

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

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.

New York County Clerk's
Index No. 651786/2011

**PRE-ARGUMENT
STATEMENT**

Respondents-Objectors-Appellants Triaxx Prime CDO 2006-1, Ltd.,
Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1 (collectively, "Triaxx")
submit this Pre-Argument Statement pursuant to Section 600.17(g) of the Rules of the
Appellate Division, First Department.

1. Title of Action

The full title of this action is as set forth in Item 1 of the Pre-Argument
Statement of Petitioner The Bank of New York Mellon ("BNYM") filed February 21,
2014 (the "BNYM Pre-Argument Statement").

2. Full Name of Original Parties and Any Changes in the Parties

The full names of the original parties to this action, and the changes to the
parties, are as set forth in Item 2 of the BNYM Pre-Argument Statement.

3. Name, Address and Telephone Number of
Counsel for Appellant or Petitioner

The names, addresses and telephone numbers of counsel for petitioner
BNYM are as follows:

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The names, addresses and telephone numbers of counsel for the petitioners other than BNYM are as follows:

GIBBS & BRUNS LLP
Kathy Patrick (*pro hac vice*)
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Houston, Texas 77002
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WARNER PARTNERS, P.C.
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New York, New York 10022
(212) 593-8000

4. Name, Address and Telephone Number of Counsel for Respondents-Objectors-Appellants

The names, address and telephone number of counsel for the Triaxx Respondents-Objectors-Appellants are as follows:

MILLER & WRUBEL P.C.
John G. Moon
Charles R. Jacob III
Amanda F. Parsels
570 Lexington Avenue
New York, NY 10022
(212) 336-3500

The names, addresses and telephone numbers of counsel for the Respondents other than Triaxx are as set forth in Item 5 of the BNYM Pre-Argument Statement.

5. Court and County From Which Appeal is Taken

Supreme Court, New York County, IAS Part 39. A copy of the Decision/Order/Judgment below, dated January 31, 2014 and filed February 21, 2014, is annexed as Exhibit A.

6. The Nature and Object of the Cause of Action

This is a proceeding under CPLR Article 77 to obtain judicial approval of a settlement claimed to have been reached among some, but many fewer than all, of the parties in interest with respect to some 530 trusts that issued mortgage-backed securities holding defaulted, contractually defective and/or modified mortgages. Triaxx was not consulted in connection with the claimed negotiation of the settlement, and, along with numerous other Objectors, objected to it on a number of grounds, including that the Petitioner trustee reached the proposed settlement without investigating the potential worth or strength of the trusts' claims based on modified mortgage loans that were not repurchased by Bank of America N.A. or its affiliates, referred to collectively as Countrywide, as required by the governing documents of 441 trusts.

7. Result Reached in the Court Below

After a hearing, the court below (Kapnick, J.) approved the settlement *except* as to the "loan modification claims," that is, the actual or potential claims that repurchase of approximately \$31 billion of modified mortgage loans by Countrywide was required under the terms of the documentation applicable to the trusts. The court below

found that the Trustee “abused its discretion in settling the loan modification claims” and that the Trustee “acted ‘unreasonably or beyond the bounds of reasonable judgment’ . . . in exercising its power to settle the loan modification claims without investigating their potential worth or strength.” Exhibit A, Decision/Order/Judgment, at 53, citation omitted. The Court cited extensive testimony in support of its conclusion. As a result, the court below approved the Settlement Agreement (as defined) “except to the extent that it releases the loan modification claims.” *Id.*

8. Grounds for Seeking Reversal

The court below was correct in finding that the Trustee abused its discretion in exercising its power to settle the loan modification claims without investigating their potential worth or strength, and Triaxx does *not* appeal from that part of the decision below. However, the court below erred in approving any part of the Settlement Agreement, for the following reasons.

First, the court below erred in approving any part of the Settlement Agreement after finding that it could not be approved as to the loan modification claims. The Settlement Agreement had to be approved or rejected as a whole; and rejecting it as to the loan modification claims required its complete rejection.

Second, the court below applied an incorrect legal standard and burden of proof in its evaluation of whether the Settlement Agreement should be approved.

Finally, had the Settlement Agreement been properly evaluated, no part of the Settlement Agreement should have been approved.

9. There is no related action or proceeding pending in this or any other court of which Triaxx is aware.

10. There are the following additional appeals pending in this action. On May 28, 2013, certain Respondents filed an appeal in this action relating to the court below's striking of those Respondents' jury demand. Copies of that notice of appeal and pre-argument statement are annexed to the BNYM Pre-Argument Statement. On February 21, 2014, BNYM filed an appeal "with respect to Supreme Court's erroneous ruling regarding loan modification claims in the settlement." Copies of that notice of appeal and pre-argument statement, without exhibits, are annexed as Exhibit B. On March 6, 2014, certain Petitioners referred to as the Institutional Investors filed an appeal on the same ground. Copies of that notice of appeal and pre-argument statement are annexed as Exhibit C.

Dated: March 21, 2014

MILLER & WRUBEL P.C.

By: 

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