that there was a *$40 billion variance* in the cumulative loss estimates among *the Petitioners' own*

experts and analysts. Ex. B at 2825:18-26 (Burnaman). Calculating the cumulative losses was the Trustee's first step in calculating a "reasonable" settlement amount. *Id.* Overlooking that threshold calculation renders the outcome unreliable. *See id*. 2826:2-9 ("Q: So the $40 billion swing matters very much to the bottom line, what would be the reasonable repurchase amount, right?" A: "Yes."). This factual uncertainty likewise exists with respect to each remaining variable in the settlement calculation: breach rate and success rate. *See, e.g.*, PTX604 (Petitioners' exhibit showing varying indicative breach and success rates); *see also* Ex. B at 5813:2-5815:22 (Rollin Summation) (summarizing the ranges of each variable in the calculation). Given the broad range of settlement amounts and the specific losses and claims relevant to the figures within that range, the Order's recitation of some disputed facts provides no explanation how the Court reached its conclusion. The Court should not have granted summary judgment given these disputed facts concerning the reasonableness of the Trustee's reliance on Mr. Lin's report.

(c) The Trustee's Reliance On Other Expert Reports During Settlement Negotiations

With respect to the Trustee's other experts, the Order recited some of the parties' competing arguments but in granting summary judgment overlooked whether those reports were credible, adequate, and supportable or whether the Trustee appropriately used them during settlement negotiations. Order at 35-36. Again, the Order merely repeats, without analysis, some of the disputed facts. For example, with respect to Professor Barry Adler, who analyzed competing legal arguments regarding when a breach of the PSAs would "materially and adversely affect" Certificateholders' interests in a loan and require repurchase, the Order acknowledges that Respondents presented evidence that he was "not an expert on [Pooling and Servicing Agreements]," and his "opinion was flawed and unreasonably narrow," while the

Trustee countered with evidence and argument that Professor Adler performed an "independent assessment" and his application of general contract interpretation principles rather than an RMBS-specific analysis was appropriate. *Id.* at 44. The Order, however, overlooked Respondents' contention that Professor Adler's analysis did not serve to maximize recoveries to the Covered Trusts for several reasons, including that the Trustee never informed Professor Adler that approximately 100 PSAs *deemed* certain breaches to be material and adverse, thus effectively eliminating one hurdle to recovery in those trusts. Doc. 953 at 43-44; *see also* Ex. B at 4426:22-24, 4427:9-16 (Adler). These disputed issues of fact—which the Order does not address in any meaningful way—should have precluded summary judgment.

Similarly, the Court acknowledged the Trustee's reliance on the expert reports of Professor Robert Daines and Capstone Valuation Services with regard to the loan repurchase claims and successor liability, but in granting summary judgment overlooked the disputed issues of fact related to those reports. For example, while Petitioners asserted that the Capstone and Daines reports remained unchallenged, Order at 36, Respondents argued that "Capstone's assignment was artificially limited," and Daines' report did not "develop the best possible successor liability case against Bank of America." Order at 36. The Court overlooked this acknowledged dispute, making it essentially impossible to understand how the Court arrived at its conclusion. The Court also overlooked several other challenges to Petitioners' reliance on the Daines and Capstone reports, including:

- Whether Professor Daines' opinions are unreliable since he admitted that successor liability and veil piercing analyses were fact-dependent, Ex. B at 3304:20-26 (Daines), but that he never conducted the relevant factual investigation here, *id.* at 3310:4-16, and instead based part of his report on unverified statements from Bank of America personnel. *Id.* at 3351:15-20; 4855:15-4856:22 (Coates).

- Whether the Capstone report is unreliable since it is based, in part, on several unverified assumptions and unverified statements from Bank of America personnel.

See Ex. B at 4484:8-25 (Bingham) (listing Capstone assumptions); 4871:12-4872:3 (Coates) ("If you want information about Countrywide's ability to pay, you don't tell somebody to just assume solvency.").

- Whether the Daines and Capstone reports are irrelevant in light of publicly-available evidence showing that, far from bankrupting Countrywide, Bank of America was paying Countrywide's debts. This evidence included statements on national television during settlement negotiations from Bank of America executive Terry Laughlin that Bank of America would honor valid repurchase claims. R-330; Ex. B at 790:23-791:21, 794:7-24 (Laughlin). Respondents also presented evidence that Bank of America made capital infusions into Countrywide to "maintain the capitalization of the company," including to pay repurchase claims for private-label deals like the Covered Trusts. *Id.* at 796:11-797:6; 1187:6-18 (Scrivener).

And, more generally, the Order overlooks whether BNYM's failure to provide information to its expert advisors limited their ability to prepare opinions that supported the Covered Trusts' claims against Bank of America—an issue highly germane to the reasonableness of the settlement amount. *E.g.*, Ex. B at 4872:7-25 (Coates) ("I do think it's unreasonable to rely on [experts] for outputs when [the Trustee] strongly limits what they can do and what information they can take into account.").

Each of these issues is disputed, but the Order provides no explanation why they do not preclude summary judgment; reargument should be granted for this reason too.

(d) The Trustee's Release Of Documentation And Servicing Claims

The Order also recites the parties' arguments concerning the documentation and servicing claims but in granting summary judgment overlooks disputed facts material to whether the Trustee obtained adequate consideration for release of those claims. *See* Order at 45-46.[8] With respect to the documentation claims, the Order overlooks: (1) whether the Trustee adequately

[8] The documentation claims concern whether Section 2.02 of the PSAs required that certain mortgage documents, including the original mortgage notes, be maintained in the mortgage loan files; whether missing documents were delaying or preventing foreclosures to the detriment of the Covered Trusts; and whether the Settlement Agreement's cure provisions eliminate the few protections that the Covered Trusts have against document exceptions. Order at 44-45. The servicing claims concern whether the servicing standards in the PSAs were violated and what damages were caused by any breach. *Id.* at 46-47.

valued the documentation claims; (2) whether the cure provisions add value to, or harm, the Covered Trusts; and (3) whether the Trustee secured adequate consideration in exchange for the release of the documentation claims. Specifically, Respondents presented evidence that the settlement unreasonably excludes the significant number of loans registered through MERS (the Mortgage Electronic Registration System) from the document cure section (Ex. B at 5338:7-11 (Levitin)), which means that the documentation cures *required* under the PSAs are being waived as to MERS loans, *id.* at 5395:23-26, which constitute at least 60 percent of the loans in the Covered Trusts. *Id.* at 5339:11-5341:7. Respondents also presented evidence that the settlement creates new and more difficult requirements to trigger a document exception cure, which gives up significant value for the trusts. *Id.* at 5396:2-5397:16. The Institutional Investors, on the other hand, argued that the $8.5 billion cash payment included adequate compensation for the document exceptions. Id. at 5912:11-20 (Patrick Summation).[9] This clear dispute in evidence should be resolved prior to approval of the Settlement Agreement, as it directly implicates whether certificateholders are receiving adequate compensation for their losses.

With respect to the servicing claims, the Court overlooked whether the Trustee (1) adequately valued those claims or (2) secured adequate consideration in exchange for the release of those claims. As with the documentation claims, the Court recited the parties' arguments and evidence, explaining that Respondents contended that "the servicing claims were released without an attempt to value the damages that were caused by past servicing failures[,]"[10] and that

[9] This argument is at odds with the Institutional Investors' testimony that the $8.5 billion was for breaches of section 2.03(c) of the PSAs, whereas documentation claims are governed by section 2.02 of the PSAs. *See* Ex. B at 615:17-26 (Smith).

[10] Petitioners in fact have conceded that BNYM did not attempt to recover damages caused by past servicing or documentation failures. *See* Doc. 942 at 39-40; *see also* Ex. B at 1450:3-1451:22; 1437:18-23; 2056:22-25 (Kravitt). And Brian Lin, who was tasked with preparing a report concerning the purported servicing improvements in the settlement agreement, was never asked to examine Bank of America's servicing. *Id.* at 3800:17-26; 3820:11-12; 3821:7-9 (Lin). Moreover, Mr. Lin never quantified the purported servicing improvements in the Settlement Agreement. *Id.* at 3819:2-18.

"the Settlement's purported servicing improvements [were] not adequate consideration … because [they] add little value given that the PSAs already required prudent loan servicing." Order at 46.[11] On the other hand, the Court acknowledged the Trustee's position that it had "decided that it was more valuable to focus on servicing remedies to create value going forward because of the difficulty of proving that the PSA servicing standard was violated or what damages were caused by any breach." *Id.* The Order does not explain how settlement of the servicing claims could be approved on summary judgment given these disputed facts concerning the reasonableness of the settlement. On reargument, these issues should be resolved at trial.

II. REARGUMENT IS WARRANTED BECAUSE THE COURT APPLIED AN INCORRECT STANDARD OF REVIEW AND IMPROPERLY PLACED THE BURDEN ON RESPONDENTS

A. Even If Abuse Of Discretion Is The Correct Standard, The Court Gave Undue Deference To The Trustee Following Its Loan Modification Ruling

Apart from the disputed factual issues that preclude summary judgment, reargument is warranted because the Court overlooked that a trustee is not entitled to deference once it is found to have abused its discretion. Here, the Court concluded that the Trustee abused its discretion with respect to the loan modification claims by acting "unreasonably or beyond the bounds of reasonable judgment" and exercising its power to settle those claims "without investigating their potential worth or strength." Order at 53. The Court also had earlier ruled that the Forbearance Agreement created a colorable claim of conflict against the Trustee. *See* Doc. No. 825. Despite these rulings, the Court deferred to the Trustee's judgment in all matters other than the loan modification claims. This error should be corrected on reargument.

[11] *See also* Ex. B at 5349:5-12 (Levitin) (testifying that the purported servicing improvements in the Settlement Agreement confer no value to the Trusts); 5361:8-16 (testifying that the servicing terms in the Settlement Agreement do not add value to the settlement because they are already required by a preexisting duty).

A trustee's duties are indivisible, and contrary to the Order, an abuse of discretion cannot be quarantined from a trustee's management, or lack thereof, in settling other claims that comprise part of a single settlement process. *See* George Gleason Bogert & George Taylor Bogert, THE LAW OF TRUSTS AND TRUSTEES § 543, at 228 (rev. 2d ed. 1993) ("[E]quity deems it better to … strike down all disloyal acts, rather than attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests.") (internal citations and quotations omitted); *Meinhard v. Salmon*, 249 N.Y. 458, 466-67 (1928) (holding that once a self-interested conflict is demonstrated courts employ an irrebuttable presumption that conflict infected the trustee's decision-making, and noting that "the standard of loyalty for those in trust relations is without the fixed divisions of a graduated scale"). This should be particularly so where, as here, the underlying claims subject to the settlement are interrelated and interdependent. Under the Settlement Agreement, the Court's decision not to release the loan modification claims or the releases the Trustee sought for its own conduct in paragraphs (n), (o), and (p) of the proposed findings renders the Settlement Agreement ineffective because those releases were material, non-severable terms of the Agreement. PTX 1 ¶¶ 2(a), 26. Deference to the trustee is not appropriate where an abuse of discretion has infected the trustee's broader exercise of discretion.

On reargument, the Court should determine whether the Trustee abused its discretion in agreeing to the settlement at least *in light of* its ruling that the Trustee abandoned its duties and obligations to the certificateholders with respect to the loan modification claims. When this misconduct is considered, the Settlement Agreement cannot be approved on summary judgment.

B. The Court Improperly Placed The Burden On Respondents

Reargument is also warranted because the Court misapprehended the applicable burden of proof by requiring Respondents to show that the Trustee abused its discretion instead of

requiring Petitioners to prove that the Trustee's actions were permissible. *See* Order at 25 ("Respondents principally contend that the Trustee abused its discretion by acting in bad faith (self-interested), outside its discretion and unreasonably. Accordingly, the Court must determine whether there was any such abuse of discretion which would warrant judicial interference with the Trustee's decision to enter into the settlement"). It is black-letter law that the settlement proponents bear the burden of proving that a trustee acted reasonably, complied with its duties, and is entitled to any requested findings. *See* Bogert's Trusts & Trustee § 560 ("The burden of proving that a discretionary power has been properly used is on the person who is asserting rights resulting from the use of the power, for example, on the trustee claiming the approval of an account which shows that he exercised a power in a certain manner.") (citing *In re Jaeck's Will*, 42 N.Y.S.2d 514 (Sur. Ct. 1943)). This is particularly true in the summary judgment context, where movants (here, Petitioners) must demonstrate the clear absence of any material issues of fact and all reasonable inferences must be drawn in favor of the non-moving parties (here, Respondents). *See, e.g.*, *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012).

Here, however, in addition to granting summary judgment despite the above factual disputes, it appears that the Court drew inferences in favor of Petitioners, accepting their arguments as true or at least disregarding Respondents' contrary arguments despite substantial support in the record. *See, e.g.*, Order at 27-28 (accepting as true Trustee's argument regarding the Mayer Brown conflict waiver); *id.* at 29-32 (accepting as true Trustee's argument regarding forbearance and indemnity agreements); *id.* at 32-33 (accepting as true Trustee's argument regarding Further Assurances clause). This oversight should be corrected on reargument.

At the very least, even if Respondents bore the burden in the first instance (which they did not), the Court overlooked that the Trustee's abuse of discretion with respect to the loan

modification claims shifted the burden to Petitioners to prove why that abuse of discretion did not infect the entire settlement process. *See, e.g., N.Y. State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 18 F.3d 179, 182 (2d Cir. 1994) ("In the law of trusts, however, it has been held that once the beneficiaries have established their prima facie case by demonstrating the trustees' breach of fiduciary duty, 'the burden of explanation or justification ... shift[s] to the fiduciaries.'") (quoting *Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 210 (3d Cir. 1977)); *Matter of Gordon*, 45 N.Y.2d 692, 698 (1978) ("Whenever ... the relations between the contracting parties appear to be of such a character as to render it certain that ... *it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood*") (quoting *Cowee v Cornell*, 75 N.Y. 91, 99-100 (1878)) (emphasis added). On reargument, the Court should ensure that the burden rests on the settlement proponents.

III. REARGUMENT IS WARRANTED BECAUSE THE COURT'S ORDER OMITS ANY ANALYSIS OR EXPLANATION

It has long been the law in New York that, in order to promote informed appellate review and ensure confidence in the judicial process, judicial decisions must be reasoned, not arbitrary, and must set forth those ultimate and essential facts that form the basis for the result. *See, e.g.*, *Gina P. v. Stephen S.*, 33 A.D.3d 412, (1st Dep't 2006) (remanding to trial court to "specifically articulate the basis" for its ruling); *Nadle v L.O. Realty Corp.*, 286 A.D.2d 130 (1st Dep't 2001) (holding that decision must include explanation and indication of reasoning supporting result); *Weckstein v. Breitbart*, 111 A.D.2d 6, 7 (1st Dep't 1985) (holding that "intelligent appellate review is impossible if the appellate court cannot ascertain on what facts and conclusions of law the lower court rested its decision" and that appellate court remedies are reserved for cases where

the "record is complete and the essential facts can be readily and sufficiently established by a review of that record").

Reargument is warranted because the Order fails to provide any explanation of its approval of the bulk of the Settlement Agreement. Mere recitation of the parties' positions, followed by the conclusion that the Trustee, for the most part, did not abuse its discretion does not provide the Appellate Division with a sufficient basis upon which to evaluate the correctness of that result. This lack of analysis is particularly troubling since the Order declines to approve a substantial component of the Settlement Agreement, thus leaving the Appellate Division (and the parties) without any understanding as to why the Trustee's abandonment of its duties and obligations did not infect the entire settlement. The Order's lack of analysis also makes it impossible to implement the settlement in any coherent way—a concern that is especially problematic since the Court refused to endorse many of Petitioners' proposed findings.

Reargument should be granted so that the Court can provide the analysis and reasoning that the Appellate Division expects and needs and to which the parties and the public are entitled. Failing to address these omissions now will only lead to a protracted appellate process.

IV. REARGUMENT IS WARRANTED BECAUSE THE ORDER DOES NOT DISPOSE OF NUMEROUS ISSUES RELATING TO THE SETTLEMENT

To the extent that the Order suggests that all issues before the Court have been resolved, reargument is warranted because the Court overlooked that critical issues relating to the effectuation of the settlement remain outstanding. Having sought judicial approval of the settlement, BNYM should now be required to make a full accounting of the method by which losses will be calculated, the amount of money that will be distributed to each trust, the number of trusts that will be excluded from the settlement, the amount of money that will be retained by Bank of America, the method and amount of distributions within each trust, and the relationship

between the amount each trust will be paid and the amount of damage suffered by each trust as a consequence of the claims being released. These issues should be addressed now, not after the exhaustion of appeals when the Trustee and Bank of America are free from judicial oversight.

Petitioners have contended that "all of these issues … were raised, litigated, and expressly decided against AIG in the Judgment." Doc. 1049 at 1. This is incorrect. It is also misleading given that the Court (1) declined to convert Petitioners' proposed findings into a Final Order and Judgment; (2) ruled that the Trustee acted unreasonably or beyond the bounds of reasonable judgment in exercising its power to settle the loan modification claims; and (3) approved only paragraphs (h), (i), (j), (k) and (t) of the proposed findings and the Settlement Agreement, *to the extent that* the loan modifications claims are not impacted. Order at 13-14, 53. Moreover, while Petitioners characterize the Court's partial approval of paragraph (t) of the proposed findings ("All objections to the Settlement have been considered and are overruled and denied in all respects") as a "Final Disposition," they ignore that the Order did not analyze the critical outstanding issues cited above. Doc. 1049 at 7-8.[12]

CONCLUSION

The Court should grant reargument and, on reargument, vacate the Order to the extent it approved the Settlement Agreement, proceed to trial to resolve the disputed material facts, and, following trial, decline to approve the Settlement Agreement in whole or in part. Alternatively, the Court should grant reargument and, on reargument, resolve the outstanding issues identified above before entering final judgment.

[12] Petitioners' suggestion (Doc. 1049 at 9) that further action regarding the loan modification claims should await exhaustion of all appeals conflicts with the Settlement Agreement's provision making Bank of America's and the Trustee's decision whether to proceed with a new, partial settlement a condition precedent to Final Court Approval. PTX 1 ¶ 2(a).

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Respectfully submitted,

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