

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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 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 : NY County Clerk's
 various Indentures), *et al.*, : Index No. 651786/2011
 :
 Petitioners, : **PRE-ARGUMENT**
 : **STATEMENT**
 for an order, pursuant to C.P.L.R. § 7701, seeking judicial :
 instructions and approval of a proposed settlement. :
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PLEASE TAKE NOTICE that, Intervenor-Petitioners BlackRock Financial Management Inc., Kore Advisors, L.P., Maiden Lane, LLC, Metropolitan Life Insurance Company, Trust Company of the West and affiliated companies controlled by The TCW Group, Inc., Neuberger Berman Europe Limited, Pacific Investment Management Company LLC, Goldman Sachs Asset Management, L.P., Teachers Insurance and Annuity Association of America, Invesco Advisors, Inc., Thrivent Financial for Lutherans, Landesbank Baden-Wuerttemberg, LBBW Asset Management (Ireland) plc, Dublin, ING Bank fsb, ING Capital LLC, ING Investment Management LLC, Nationwide Mutual Insurance Company and its affiliated companies, AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company (collectively the "Institutional Investors"), by their

counsel, Warner Partners, P.C. and Gibbs & Bruns, LLP, hereby submit this Pre-Argument Statement pursuant to 22 NYCRR § 600.17(b).

1. The full title of this action is set forth below:

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.

2. The full names of the original parties are set forth below:

Original Petitioners:

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset

Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor).

Original Respondents:

Cranberry Park II LLC; Cranberry Park LLC; Federal Home Loan Bank of San Francisco; Federal Home Loan Bank of Seattle; TM1 Investors, LLC; Walnut Place II LLC; Walnut Place III LLC; Walnut Place IV LLC; Walnut Place IX LLC; Walnut Place LLC; Walnut Place V LLC; Walnut Place VI LLC; Walnut Place VII LLC; Walnut Place VIII LLC; Walnut Place X LLC; Walnut Place XI LLC; Federal Deposit Insurance Corporation; RMBS Acquisition Co, LLC; Federal Home Loan Bank of Boston; Federal Home Loan Bank of Chicago; Federal Home Loan Bank of Indianapolis; Federal Home Loan Bank of Pittsburgh; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policeman's Annuity and Benefit fund of the City of Chicago; The Westmoreland County Employee Retirement System; The Western and Southern Life Insurance Company; Western-Southern Life Assurance Company; Columbus Life Insurance Company; Integrity Life Insurance Company; National Integrity Life Insurance Company; Fort Washington Investment Advisors, Inc. (on behalf of Fort Washington Active Fixed Income LLC); Mortgage Bond Portfolio LLC; Triaxx Prime CDO 2006-1, Ltd.; Triaxx Prime CDO 2006-2, Ltd.; Triaxx Prime CDO 2007-1, Ltd.; 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; Western National Life Insurance Company; First Reliance Standard Life Insurance Company; Liberty View; Platinum Underwriters Bermuda, Ltd.; Platinum Underwriters Reinsurance, Inc.; Reliance Standard Life Insurance Company; Safety National Casualty Corporation; Sun Life Insurance Company of Canada; CA Core Fixed Income Fund, LLC; CA Core Fixed Income Fund, Ltd.; CA High Yield Fund, LLC; CA High Yield Fund, Ltd.; Strategic

Equity Fund, LLC; Strategic Equity Fund, Ltd.; Sand Spring Capital III Master Fund, LLC; Knights of Columbus; American Equity Investment Life Insurance Company; American Equity Investment Life Insurance Company of New York; Amici Associates, LP; Amici Fund International Ltd., Amici Qualified Associates; Blue Mountain Credit Alternatives Master Fund, LP; Cedar Hill Capital Partners LLC; Cedar Hill Mortgage Fund GP LLC; Cedar Hill Mortgage Opportunity Master Fund LLP; Declaration Management & Research LLC; Doubleline Capital LP; First Bank; First Financial of Maryland Federal Credit Union; First National Bank & Trust Co. of Rochelle, Illinois; First National Banking Company; First Penn-Pacific Life Insurance Company; Kerndt Brothers Savings Bank; Lea County State Bank; LibreMax Capital LLC; Lincoln Investment Solutions, Inc.; Lincoln Life & Annuity Company of New York; Lincoln National Reinsurance Company (Barbados) Limited; LL Funds LLC; Manichean Capital, LLC; NCMIC Group, Inc.; NCMIC Insurance Company; NexBank, SSB; Peoples Independent Bank; Radian Asset Assurance Inc.; Stone Creek LLC; Taconic Capital Advisors LP; The Collectors' Fund LP; The Lincoln National Life Insurance Company; Thomaston Savings Bank; Valley National Bank; CIFG Assurance North America, Inc.; American Fidelity Assurance Company; United States Debt Recovery VIII, LP; United States Debt Recovery X, LP; Bankers Trust Company; Bankers Life Insurance Company; Bankers Specialty Insurance Company; First Community Insurance Company; Sterling Federal Bank, FSB; Oriental Bank and Trust; Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; Washington State Plumbing and Pipefitting Pension Trust; Goldman Sachs & Co. Securities Division; Pine River Fixed Income Master Fund Ltd.; Pine River Master Fund Ltd; Silver Sands Fund LLC; Two Harbors Asset I LLC; Good Hill Partners LP; Syncora Guarantee Inc.; Federal Housing Finance Agency as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; National Credit Union Administration Board as Liquidating Agent of US Central Federal Credit Union, Western Corp. Fed. Credit Union, Members United Corp. Fed. Credit Union, Southwest Corp. Fed. Credit Union, Constitution Corp. Fed. Credit Union; Ballantyne Re Place; the State Attorneys General for the State of New York and Delaware.

Since the commencement of this proceeding, the following Respondents have withdrawn their objection to the settlement at issue:

Federal Home Loan Bank of San Francisco; Federal Home Loan Bank of Seattle; TMI Investors, LLC; Walnut Place II LLC; Walnut Place III LLC; Walnut Place IV LLC; Walnut Place IX LLC; Walnut Place LLC; Walnut Place V LLC; Walnut Place VI LLC; Walnut Place VII LLC; Walnut Place VIII LLC; Walnut Place X LLC; Walnut Place XI LLC; Oriental Bank and Trust; Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; Washington State Plumbing and Pipefitting Pension Trust; LibreMax Capital LLC; Clayhill Investors LLC; Syncora Guarantee Inc.; Federal Deposit Insurance Corporation; RMBS Acquisition Co, LLC; Federal Housing Finance Agency as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; National Credit Union Administration Board as Liquidating Agent of US Central Federal Credit Union; Western Corp. Fed. Credit Union, Members United Corp. Fed. Credit Union, Southwest Corp. Fed. Credit Union, Constitution Corp. Fed. Credit Union; National

Credit Union Administration; Cranberry Park II LLC; Cranberry Park LLC; V Re-Remic, LLC; Federal Home Loan Bank of Boston; Federal Home Loan Bank of Chicago; Federal Home Loan Bank of Indianapolis; Columbus Life Insurance Company; Fort Washington Investment Advisors, Inc. (on behalf of Fort Washington Active Fixed Income LLC); Integrity Life Insurance Company; National Integrity Life Insurance Company; The Western and Southern Life Insurance Company; Western-Southern Life Assurance Company; Ambac Assurance Corporation; The Segregated Account of Ambac Assurance Corporation; Monarch Debt Recovery Master Fund Ltd.; Monarch Opportunities Master Fund Ltd.; Monarch Capital Master Partners LP; Monarch Structured Credit Master Fund Ltd.; Monarch Capital Master Partners II LPP.; Monarch Recovery Ltd.; Monarch Alternative Solutions Master Fund Ltd.; Oakford MF Limited.; Monarch Cayman Fund Limited.; Monarch Capital Master Partners II-A LP; American Equity Investment Life Insurance Company; American Equity Investment Life Insurance Company of New York; Blue Mountain Credit Alternatives Master Fund, LP; Lincoln Investment Solutions, Inc; NCMIC Group, Inc.; NCMIC Insurance Company; Stone Creek LLC; Taconic Capital Advisors LP; Goldman Sachs & Co. Securities Division; Vertical Capital, LLC.

3. The names, addresses and telephone numbers of counsel for Petitioners-Intervenors, the Institutional Investors, are:

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

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

Attorneys for Intervenor-Petitioners, the Institutional Investors

The names, addresses and telephone numbers of counsel for Petitioner The Bank of New York Mellon ("BNYM") (which has filed a separate Notice of Appeal and Pre-Argument Statement) are:

DECHERT LLP
Hector Gonzalez
James M. McGuire

Mauricio A. España
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Matthew D. Ingber
Christopher Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

4. The names, addresses and telephone numbers of counsel for Respondents are:

Daniel Reilly
Michael Rollin
REILLY POZNER LLP
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
(303) 893-6100

Mark C. Zauderer
FLEMING ZULACK WILLIAMSON ZAUDERER LLP
One Liberty Plaza
New York, New York 10006
(212) 412-9500

Attorneys for AIG Entities

John G. Moon
MILLER & WRUBEL P.C.
570 Lexington Avenue
New York, New York 10022
(212) 336-3500

Attorneys for the Triaxx Entities

Beth A. Kaswan
William C. Fredericks
Max R. Schwartz
SCOTT+SCOTT, Attorneys at Law, LLP
The Chrysler Building
405 Lexington Avenue, 40th Floor
New York, New York 10174
(212) 223-6444

Counsel for the Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago and other members of the Public Pension Fund Committee

Peter N. Tsapatsaris
PETER N. TSAPATSARIS, LLC
200 East 33rd Street
27th Floor, Suite D
New York, New York 10016
(646) 490-7795

Talcott J. Franklin
TALCOTT FRANKLIN P.C.
208 North Market street
Suite 200
Dallas, Texas 75202
(214) 736-8730

Counsel for Respondent-Intervenors the Knights of Columbus

Donna H. Lieberman
Scott A. Ziluck
HALPERIN BATTAGLIA RAICHT, LLP
40 Wall Street, 37th Floor
New York, New York 10005
(212) 765-9100

Attorneys for United States Debt Recovery, LLC VIII, L.P., and United States Debt Recovery X, L.P.

Sarah E. Lieber
CIFG Assurance North America, Inc.
850 Third Avenue, 10th Floor
New York, New York 10022
(212) 909-0425

Jason H. Alperstein
KOPELOWITZ OSTROW P.A.
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, Florida 33301
(954) 525-4100

Attorneys for Sterling Federal Bank, F.S.B., Bankers Insurance Company, Bankers Life Insurance Company, First Community Insurance Company, and Bankers Specialty Insurance Company

Thomas B. Hatch
Bruce D. Manning
ROBINS, KAPLAN, MILLER & CIRESI L.L.P
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500

Counsel of Federal Home Loan Bank of Pittsburgh

William B. Federman
FEDERMAN & SHERWOOD
10205 North Pennsylvania Ave.
Oklahoma City, Oklahoma 73120
(405) 235-1560

Attorneys for American Fidelity Assurance Company

5. This appeal is taken from the Decision/Order/Judgment of Supreme Court of the State of New York, County of New York (*per* Hon. Barbara R. Kapnick), entered in the office of the Clerk, County of New York, on February 21, 2014 (the "Judgment"). Attached hereto as Exhibit A is a true and correct copy of the Judgment.

6. On June 29, 2011, Petitioner BNYM, as trustee for 530 residential mortgage backed securities (RMBS) trusts, filed a Verified Petition, pursuant to CPLR Section 7701, seeking approval of its decision to enter into a settlement of certain trust claims. Under the settlement, certificateholders in the trusts would receive \$8.5 billion in cash, as well as more than \$2 billion in landmark servicing improvements for the mortgages still held in the trusts, upon entry of a final, non-appealable judgment finding that BNYM acted reasonably and within the scope of its discretion and authority in entering into the settlement.

On July 8, 2011, the Institutional Investors' motion for leave to intervene in support of the settlement, and in support of BNYM's request for relief, was granted.

7. On June 3, 2013, Supreme Court commenced a nine-week evidentiary hearing that concluded on November 21, 2013. On January 31, 2014, Supreme Court issued the Judgment and held:

After reviewing the voluminous record and carefully considering the arguments presented by all counsel, this Court finds that, except for the finding below regarding the loan modification claims, the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment.

. . . . What is before this Court, however, is the issue of whether the Trustee abused its discretion in settling the loan modification claims. On this issue only, the Court finds that the Trustee acted “unreasonably or beyond the bounds of reasonable judgment,” (*supra* at 25), in exercising its power to settle the loan modification claims without investigating their potential worth or strength. (*See* Hr’g Tr. 2684:10-19, July 19, 2013 (Trustee’s corporate trust law expert states that a Trustee cannot release a claim without understanding its value).) As a result, paragraphs (h), (i), (j), (k) and (t) of the PFOJ are approved to the extent that they do not apply to the loan modification claims.


Accordingly, it is hereby ORDERED and ADJUDGED that the Settlement Agreement is approved except to the extent that it releases the loan modification claims.

8. Intervenor-Petitioners, the Institutional Investors, appeal from the Judgment with respect to Supreme Court’s erroneous ruling regarding loan modification claims in the settlement.

9. There is not a related action or proceeding pending in any court of this or any jurisdiction, except for a pending appeal by BNYM from the above Decision/Order/Judgment (copies of BNYM’s Notice of Appeal and Pre-Argument Statement are attached as Exhibit B). Also, on May 28, 2013, certain Respondents filed an interlocutory appeal in this action from Supreme Court’s order striking their jury demand. Doc. No. 826. However, now that the final Judgment of Justice Kapnick has been entered below, the foregoing interlocutory appeal is being withdrawn.

Dated: March 6, 2014
New York, NY

WARNER PARTNERS, P.C.

By: 
Kenneth E. Warner

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

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

*Attorneys for Intervenor-Petitioners, the
Institutional Investors*