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), 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 C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Kapnick, J.

THE BANK OF NEW YORK MELLON'S <u>RESPONSE TO OBJECTIONS</u>

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PRELIMINARY STATEMENT

If there were ever a time to heed the advice of Judge Learned Hand, it is now, after reading the objectors' briefs:

> [T]here must come a point at which [a trustee] is not bound to take against him a future chain of events, each link of which carries a substantial coefficient of improbability. Pushed with relentless logic, a possible conflict of interest can be conjured up out of all sorts of situations in which persons of normal scruple would feel no hesitation to go ahead. The law ought not make trusteeship so hazardous that reasonably responsible individuals will shy away from it.

Dabney v. Chase Natl. Bank, 196 F.2d 668, 675 (2d Cir. 1952).

There is apparently no limit to the objectors' ability to conjure. Yet after two years of expansive discovery—34 depositions, 14 expert reports, and the production of thousands of bilateral and trilateral settlement communications—the objectors' theories are no more than theories. And they do not add up.

To this day, the objectors still do not argue that the Settlement—which offers investors monumental monetary benefits and billions more in servicing improvements—is inadequate. No trustee before or since has achieved such a large-scale remedy for its certificateholders, a point the objectors do not dispute. In this near-final round of briefing, the objectors remain unable to present a coherent reason to seriously consider rejecting the Settlement. They continue to speculate that the Trustee entered into a Forbearance Agreement to avoid having to exercise rights—the pursuit of remedies against Countrywide—that it had already decided to exercise. Why that caused the Trustee to enter into a "bad" settlement, the objectors do not say. The objectors ask the Court to accept that the Trustee was conflicted when it received a confirmation of an indemnity it already had, that applied only to settlement-related activities, and that was attached to the Settlement Agreement for the world to see. How the indemnity could possibly harm certificateholders—a key element of any conflict theory—or incentivize the Trustee to take a "bad" deal is something the objectors, again, do not say. The objectors argue that the Trustee entered into a "sweetheart" settlement because it was concerned about its own liability. How this theory of conflict can be reconciled either with the sworn testimony that the Trustee never considered (or even thought it had) potential exposure for trust administration activities, or with the undisputed fact that the Settlement Agreement provides no benefit to the Trustee (no release, no settlement payment, no additional fees), the objectors, again, do not say. And the objectors cite as evidence of a "self-interested trustee" the fact that BNYM filed this proceeding, implemented one of the world's most robust notice programs ever, created a website for transparency and disclosure, and asked this Court to consider the facts before approving the Settlement, but they never explain how this could possibly mean that the Trustee acted in bad faith.

The objectors' "duty of care" arguments are equally baseless. They say that the Trustee never conducted any legal investigation, but then brush off expert reports on the critical issues of causation and successor liability that the Trustee received before entering into the Settlement, and ignore that the Trustee consulted with experienced legal counsel throughout the process. They say the Trustee never participated in settlement discussions, but then ignore the dozens of meetings and calls attended by the Trustee or its counsel, the innumerable comments to draft settlement agreements, and the sworn testimony from every settlement participant about the Trustee's active participation. They argue that the Trustee forced its experts to put aside their own standards, and their own ethics, to "rubber stamp" a bad settlement. To the extent that even requires a response, they ignore the depth of the experts' analysis, the additional, unrefuted expert analysis that reinforces those earlier opinions, and the experts' sworn testimony—

including that the economic experts never even knew the amount of the settlement that they were supposedly rubber stamping.

The objectors tie themselves in knots to make the benign appear nefarious. We offer something simpler, which requires only the application of common sense. The Trustee entered into the Settlement because it thought it was a good deal for the Trusts. It entered into the Settlement because the trusts would receive $8.5 billion that they did not have and likely would never receive otherwise, and because the Settlement offered additional servicing improvements (since valued at $3 billion) that only a global settlement—and not litigation—would achieve. It entered into the Settlement because, based on the expert opinions it received, the Trustee believed that the settlement amount was reasonable, that there were substantial obstacles to litigation, that Countrywide and Bank of America had credible defenses, and that the monetary component was at least $3.7 billion more than Countrywide would ever be able to pay. It entered into the Settlement because 22 institutional investors with billions in holdings *each* asked the Trustee to do so. And it entered into the Settlement because not doing so—and instead gambling with trust assets—was not an acceptable or reasonable alternative.

The Court should approve the Settlement.

ARGUMENT

I. The Objectors' Garbled Standard of Review Is Incorrect.

A trustee's discretionary action is not subject to control by a court except in cases of bad faith or abuse of discretion. Only if a trustee acted in bad faith, or had a disabling conflict of interest, as when it seeks to purchase trust property for itself, may a court delve into the merits of its decision. Statement at 12-13.[1]

The objectors incorrectly argue that the Court is required to scrutinize the substantive merits of the Settlement: "The Court must determine whether (1) the settlement is fair and reasonable" AIG 11.[2] The objectors rely on *In re Jaeck's Will*, a 1943 decision from Nassau County Surrogate's Court, but *Jaeck's* properly acknowledged that discretionary trustee decisions are entitled to judicial deference, stating that "had the invasions of principal occurred as a result of the exercise of [the trustees'] discretion . . . the court . . . *could or should not interfere* so long as the trustees in making their determination exercised sound discretion." 42 N.Y.S.2d 514, 519 (emphasis added). In that case, however, "the executrix-accountant has placed herself in the position of a trustee; and she being *also the beneficiary* for whom the invasion has been made, the burden rests upon her." *Id.* In other words, only because there was true self-dealing—the executrix was distributing assets to herself—did the court need to review the substance of the transaction; it otherwise would have applied a deferential standard. (It overruled the objections anyway. *Id.* at 522).

The appropriate standard of review in this case is well settled: the Settlement should be approved if the Trustee acted "within the bounds of a reasonable judgment." *In re Stillman,* 107 Misc. 2d 107, 110 (Sup. Ct. N.Y. Cnty. 1980); *see also In re Application of IBJ Schroder Bank & Trust Co.*, Index No. 101530/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (securitization trustee's discretionary decision to enter into settlement of trust claims was

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[1] BNYM's Brief in Support of the Settlement is referred to herein as the "Statement" or "BNYM Statement."

[2] Citations to the May 3, 2013 objections are as follows: "AIG" refers to the AIG Objection (docket 588); "S+S" to the objection filed by clients of the Scott + Scott firm (docket 718); "CP" to the Cranberry Park objection (docket 719); "Triaxx" to the Triaxx Entities (docket 709); and "KOC" to the objection of Knights of Columbus and others (docket 735).

"entitled to judicial deference"). But even under the objectors' inapt "fairness standard," if the Court finds that the Trustee entered into the right settlement for the wrong reasons, the Settlement should still be approved, because it would be unfair to Certificateholders to blow up an objectively fair Settlement and, in the process, condemn the trusts to litigation in which they almost certainly would recover far less, and perhaps nothing. For an example of a court accepting a business judgment without accepting the decisionmaker's process, see *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557, 574 (1984) ("Noting that defendants had not employed any neutral committees in negotiating the merger, Supreme Court conducted its own objective review of the transaction. There is evidence in the record to support its conclusion that, viewed as a whole, the transaction was fair."). Given the objectors' proposed standard, it is remarkable that they have chosen not to put forth any expert to opine on what they would consider a fair settlement range—in fact, the objectors have now withdrawn their expert's flawed "simulation" of potential repurchase liability. *See* Ex. 1.[3] *see also* May 13, 2013 Response by the Institutional Investors (docket 763).

If the test is substantive fairness, the Settlement still passes with flying colors. *See* BNYM Statement 2, 12-13.

II. The Trustee Did Not Act in Bad Faith.

A. Undivided loyalty is not the standard.

Over the past two years, the Court has heard countless allegations that the Trustee was "conflicted." As shown in BNYM's Statement (16), the evidence is undisputed both that the Trustee's actual motives were pure, and that the Settlement Agreement itself provides no

[3] All citations to "Ex. _" reference the exhibits to the Affirmation of Matthew D. Ingber in Support of this Response to the Objections, dated May 13, 2013 and filed simultaneously with this brief.

benefit—financial or otherwise—to the Trustee. The objectors can speculate about conflicts all they want, but the Settlement Agreement speaks for itself and is dispositive. In any event, all of these conflict theories rest on a misapprehension of the relevant legal standard.

1. The PSAs do not impose a duty of undivided loyalty.

Some trustees have a duty of "undivided loyalty," "barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest *possibly conflicts* with the interest of those owed a fiduciary duty." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (emphasis added) (quoted in AIG 13). Even then, "a trustee's action or decision that is motivated by and taken in the best interest of the beneficiaries does not violate the [duty of loyalty] merely because there may be an incidental benefit to the trustee." *Restatement (Third) of Trusts* § 78 cmt. d(1) (2007).

"An indenture trustee," however, "*is not subject to the ordinary trustee's duty of undivided loyalty*." *Meckel v. Cont'l Res.*, 758 F.2d 811, 816 (2d Cir. 1985) (emphasis added). Its duties are defined by the trust instrument—here, the PSAs. *See Magten Asset Mgmt. Corp. v. Bank of New York*, 2007 WL 1326795, at *6 (Sup. Ct. N.Y. Cnty. 2007) ("The role of an indenture trustee differs from that of an ordinary trustee. . . . An ordinary trustee is subject to duties beyond those in the trust agreement, such as the duty of undivided loyalty") (citations omitted). Though this point often arises under bond indentures, it derives from a much more basic principle of trust law. There is "[n]o doubt [that] the rule of undivided loyalty due from a trustee may be relaxed by a settlor by appropriate language in the trust instrument in which he, either expressly or by necessary implication, recognizes that the trustee may have interests potentially in conflict with the trust." *O'Hayer v. de St. Aubin*, 30 A.D.2d 418, 423 (2d Dep't 1968) (citations omitted); *see also In re Balfe's Will*, 245 A.D. 22, 24 (2d Dep't 1935) (will permitting "what is called 'divided loyalty'. . . did not impinge public policy"). The *Restatement*

(Second) agrees, recognizing that trust documents may authorize actions that might otherwise be deemed a conflict. Section 170 cmt. t. As shown below in Parts II.D.4 and II.E., the supposed "conflicts" here are not conflicts at all, and in any case are all authorized either by the PSAs or by trust law.[4] The trustee must act in good faith, but merely engaging in transactions that the documents permit does not even begin to show bad faith.

2. Default trust law does not impose a duty of undivided loyalty.

The objectors suggest that default trust law imposes a duty of undivided loyalty by quoting part of a comment to Section 78 of the *Restatement (Third)*. But Section 78 itself—omitted from the objectors' brief—says that "*[e]xcept as otherwise provided in the terms of the trust*, a trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose." (Emphasis added); *see also id.* § 78(2) ("*Except in discrete circumstances*, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests") (emphasis added). Consistent with New York law, then, the third *Restatement*, like the second, allows trust instruments to relax the duty of loyalty.[5]

[4] The PSAs, indentures, and SSAs are collectively referred to herein as the "PSAs." Cites herein to PSA" are to the PSA for CWALT 2006-OC7, Ex. 2. All of the contracts are governed by New York law.

[5] The objectors also quote comment *b* to Section 78 as requiring that "a trustee must refrain . . . from transactions in which it is reasonably foreseeable that the trustee's future fiduciary conduct might be influenced by considerations other than the best interest of the beneficiaries." AIG 13. The first sentence of that comment, however, explains that "[t]he rule . . . flatly prohibits certain transactions by trustees . . . *unless authorized as stated in Comments c(1)-c(3).*" (Emphasis added.) Comment c(1) says that "[a] transaction that would otherwise be prohibited under the rules of Subsections (1) and (2) may be undertaken by a trustee with court authorization," an exception with obvious relevance to the allegations (false as they may be) concerning the Side Letter indemnity confirmation and the so-called "release" in the Proposed Final Order and Judgment. Comment c(2) says that "[a] trustee may be authorized by the terms of the trust, expressly or by implication, to engage in transactions that would otherwise be

The contracts here waive all of the duties that the objectors claim were breached. For example, they generally disclaim "implied covenants or obligations," which would include a "duty of undivided loyalty" (PSA § 8.01(i)), and specifically guarantee the Trustee's right to adequate indemnity before it takes any action (*id.* § 8.02).

The objectors' principal case (AIG 13) stresses that "[m]erely vague or remote possible selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question." *Dabney*, 196 F.2d at 675 (quoting *York v. Guaranty Trust Co.*, 143 F.2d 503, 514 (2d Cir. 1944)); *see also Knights of Columbus v. BNYM*, Index No. 651442/2011, Apr. 30, 2013 decision, at 17 ("the Knights fail to allege that BNYM *personally benefitted* from its actions, which has been held to be a necessary element to support a breach of fiduciary duty claim") (emphasis added). The abuses in which the objectors have indulged for the last two years fit squarely within Judge Hand's admonition against conjuring up implausible conflicts of interest. *See Dabney*, 196 F.2d at 675. Indeed, this case, in which a tiny group of objectors have used one speculative theory of "conflict" after another to hold up an $8.5 billion distribution to their co-beneficiaries, is Exhibit A.

3. Bad faith, not conflict of interest, is the standard.

The objectors argue that the Trustee was "conflicted" and that this supposed conflict dooms the Settlement. But freedom from potentially conflicting interests is not the standard: good faith is. The Second Circuit made this point in a case examining whether The Bank of New York had relied in good faith on advice of counsel:

> Plaintiffs have put forward no evidence of BNY's actual motive for relying on [its attorneys'] advice. Instead, they simply cite testimony by expert witnesses who understood that BNY could avoid liability and costs by following [its

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prohibited by the rules of undivided loyalty." *See also id.* ("even the vital fiduciary duty of loyalty is a *default rule* that may be modified by the terms of the trust").

> attorneys'] advice. This evidence is insufficient to establish a question of fact regarding BNY's good faith . . . .

Craig v. BNY, 59 F. App'x 388, 390 (2d Cir. 2003); *see also Trustees of S. Cal. IBEW-NECA Pension Plan v. Rios*, 2009 WL 3232224, at *5 (C.D. Cal. 2009) (quoting *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 970 (9th Cir. 2006) ("Even if a conflict of interest exists, its significance in determining how much deference to afford the entity's decision depends on the 'nature, extent, and effect' the alleged conflict actually had on the entity's decision-making process."). The court observed that the desire to avoid liability is not even relevant to good faith. *See Craig*, 59 F. App'x at 390 ("even assuming arguendo that a party's desire to avoid liability prompted reliance upon the advice of counsel, that fact alone would not create a triable issue of fact with respect to good faith").

The *Restatement*, too, holds that a trustee may exercise discretion unless it "*acts* dishonestly" or "*acts from* an improper even though not a dishonest motive." Section 187 cmts. e, g (emphasis added). Merely having a conflicting *interest*, which the trustee ignores or does not even know it has, does not taint its decision. The example of dishonesty is that "the trustee receives a bribe." *Id.* cmt. f. As to "improper motive," the *Restatement* says that

> if the trustee in exercising or failing to exercise a power does so *because of* spite or prejudice or *to further* some interest of his own . . . , the court will interpose. Although ordinarily the court will not inquire into the motives of the trustee, if it is shown that his *motives were improper* or that he *could not have acted* from a proper motive, the court will interpose.

Id. cmt. g (emphasis added). The *Restatement* underscores that it is the Trustee's "motives" for settling, not its "interests," that matter. On the relevant point—whether the trustee acted in good faith in entering into the Settlement—the evidence points uniformly toward a finding of good faith.

B. The Trustee's relationship with Bank of America did not affect its strategy.

The objectors suggest that the Trustee's "important ongoing business relationships" with Bank of America played some unspecified role in the Settlement. AIG 14. They do not explicitly identify this as a source of conflicting interests, and with good reason. Courts applying New York law have held in no uncertain terms that "[a] mere hypothetical possibility that the indenture trustee might favor the interests of the issuer merely because the former *is* an indenture trustee does not suffice" to show bad faith. *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1992). In fact, those courts include this Court, which just last month ruled that "alleg[ations] that BNYM labored under a conflict because BNYM defines itself as a 'bank for banks' . . . fail to allege that BNYM acted to advance its own interests at the expense of Certificateholders [or] . . . that BNYM personally benefited from its actions, which has been held to be a necessary element to support a breach of fiduciary duty claim." *Knights of Columbus*, *supra*, at 17; *accord Elliot Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 70 (2d Cir. 1988) (plaintiff must show that trustee "personally benefited" or "was taking a position that would harm the interests of the debenture holders and correspondingly inure to the trustee's benefit").

The theory of AIG's expert, Professor Levitin, that BNYM is a "pocket trustee," in particular, has faced the test of judicial scrutiny and failed every time. *See CFIP Master Fund, Ltd. v. Citibank N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) ("As to the Fund's allegations concerning U.S. Bank's status as 'default trustee' for other Citi deals, the Court finds that there is no evidence supporting the hypothesis that the total revenues from such business, which are infinitesimal in comparison with the overall revenues of these financial institutions, in any way affected U.S. Bank's actions."); *Page Mill Asset Mgmt. v. Credit Suisse First Boston Corp.*, 2000 WL 877004, at *2 (S.D.N.Y. 2000) ("Page Mill argues that the existence of a Page Mill–State

Street conflict of interest can be inferred from the fact that State Street's billings from the CS Defendants 'increased geometrically' over the past five years. However, the existence of a conflict of interest can not be inferred solely from a relationship between an issuer and an indenture trustee that is mutually beneficial and increasingly lucrative") (citation omitted); *Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, 2010 WL 3324705, at *5 (N.D. Ill. 2010) ("If this is a conflict of interest, then it is inherent in the office of trustee as defined in the PSAs. Courts applying New York law have rejected lawsuits against indenture trustees predicated on similar allegations.").

The allegation that Bank of America's interests drove the Trustee's decision is also contrary to the Trustee's record of suing securitization sponsors that are its clients. The objectors' own observation that "BNYM itself has pursued put-back remedies against a loan seller" (AIG 36) belies their theory. In that litigation, BNYM, at the direction of holders, sued GE-WMC, a sponsor of securitizations for which BNYM is the trustee. *See also Chesapeake Energy Corp. v. BNYM*, No. 13-cv-1582 (S.D.N.Y. May 8, 2013) (dispute between issuer of bond underwritten by Bank of America and BNYM as trustee, acting at the suggestion of investors).

Finally, as shown in BNYM's Statement (16-17), when asked, the Trustee's witnesses uniformly gave cogent explanations for why they believed the Settlement benefitted Certificateholders. There is no evidence—none—that a desire to curry favor with Bank of America or Countrywide (neither of which have even issued a mortgage securitization in years) played any role in the decision to enter into the Settlement. In any event, it is beyond dispute that, as the objectors' own expert concedes, the private-label mortgage securitization industry "remains moribund, with only a handful of deals having been done since 2008." Levitin Rep. ¶

261 (Ex. 3). The objectors offer no explanation for their implausible theory that the Trustee would have exposed itself to the type of accusations it faces here in the hope of achieving future (non-existent) business in a securitization market that has been dormant since the onset of the financial crisis. In short, the Settlement exists not because of an interest in currying favor with Bank of America, but because the Trustee here went out of its way to take action, where no other trustee was willing to protect Certificateholders.

C. The Forbearance Agreement shows good faith, not bad faith.

1. Because an Event of Default would not affect the standard of care, the Trustee had no conflicting interest in avoiding an Event of Default.

The objectors argue that the Trustee has a duty to act in good faith and reasonably at all times (AIG 28-33). We agree. It is precisely *because* the Trustee's actions are judged for good faith and reasonableness—regardless of whether an Event of Default has occurred—that the allegation that the Trustee agreed to the Forbearance Agreement to protect itself makes absolutely no sense.

The prudent-person standard raises a question of action versus inaction. Before an Event of Default, the Trustee "shall undertake to perform such *duties* and only such *duties* as are specifically set forth in this Agreement." PSA § 8.01; *see also id.* § 8.01(i) ("unless an Event of Default known to the Trustee shall have occurred and be continuing, the duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee"). By contrast, after an Event of Default of which the Trustee has "received written notice" (*id.* § 8.02(vii)), "the Trustee *shall exercise* such of the *rights and powers* vested in it by this Agreement, and use the same degree of care and skill in their exercise as a prudent person would exercise or use" (*id.* § 8.01) (emphasis added). Thus, before an Event of Default, except as expressly set out in the PSAs, the Trustee has the prerogative to *not act*, regardless of whether inaction is in the interest of Certificateholders. After an Event of Default, the Trustee must "exercise" its "rights and powers" as a prudent person would.

When the Trustee acts, evaluation of its actions has nothing to do with the occurrence of an Event of Default. The PSAs do not say, and the Trustee has never maintained, that when it *does* exercise a right before an Event of Default, it may do so unreasonably or in bad faith. The Trustee may not act unreasonably or in bad faith after an Event of Default, either. In other words, the standard is the same before and after an Event of Default—good faith and reasonableness. The Trustee has made this point any number of times throughout the case,[6] it is reflected in the proposed findings, and it is now confirmed by Professor Langbein. *See* Langbein Tr. 279-80 (Ex. 5).

In any event, the Trustee never relied on its pre-Event of Default prerogative anyway, either in this proceeding or in the settlement negotiations, because it was already acting, exercising its rights, and ultimately pursuing and entering into a settlement. *See also Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863, at *6 (Sup. Ct. N.Y. Cnty. 2012), *aff'd*, 96 A.D.3d 684 (1st Dep't 2012) ("the Trustee did, in fact, act upon plaintiffs' complaints, as demonstrated by the settlement agreement"). That is certainly why the Institutional Investors, who initially sought to trigger an Event of Default and supposedly pointed a "shotgun" at the Trustee (while the objectors did nothing), agreed to forbear on their notice and proceed with settlement negotiations, rather than litigate with Bank of America over whether the

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[6] *See* 2/7/2013 Hearing Tr. 151:13-152:2 (Ex. 4) ("And the reason why I said it's irrelevant [whether an Event of Default occurred] is because the trustee *exercised* the right …to pursue remedies against Bank of America and Countrywide.") (emphasis added).

Master Servicer had materially breached the PSAs. Given the lack of any upside in avoiding an Event of Default, there is no reason to doubt the sworn testimony that the Trustee agreed to forbear because it was in the interest of Certificateholders. *See* Griffin Tr. 148:2-4 (Ex. 6); Kravitt Tr. 182:19-183:12 (Ex. 7).

2. The Forbearance Agreement was proper.

The objectors also contend that the Forbearance Agreement was somehow invalid or improper. Because the occurrence or not of an Event of Default has no ultimate bearing on the review of the Trustee's decision to settle or whether the Trustee acted in good faith, this point is irrelevant, but we will explain briefly why it is also incorrect. *See* Landau Tr. 288:5-14 (Ex. 8) (explaining why the Event of Default question is irrelevant: "They were acting, in my opinion, in good faith. They were acting thoroughly. They were acting responsibly. They were doing all of those things that, in my experience, as a Trustee, corporate trust officer, you would do even as a prudent person. It didn't make any difference whether you called them a prudent person or a pre-default Trustee. What they did, in my opinion, measured up to the highest standard.").

The PSAs do not permit just *any* Certificateholder to attempt to trigger an Event of Default. Section 7.01(ii) provides that a material breach by the Master Servicer becomes an Event of Default only after notice by either the Trustee or Certificateholders having at least 25% of the Voting Rights in each of the subject trusts. That requirement is consistent with other contract terms that reinforce the principle that the amount of holdings matters under a PSA and that small holders cannot attempt to seize control of the trusts and declare Events of Default, direct the Trustee, or sue derivatively. For example, Section 8.01(iii) protects the Trustee against liability when it follows an investor direction, but only if the direction is given by Certificateholders with the requisite Voting Rights. Likewise, Section 10.08 permits investors to sue derivatively, but only if they have the requisite holdings, have directed and indemnified the

Trustee, *and* have given notice of an Event of Default to the Trustee, which refuses to act at the Certificateholders' direction.

Because the power to send, or not to send, a Section 7.01(ii) notice of an Event of Default is entrusted to holders with sufficient holdings, those same holders can retract the notice or agree to suspend it. *See* Langbein Tr. 226-27 (Ex. 5) ("implicit in [the Institutional Investors'] control over the triggering event here in 7.01(ii) is … their power to extend that 60-day period"; if the investors "had the right to insist on the 60 days, they had the right by implication to extend it"); *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1315 (9th Cir. 1998) (greater power to terminate a contract necessarily includes the lesser power to modify it). The PSAs' silence on this specific point does not imply that the Trustee cannot agree with the noticing Certificateholders to forbear. *See Restatement (Third)* § 85 cmt. a (2007) ("black-letter generalization" is that trustees can exercise powers that "'are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust'") (quoting *Restatement* § 186); Landau Tr. 192 (Ex. 8) ("In my view, this flows out of the provisions dealing with the assignment basically of ownership rights to the Trustee[,] the right it's given under the PSA, including the right to pursue legal action. And this is part and parcel of a legal action. So I concluded that this was. . . fairly within the scope of their responsibilities and their duties.").[7]

Though they never articulate their alternative reading, the objectors implicitly argue that once the requisite percentage of Certificateholders sends a notice, it becomes public property.

[7] Forbearance by creditors on the exercise of remedies following a default is not at all extraordinary. *See, e.g.*, *In re Perry H. Koplik & Sons, Inc.*, 476 B.R. 746, 791 n.252 (Bankr. S.D.N.Y. 2012); *Nilson v. JPMorgan Chase Bank, N.A.*, 690 F. Supp. 2d 1231, 1239 (D. Utah 2009); *LaSalle Bus. Credit, Inc. v. Lapides*, 2003 WL 722237, at *7 (N.D. Ill. 2003); *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park DR. BNK Investors, L.L.C.*, 2009 WL 3335332, at *2 (Del. Ch. Ct. 2009); George B. South III, Law360, *Nuts and Bolts of Negotiating Forbearance Agreements* (May 8, 2013).

But that would upend the express contractual holdings requirement in the PSAs. It would mean, for example, that even if the group that was entitled to send the notice learned that its allegations were mistaken, or thought they would be difficult to prove, or for any other reason wanted to withdraw a notice of non-performance, a 1% holder could still use that notice to eventually trigger an Event of Default.[8] That would be contrary to the PSAs and manifestly unreasonable. That 1% holder could not have sent a notice on its own, nor could it do anything after the Event of Default occurred—it could not direct the Trustee (§ 8.02(iv)), fire the Master Servicer (§ 7.01), or pursue litigation (§ 10.08). The PSAs do not abrogate the 25% holdings threshold for every individual Certificateholder thereafter, simply because one group of substantial holders chose to send a notice and then decided to withdraw or toll it.

The objectors also imply that the Trustee was required to send its own notice, or adopt the investors' notice after they agreed to forbear. AIG 33-35. That conclusion is illogical, because it assumes that the Trustee's *pre*-default duty required it to investigate and assert breaches that could have established an Event of Default. Addressing that same theory, that BNYM was required to investigate a bond issuer's financial condition to determine whether an Event of Default had occurred, Justice Fried held that it would nullify the pre-default no-implied-duty language:

> Whether BNY had a duty to investigate NorthWestern's financial condition is governed by the standards applied to an indenture trustee's pre-default duty. Neither the law regarding an indenture trustee's duties, nor the Indenture, supports Magten's contention that BNY was duty bound to examine NorthWestern's financial condition in order to decide whether NorthWestern had made the admission or was actually able to pay its debts. . . . BNY's duty did not extend to undertaking a complicated and unavoidably

8 Of course, if another Certificateholder or group of Certificateholders with the requisite holdings wanted to attempt to trigger an Event of Default, it could, but it would not need to piggyback on the Institutional Investors' notice.

> speculative investigation in order to decide whether there was or would be an event of default.

Magten Asset Mgmt. Corp. v. BNY, 2007 WL 1326795 (Sup. Ct. N.Y. Cnty. 2007).

The Trustee unquestionably acted in good faith—and for the benefit of the trusts—in entering into the Forbearance Agreement. Without the forbearance agreements, the nascent settlement negotiations risked devolving into a battle—and potential litigation—about whether an Event of Default had in fact occurred, making it difficult, if not impossible, for the Trustee to achieve a constructive resolution for the Trusts. *See, e.g.*, Kravitt Tr. 182:23-183:8 (Ex. 7) ("It's very difficult in my experience… to negotiate something as big and complicated as [the Settlement] with the possible threat of an event of default outstanding hanging over it. It makes you go too fast instead of considering everything very carefully."); *Id.*186:23-25 (Trustee potentially would have had to "let the parties fight about whether there's an event of default or not"); *Id.* 188:8-10 ("We were just trying to give ourselves a chance to negotiate a good settlement."); Griffin Tr. 148:2-4 (Ex. 6) ("We looked at this as being very beneficial for holders.").

The Forbearance Agreement-conflict theory is even more off-point because an essential element of the theory—harm to Certificateholders—is missing. The effect of the Forbearance Agreement is expressly limited to the Institutional Investors' October 18, 2010 Notice of Non-Performance. A few objectors have 25% holdings in a few trusts and could have—but did not, for reasons known only to themselves—send their own notices of non-performance. Other objectors' holdings are so small that they lack 25% in any trust, and therefore could not send a notice under the plain terms of the PSAs, although nothing stopped them from aggregating with other holders as the Institutional Investors did.[9] Indeed, the Forbearance Agreement did not stop Walnut Place from sending its own notice of non-performance for one trust in May 2011, well after the Forbearance Agreement was signed. (Ex. 10). Though it is true, as Robert Griffin testified, that he "[redacted]'" (AIG 22 (quoting Griffin Tr. 218)), the uncontroverted evidence is that the Forbearance Agreement did not have that effect. Kravitt Tr. 183, 629 (Ex. 7).[10] It did not preclude any other certificateholder with the requisite holdings from sending a notice of non-performance, PSA § 7.01, directing the Trustee, PSA § 8.01, or initiating suit for the Trusts if the conditions of the no-action clause were met. PSA § 10.08. As Jason Kravitt explained, "the purpose of the forbearance agreement was to create stability while we thought there was [] still a good chance of negotiating something constructive." Tr. 183:9-12 The objectors may disagree with this rationale, but that does not make the Trustee's decision unreasonable.

D. The Settlement does not affect the Trustee's liability.

1. <u>The Trustee's reaction to the financial crisis reflects prudent administration, not paranoia about "risk."</u>

The objectors argue that the Court, before granting the Petition, must evaluate the Trustee's conduct going back at least as far as 2008. AIG 15-16; *see also* S+S 10. They also

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9 In fact, the record evidence is clear that the Institutional Investors' Notice of Non-Performance, the forbearance agreement, and the existence of the negotiations were widely publicized. As Ms. Patrick testified, "[redacted]" Patrick Tr. 93-94, 103-05 (Ex. 9).

10 The contention that notice was required *before* the Settlement Agreement was signed ignores that no claims will be extinguished until *after* the unprecedentedly massive notice program was implemented, the Article 77 proceeding is complete, and the Court approves the Settlement.

insist that the Court must find that "the Trustee complied with its fiduciary duties during the negotiations that led to the proposed settlement." AIG 11. This is ironic, since they also say that the Trustee's suggestion, in a draft of the proposed final order, that the Court be asked to review those matters somehow created a conflict of interest. *Id.* at 26-28.

In any event, all that the objectors say is that "there was 'a lot of activity' within BNYM"—one of the largest financial institutions in the world—during the financial "meltdown" in 2008. AIG 15 (quoting Baker Tr. 15-16). The objectors accuse the Trustee [redacted] *Id.* (quoting Baker Tr. 27:21-24; 32:15-33:2). Any reasonable observer would call this prudent and proactive administration during the worst financial crisis since the Great Depression, but the objectors somehow conclude that it shows "significant uncertainty and potential liability for BNYM." *Id.*

They also fault the Trustee for responding to investor requests in accordance with the terms of the PSAs. AIG 15-16. They note that, as investor inquiries were increasing in number, a group within BNYM "began holding daily meetings," worked "to ensure that issues were being properly escalated within BNYM," and held "regular meetings at the senior executive level to similarly monitor investor inquiries and related issues." *Id.* at 16. That is evidence of one thing: prudent trust administration. In line with their rejection of other express terms of the contracts that these objectors agreed to—such as the no-action clause, the Trustee's indemnity, and the limits on the Trustee's duties—they characterize the Trustee's responses as "hypertechnical," but they cannot assert that the Trustee was wrong, or that it somehow breached the PSAs when it relied on those contracts. *Id.*

There is no evidence that "concern[s] about [the Trustee's] own exposure in the Covered Trusts" played any role in the decision to settle (*see* BNYM Statement 16-18), nor logically could it have, because the Settlement does not release any such exposure. But the flimsiness of the objection shows more than that—after 34 depositions and hundreds of thousands of pages of discovery, there is no evidence that the Trustee even had any exposure to begin with.

2. <u>The Institutional Investors never threatened the Trustee.</u>

In spite of their own inability to identify a single non-frivolous claim against the Trustee, the objectors maintain their "Trustee exposure" canard by completely misconstruing the actions of the Institutional Investors. While they argue (again, counterfactually) that the Institutional Investors never seriously threatened Bank of America or Countrywide, they say that those investors "took dead aim at the *Trustee*" and fired a "shot across the *Trustee's* bow" by sending a notice alleging that *Bank of America* had breached the PSAs. AIG 17. Their argument is long on metaphors but short on substance. It also makes absolutely no sense. Those letters were "aimed" at the Master Servicer, whom the PSAs state the Trustee has no duty to monitor. *See* PSA § 3.03 ("Neither the Trustee nor the Depositor shall have any responsibility or liability for any action or failure to act by the Master Servicer nor shall the Trustee…be obligated to supervise the performance of the Master Servicer. . . .") The objectors also point to a letter in which the Institutional Investors asked the Trustee about mortgage files—which, of course, they wanted in order to pursue claims against *Bank of America and Countrywide* and not against the Trustee. The objectors do not even try to support their claim that "failure to comply with those duties [to compel repurchase of loans] would result in direct liability against BNYM." AIG 17. This is precisely the theory that this Court rejected in the *Knights of Columbus* case, because plaintiff failed to identify any contractual provision that the Trustee breached. It is hardly surprising, therefore, that even in the case filed by Walnut Place as late as March 2012—a mere three months before the Settlement—there was no attempt to even allege misconduct by the Trustee. As this Court pointed out, "there is no allegation of misconduct or breach by the Trustee in the administration of the trusts." *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863, at *5 (Sup. Ct. N.Y. Cnty. 2012).

This objection culminates in accusations that the Trustee became *too* responsive to the Institutional Investors, whereas only a few pages earlier, the objectors complained about the Trustee's "hypertechnical" responses to investor inquiries. BNYM's counsel, they say, scheduled a meeting with Kathy Patrick too quickly. AIG 19. This punch line underscores the absurdity of the objection. Even if all of the facts were as the objectors allege (and they are not, *see* Part II.F.1. below), their narrative is that a trustee was persuaded by investors that it should take action against Countrywide, and responded by taking action against Countrywide. This is not a conflict of interest, and it is not self-dealing. The most damning indictment that the objectors have is that the Trustee complied with what they say are its duties under the PSAs, leading to the recovery of $8.5 billion for investors.

3. <u>The Settlement does not release any claims against the Trustee.</u>

The objectors have argued throughout this proceeding that the Trustee received a "release" in the Settlement Agreement. AIG Verified Petition to Intervene, Doc. No. 114, at 2-3 That objection has always been false. *See* SA ¶ 9 (Ex. 11). Were there any such release, the Trustee would have had ample opportunity to invoke it in response to the wave of Certificateholder litigation that has followed the announcement of the Settlement, including the *Knights of Columbus* case in this Court and the *Policemen's Fund* case pending before Judge Pauley. But as we have explained, repeatedly and in open court, those claims have not been released. *See, e.g.*, 4/12/2013 Tr. 122:2-22 (Ex. 12); Index No. 651442/2011, 4/25/2012 Tr. 33 (Ex. 13).

4. <u>A request for judicial instruction is not a "release" and does not suggest bad faith.</u>

The objectors have also suggested that the Proposed Final Order and Judgment, or drafts thereof, somehow served as a "release" of Certificateholder claims against the Trustee. This, too, is false. For one thing, there is an enormous difference between a release, by which a party gives up potentially valid claims, and a finding entered after a court determines that there was no claim to begin with. *Compare Black's Law Dict.*, **release**(1) (9th ed. 2009) ("the act of giving up a right or claim to the person against whom it could have been enforced") *with id.*, **finding of fact**(1) ("A determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record"); *id.*, **res judicata** (1) ("An issue that has been definitively settled by judicial decision."). Even the broader *draft* judgment, had it been filed, would not have created a benefit any more than filing a complaint benefits a plaintiff—the Trustee would have had to prove all of the proposed findings.

Authority for the Trustee's right to seek instruction is abundant. The *Restatement (Second)* provides that "[t]he trustee is entitled to instructions of the court in respect to . . . the extent of his powers and duties." Section 259 cmt. a (emphasis added); *see also BlackRock Fin. Mgmt. Inc. v. The Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 174-75 (2d Cir. 2012). In particular, "[i]f the trustee is in doubt whether he should compromise or submit to arbitration a claim, he may ask the instruction of the court or he may agree thereto conditionally upon the subsequent approval of the court" (§ 192 cmt. d). This is precisely what the Trustee did here—and, for that matter, in *IBJ Schroder*.

This principle is universally accepted. Among many others, the U.S. Supreme Court has written that

> Trustees are often obliged to make difficult business judgments, and the best that disinterested judgment can accomplish with foresight may be open to serious criticism by obstreperous [beneficiaries] aided by hindsight. *Courts*

> *are quite likely to protect trustees* . . . . The practice is *well established* by which trustees seek instructions from the court, given upon notice to creditors and interested parties, as to matters which involve difficult questions of judgment.

Mosser v. Darrow, 341 U.S. 267, 273-74 (1951) (emphasis added); *see also, e.g.*, *Kelly v. R.S. Jones & Assocs., Inc.*, 406 S.E.2d 34, 37 (Va. 1991) (citations omitted) ("We have long recognized that under the common law a fiduciary has the right to compromise claims of and against the estate without court approval. . . . If the compromise should be approved by the court, subsequent challenge would be precluded"); *Bangert v. N. Trust Co.*, 839 N.E.2d 640, 646 (Ill. App. Ct. 2005) ("Northern Trust is certainly on good footing for arguing that it cannot be held accountable for losses that occurred after and as a direct result of the circuit court's order. . . . [I]t is well established that a party cannot be held liable for abiding by a court order"); 2 STORY'S EQUITY JUR. § 961 (11th ed. 1873) (courts "will assist the trustees, *and protect them* in the due performance of the trust, *whenever they seek the aid and direction of the court* as to the establishment, the management or the execution of it") (emphasis added); 4 SCOTT ON TRUSTS § 259, at 406-07 (4th ed. 1989) ("A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection.").

Indeed, just last month, a federal court approved a settlement by a trustee and a monoline insurer and found, among other things, that:

> 3. The Trustee has due authority to enter into the Settlement Agreement for the benefit of all Certificate Holders. . . .
>
> 5. The Trustee has acted consistent with its duties and responsibilities under, and entry of this order does not violate, the terms of the Trust Agreement . . . .
>
> 6. All objections, if any, to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included in any such objections, are hereby overruled . . . .

> 9. The Approval Order and the Settlement Agreement shall be binding on the Debtor, the Authority, Insurer, the Trustee and all creditors of the Debtor, including the Certificate Holders, and each of their respective successors and assigns. . . .
>
> 12. The Approval Order shall be binding on each Certificate Holder and any successors and assigns thereof . . . .

In re City of Stockton, Cal., 2013 WL 1789525, at *1-*2 (E.D. Cal., 2013).

In fact, not only is judicial instruction under Article 77 proper, it can cure conflicts arising out of plainly self-dealing transactions. Addressing a trustee that sought to purchase trust property, the Court of Appeals held that:

> there is little danger of such prejudice [to beneficiaries] if the transaction is subjected to prior judicial scrutiny and given court approval. Accordingly, the rule against self-dealing has not been applied, and does not apply, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing at which all interested parties are represented, approves and authorizes the sale.

In re Scarborough Props. Corp., 25 N.Y.2d 553, 558-59 (1969).

Seeking instruction is *good* trust practice. It benefits trustees in the same way that it benefits beneficiaries: by giving trustees guidance in advance so that they do not take action that may harm their beneficiaries. A ruling that a trustee's willingness to subject its actions to judicial scrutiny is evidence of bad faith would be unprecedented.

5. Valid *res judicata* and collateral estoppel effects are no reason to refrain from approving the Settlement.

A small separate group objects for the sole purpose of preserving the remnants of a claim for negligence brought by the Knights of Columbus against the Trustee after the Settlement was entered into.[11] No other objectors joined this group's filing.

[11] Notably, half of the intervenors originally part of this group have determined not to object to the Settlement, or have affirmatively withdrawn as intervenors.

For those still objecting, much of the objection consists of complaints about discovery that the Knights of Columbus have failed to pursue in their separate case. We have been waiting

The Knights of Columbus complain that the Trustee's counsel told its counsel that any order by this Court would have *res judicata* effect. It will: "The rules determining the effect of the instructions of the court in barring the beneficiary from thereafter holding the trustee liable for a breach of trust are part of the law relating to *res judicata*." *Restatement* § 259 cmt. e. If the objectors wish to bring a claim that has already been decided in this proceeding, then that claim will be barred. *See id.* § 220 ("The beneficiary may be barred by a decree of a proper court from holding the trustee liable for a breach of trust.").

This Court should decide the case before it. Any collateral effects on other litigation are governed by well-established rules of *res judicata* and collateral estoppel and are no reason to refrain from making appropriate findings here.

6. <u>There is no evidence that concern about a "release" affected the Trustee's decision.</u>

The two slender reeds that the objectors cite cannot bear the weight of their blatantly false assertion that "BNYM was *preoccupied throughout* the negotiations with obtaining a broad release for itself." AIG 26 (emphasis added).

First, the objectors point to an email from Jason Kravitt in December 2010 asking, among 38 other questions, "[t]o what degree will the settlement protect BONY against future claims from investors? Borrowers?" AIG 26. Like so much in this case, the answer lies in the Settlement Agreement—none. *See also* Part II.D.3. above. If a release of investor claims was the guiding light of the Trustee's decisionmaking, the Settlement would be a tremendous disappointment.

Last, they cite a draft of the Proposed Final Order and Judgment—not a release, not an order, not even a proposed order, but a *draft* of a <u>proposed</u> order that was never filed. The back-

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for well over a year for the Knights of Columbus to tell us which mortgage files it wants to review, to investigate its baseless claim that the Trustee does not have custody of any mortgage files. *See* Index No. 651442/2011, 4/25/2012 Transcript 34 (Ex. 13).

and-forth on the drafts is fully documented, and the contention that BNYM reinserted deleted language or that the parties haggled over this point misses the mark. The first draft, just like the proposed order in *IBJ Schroder*, [redacted] (Ex. 14); 4/12/2013 Tr. 117:5-10 (Ex. 12). [redacted] (Ex. 17). [redacted] (Ex. 18) (June 23, 2011 [redacted] As for the Trustee itself, [redacted] Bailey Tr. 319:17-19, 320:11-15, 322:16-19 (Ex. 19). Even if this never-filed draft could be mischaracterized as a "release," there is no evidence that it "preoccupied" the Trustee. The argument is meritless.

E. There is no new or expanded indemnity.

1. <u>The PSAs allow the Trustee to condition its actions on receipt of an "adequate indemnity."</u>

From the beginning of this proceeding, the objectors have insisted that the Trustee was conflicted because it somehow expanded its indemnity. This theory is illogical and counterfactual.

It is illogical because both the December 2010 indemnity confirmation (Ex. 21) and the Settlement Agreement indemnity confirmation (Ex. 20) (what the objectors refer to as the "side letter") (together, the "Indemnity Confirmations") are expressly limited to settlement-related activity. Tellingly, the Trustee could have completely avoided expenses or liability relating to the Settlement by not negotiating or entering into the Settlement. To this day, the objectors fail to explain why the Trustee would have been incentivized to engage in months of settlement negotiations in the first instance—and to enter into a wide-ranging settlement for the benefit of all Certificateholders—by the prospect of an indemnity that covered *nothing* more than those

Settlement-related activities. The PSA indemnities (confirmed by the Indemnity Confirmations) merely limit the Trustee's possible downside from the Settlement; the Trustee does not "profit" from them. *See Knights of Columbus*, Index No. 651442/2011 at 17 ("the Knights fail to allege that BNYM personally benefitted from its actions, which has been held to be a necessary element to support a breach of fiduciary duty claim").

In that respect, the PSA indemnities serve exactly the purpose for which they were intended. By ensuring that the Trustee does not face enormous expense from a transaction that brings enormous benefit to Certificateholders (but none to the Trustee), the indemnity aligns the Trustee's interests with those of the trusts—in fact, they make the Trustee *more* likely to act affirmatively, as here, to protect Certificateholders' interest. Most fundamentally, the Indemnity Confirmations provide no *incentive* for the Trustee to enter into a bad Settlement, and they obviously cause no harm to Certificateholders.

The "expanded indemnity" theory is also counterfactual and is refuted by the plain language of the contracts. The PSAs are unambiguously clear that

> [t]he Trustee and any director, officer, employee or agent of the Trustee shall be indemnified by the Master Servicer and held harmless against any loss, liability or expense (including reasonable attorney's fees) (i) incurred in connection with any claim or legal action relating to (a) this Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee's duties hereunder, other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence . . . .

Section 8.05. In addition, the Master Servicer indemnifies the Trustee for "the reasonable compensation and the expenses and disbursements of its counsel." *Id.* As Judge Sullivan of the Southern District of New York has explained, by "requiring [the Master Servicer] to indemnify [the Trustee]," "the PSA seek[s] to *lessen* [a] potential 'conflict of interest.'" *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 187 (S.D.N.Y. 2011) (addressing theory that trustee is conflicted whenever investors allege servicing breaches). The objectors own trust-law expert agrees. *See* Tamar Frankel, *Securitization* § 14.6 (2d ed. 2005) ("Trustees are typically entitled to indemnification in a wide variety of contexts").

In the Indemnity Confirmations, the Master Servicer merely confirmed that the contractual indemnity applies. Settlement Side Letter, BNYM_CW-00254761 ("confirm[ing]" that the Trustee's settlement expenses are "actions that, for purposes of the Indemnity, relate to the [PSAs], the applicable securities, or the performance of the Trustee's duties under the [PSAs]."); December 10 indemnity confirmation letter, BNYM_CW-00270587 ("[N]othing herein is intended to limit, modify, supersede, expand or in any way affect any indemnity rights already available to the Trustee under each PSA for each Original Trust and Additional Trust.").

In short, the Indemnity Confirmations could not possibly have "expanded" the Trustee's indemnity, because they provided the Trustee with nothing to which it was not already entitled. The deposition testimony is unequivocal on this point. Bank of America's counsel [redacted] Mirvis Tr. 14:21-15:6 (Ex. 22); *see also* Kravitt Tr. 254 (Ex. 7) ([redacted]); *id.* Tr. 253 ([redacted]).

The Indemnity Confirmations accord completely with the applicable duty of loyalty, as reflected in the PSAs. The PSAs state that:

- "the Trustee shall not be required to risk or expend its own funds or otherwise incur any financial liability . . . if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it" (§ 8.02(vi)); and

- "the Trustee shall be under no obligation to exercise any of the trusts, rights or powers vested in it by this Agreement or to institute, conduct or defend any litigation hereunder . . . at the request, order or direction of . . . any of the Certificateholders, . . . unless . . . such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee" (§ 8.02(ix)).

These provisions confirm that the Trustee not only has an indemnity from the Master Servicer (§ 8.05), but that it is entitled not to take any action that would put its own funds at risk or that would expose it to the possibility of liability. Even if seeking a confirmation of its contractual indemnity is somehow self-interested, it is expressly authorized by the contracts. In any event, as we have discussed, the objectors have offered no explanation as to how the Indemnity Confirmations possibly could have resulted in a bad settlement.

2. <u>The Trustee did not settle at the direction of the Institutional Investors, and even if it did, it was entitled to an "adequate indemnity."</u>

After two years of discovery, countless pages of briefing, and ever-changing theories of conflict, the objectors' newly flawed "expanded indemnity" theory comes down to this: the Master Servicer indemnity in Section 8.05 was "turned off" because the Trustee purportedly followed a direction from the Institutional Investors, so the Trustee "benefitted"—at whose expense, the objectors do not say—by getting an indemnity from Bank of America instead of 22 of the world's largest Institutional Investors. AIG 24-25. The objectors' theory, in other words, is that the Trustee settled in order to regain an indemnity that it had lost by taking a direction to enter into the negotiations that produced the Settlement. Or put another way, according to the objectors, the seven months of settlement negotiations, the more than 25 drafts of the Settlement Agreement, the retention of experts and receipt of reports, the worldwide notice campaign, and the filing of the Article 77 proceeding were all designed by the Trustee so that it could end up exactly where it started, with an indemnity from the Master Servicer.

The investor-direction theory is both wrong and irrelevant. The record is crystal clear that the Institutional Investors never gave a binding direction to the Trustee. Bailey Tr. 116:16-117:3, 117:15-118:14 (Ex. 19); 8/2/2012 Hearing Tr. 59:3-4 (Ex. 23) (statement of Ms. Patrick that the Institutional Investors "didn't give a binding direction to the Trustee"). In 2010, Ms. Patrick (on behalf of the Institutional Investors) [redacted] (Ex. 4 in Support)[12]. The Trustee obviously did not do that.[13] The Trustee [redacted] (Ex. 25) (June 21, 2010 letter); (Ex. 26) (September 3, 2010 letter)]. There is no letter anywhere in which the Institutional Investors direct the Trustee to negotiate a settlement, or even to enter into the Settlement. Near the end of the process, after seven months of hard-fought negotiations, those investors "urge[d] the Trustee to accept" the Settlement ((Ex. 27) (June 23, 2011 letter)), but that letter also "ask[ed] BNY to exercise its independent business judgment" and said explicitly that the letter was "not a binding instruction." *Id.* at 2. Nor could it have been: though the Institutional Investors' holdings exceeded $40 billion, they did not have the requisite Voting Rights in every one of the 530 Settlement trusts to instruct the Trustee to do *anything*. In short, the record is devoid of any

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[12] All citations to "Ex. __ in Support" reference the Ingber Affirmation filed with The Bank of New York Mellon's Brief in Support of the Settlement.

[13] AIG's quotation of BNYM's counsel saying that "the process leading to the proposed settlement began because the Trustee 'received an instruction' from the Inside Institutional Investors" is obviously misleading. AIG Obj. 24-25. The "instruction" was the same one mentioned in text, which the Trustee did not follow: "The institutional investors sent a letter of direction to [the Trustee] and instructed the trustee to investigate and eventually to file claims against Bank of America and Countrywide." 9/21/11 Tr. 7 (Ex. 24). That colloquy related to the growth of the population of Covered Trusts, which did initially (though not in the end) depend on the number of trusts for which the Institutional Investors held 25%. *Id.*

evidence to support the objectors' theory that the Trustee was acting under a Certificateholder "direction" in negotiating and entering into the Settlement.

That leads to a broader point, which is that the terms of the PSAs addressing investor directions are not designed as traps for unwary trustees. Section 8.01(iii) states that a direction letter *protects* the Trustee from liability: "the Trustee shall not be liable with respect to any action taken . . . in good faith in accordance with the direction of [25% of] Holders . . . relating to . . . exercising any trust or power conferred upon the Trustee under this Agreement." Yet the Trustee also is "under no obligation to exercise any of the trusts, rights, or powers . . . at the request, order or direction of . . . any of the Certificateholders . . . , unless . . . such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee." PSA § 8.02(ix).[14] The Trustee has every incentive to solicit a direction and invoke those PSA provisions, because the direction must be coupled with an investor indemnity (§ 8.02(ix)) and it insulates the Trustee from liability (§ 8.01(iii)). But an investor cannot unwittingly give a direction, and the Trustee cannot unwittingly follow one.

Under the objectors' theory, any time the Trustee does anything that an investor agrees with, the Trustee loses its indemnity from the Master Servicer. The PSAs do not support that reading, on which the entire "expanded indemnity" theory rests. Accepting it would force trustees to be unresponsive to any investor requests, for fear that acting in accordance with the request—but not a binding direction—would void their indemnity from the Master Servicer.

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[14] This provision also shows that the objection is internally contradictory. On the one hand, the objectors say that the Trustee was so obsessed with its indemnity that it was the sole reason for entering into the Settlement, but on the other hand, they say that the Trustee followed an investor direction, losing its Master Servicer indemnity, without insisting on the investor indemnity to which it was entitled.

The objectors' contention is also irrelevant, and contains a fundamental flaw in its logic. Section 8.02(vi) makes clear that the Trustee need not take any action if "adequate indemnity . . . is not assured to it," and Section 8.02(ix), noted above, makes clear that the Trustee is not required to act at a Certificateholder direction unless those Certificateholders provide it with satisfactory indemnity. Therefore, even accepting the objectors' theory that the Trustee was acting at the Institutional Investors' direction and somehow "lost" its indemnity under Section 8.05, it was *never* at risk of having to proceed without an indemnity—it would have been entitled to one from the directing Certificateholders, or from *someone*, before signing the Settlement.[15] As a matter of law, then, there could not have been any conflict because the PSAs authorize the Trustee to condition its own actions, however beneficial they may be for Certificateholders, on an "adequate indemnity" for itself. *See also CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) ("the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability, . . . so it was reasonable for U.S. Bank to seek indemnification once it became clear that there was a dispute"; citing "undisputed" R. Landau testimony that "indemnifications in similar situations are a common industry practice") (citation omitted).

If the Trustee is entitled to refuse to act unless it has an indemnity, but any action that it takes after insisting on an indemnity is automatically in bad faith, then the Trustee could never act. That would not be in the interests of Certificateholders.

[15] Elsewhere, the objectors seem to say that any investor who suggests a course of action is impliedly agreeing to indemnify the Trustee (AIG 39), but what the PSAs say is that the Trustee is not obligated to *follow* any direction that is not accompanied by an adequate indemnity. The Trustee cannot impose an indemnity on investors against their will.

3. <u>The indemnity does not give Bank of America "control" over anything.</u>

The objectors assert that the indemnity not only requires Bank of America to pay the Trustee's expenses—an unambiguously good result for investors, who otherwise would have to pay those expenses themselves—but also gives it "control" over "the entire settlement negotiation process." AIG 25. If there were a shred of evidence to support that claim, the objectors presumably would not have relegated it to a three-word parenthetical. It is, of course, false. The indemnities, including, most importantly, the PSA indemnity that the holders all knew existed when they purchased their certificates, do not give Bank of America any right to control the Trustee's actions or strategy. There is unquestioned testimony that Bank of America exerted no control whatsoever over the Trustee, its counsel, or its pre-settlement experts. *See* Kravitt Tr. 540:20-541:3. *See also* Daines Tr. 109:25-110:3 (Ex. 28) (answering "no" when asked if he knew "who is actually paying [Mayer Brown's] bills"); Lin Tr. 161:14-20 (Ex. 29) ([redacted]); Adler Tr. 177:7-12 (Ex. 30) (testifying that he did not know whether Bank of America paid his bills).

F. The Trustee did not "coerce" the Institutional Investors.

The Scott + Scott firm filed an objection on behalf of holders of just over $3 million of securities, which is .002% of the outstanding principal balance in the Settlement trusts. Its clients' minimal holdings reside in only 8 of the 530 Settlement trusts (or 1.5% of the trusts). In other words, their clients possess miniscule holdings in a miniscule number of trusts. They have filed a lawsuit against BNYM pending before Judge Pauley, *Retirement Board of Policemen's Annuity and Benefit Fund of the City of Chicago v. The Bank of New York Mellon*, 1:11-cv-05459. They euphemistically call themselves the "Public Pension Funds," though several of the Institutional Investors individually manage public pension assets many times the amount of the Scott + Scott clients' aggregate holdings.

The Scott + Scott Objection contradicts one of the key themes of the AIG Objection. Whereas AIG claims that the Trustee settled because "the institutional investors have their shotgun pointed at the trustee saying, you have to act, there is an Event of Default, you are going to get sued" (4/12/2013 Tr. 121:4-6 (Ex. 12)), Scott + Scott argues that "the Institutional Investors lacked the leverage and tools to extract a fair and adequate settlement," because the Trustee had "disable[d] [them] from bringing suit" (S+S 2, 6). After a barely disguised solicitation for others to hire Scott + Scott to sue the Trustee, the objection concludes with a plea that the Court nullify the Settlement but order the parties to mediation, in the vain hope that Bank of America will open its checkbook once it learns the Trustee is powerless to agree to a settlement. This objection is completely misguided.

1. <u>The allegations about the no-action clause are false.</u>

The Scott + Scott Objection begins with a fabrication: "BNY Mellon exploited the use of the 'No-Action' clauses in the [PSAs] and used the limitations on the ability of MBS holders to bring suit to protect their economic interests." S+S 2. It says that the Trustee used the no-action clauses in order to "coerce an extra-judicial settlement and to protect itself from liability for its own breaches of the PSAs." *Id.* Neither of these allegations has any basis in reality.

No-action clauses are "enforced in a variety of contexts in both federal and state courts." *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1050-51 (2nd Cir. 1995). They do not exist to shield wrongdoers: to the contrary, they *benefit* investors by "protect[ing] against the risk of strike suits," whereby "a single bondholder or a small group of bondholders . . . might . . . bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest." *Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *6 (Del. Ch. June 1, 1992) (applying New York law); *see also Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1892) (no-action clasues "prevent[] individual bondholders from pursuing an individual course of action and thus . . . jeopardizing the fund provided for the common benefit"). "Granting standing to a certificateholder would not only override the terms of the [agreement] and alter the bargained for-terms . . . , it would encourage and embolden other certificateholders to hire their own counsel to advance their individual and conflicting pecuniary interests." *In re Innkeepers USA Trust*, 448 B.R. 131, 145 (Bankr. S.D.N.Y. 2011). If "every holder . . . were free to sue at will for himself and for others similarly situated, the resulting harassment and litigation would be not only burdensome but intolerable." *Friedman v. Chesapeake & Ohio Ry. Co.*, 261 F. Supp. 728, 731 n.7 (S.D.N.Y. 1966) (quotation marks omitted), *aff'd*, 395 F.2d 663 (2d Cir. 1968).

This Court's decision in *Walnut Place v. Countrywide* is a perfect illustration. Walnut Place brought repurchase claims against Countrywide on its own behalf. Countrywide, not the Trustee, moved to dismiss, and this Court granted the motion. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863, at *5 (Sup. Ct. N.Y. Cnty. 2012) ("the cases cited by plaintiffs do not support a reading of Section 10.08 as inapplicable to claims for breach of the representations and warranties made by Countrywide"). A unanimous panel of the First Department agreed. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684 (1st Dep't 2012) ("[Justice Kapnick] correctly held that plaintiff certificate holders' action is barred by the 'no-action' clause in the PSAs"). That experience shows that the no-action clause is not a bogeyman conjured up by the Trustee but rather an enforceable term of the contracts to which all investors, including Scott + Scott's clients, agreed when they bought their certificates. The law is clear that no-action clauses are "bargained-for contractual provisions," *Feldbaum*, 1992 WL 119095, at *5, that, as this Court has recognized, Certificateholders "agree[] to when they purchase the certificates," *Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v.*

Countrywide Fin. Corp., Index No. 650474/2008, slip op. at 7 (Sup. Ct. N.Y. Cnty. Oct. 7, 2010). The PSA's limit on Certificateholders' right to sue derivatively—not insuperable, but not negligible either, especially for those with miniscule holdings—is a fact that the Trustee could not have ignored in considering the merits of the Settlement. The Trustee in good faith believed that the Settlement provided a recovery for thousands of Certificateholders when no recovery might otherwise exist.

The notion that BNYM used the no-action clause "to protect itself from liability for its own breaches of the PSAs" (S+S 2) is completely divorced from reality. Since entering into the Settlement, the Trustee has been sued at least seven times on one or more of the Settlement trusts. As Scott + Scott is well aware, because it brought one of those suits itself, the Trustee has never asserted the no-action clause as a defense. Indeed, after eight pages accusing the Trustee of "coercing" the Institutional Investors, Scott + Scott notes that "MBS holders might be limited in their ability to sue BofA directly, but they *can* sue BNY Mellon for wrongfully causing the loss of their repurchase rights." S+S 8 (emphasis added). The latter point is wrong, but it has nothing to do with the no-action clause. And the former proves precisely the Trustee's point: that, absent the Settlement, Certificateholders may well *never* have been able to recover from Bank of America and/or Countrywide on the settled claims.

The objection presumes that the Trustee "coerced" the Institutional Investors by foiling their plans to sue Bank of America and Countrywide, and that Kathy Patrick and her clients—including PIMCO, BlackRock, MetLife, the Federal Reserve, and Freddie Mac—were such shrinking violets that the Trustee got away with it. This assumption defies all common sense given Scott + Scott's own position that remedies were and are available directly against the Trustee had it truly "thwarted" the investors' efforts to obtain recovery from Bank of America.

Indeed, much of the AIG Objection makes the opposite, but equally false, allegation that counsel for the Institutional Investors threatened to *sue* the Trustee, and the Trustee thus entered into the Settlement in an effort to *avoid* such liability. The objectors cannot get their stories straight. The evidence supports neither objection—the Institutional Investors did not threaten the Trustee, and they had no need to because the Trustee was working with them to achieve an outcome that was good for investors. *See* Bailey Tr. at 146 (Ex. 19) ("I don't believe Ms. Patrick ever said or threatened to bring suit against the trustee. . . . To my knowledge, that was never raised by Ms. Patrick."); Kravitt Tr. at 354 (Ex. 9) ("Ms. Patrick never threatened, to the best of my memory, never threatened to sue Bank of New York over any action in connection with these matters."); Patrick Tr. at 55-56 (testifying [redacted]).

2. The Institutional Investors can look out for themselves.

It is equally unlikely that the Institutional Investors, with their tens of billions of dollars of holdings, need Scott + Scott, which represents holders of less than one ten-thousandth the size, to protect them from "coercion" by the Trustee. Scott + Scott says "the Institutional Investors lacked the leverage and tools to extract a fair and adequate settlement." S+S 2. But this ignores the Institutional Investors' express statements to the contrary and their unwavering support for the Settlement. 6/23/2011 Letter from Patrick to Bailey, Ex. D to the Verified Petition (The Institutional Investors believe that "the settlement is in the best interests of all of the Trusts included in the settlement."); *see also* Patrick Tr. 339:14-18 (Ex. 9) ([redacted]); Smith Tr. 53:22-54:1 (Ex. 31) ([redacted]

[redacted]").

Scott + Scott again contradicts itself when it says that "BNY Mellon . . . wield[ed] the PSA's 'no action' clause to disable the Institutional Investors from bringing suit." S+S 6. Yet only two pages earlier, they quote the Institutional Investors' counsel saying that "we went to Bank of New York and said we're going forward with this, either you're going to bring these claims *or we're going to bring them derivatively*." *Id.* at 4 (quoting R. Madden) (emphasis added). As Mr. Madden said, "[we] went through the hoops that have been talked about here. . . . We gathered together. We demonstrated to the trustee that we had 25 percent." *Id.*

That determination to proceed with litigation, by *satisfying*, not ignoring, the no-action clauses, and by offering a valid direction and indemnity to the Trustee, is the source of a major disconnect in the Scott + Scott Objection. The objection cites, wrongly, *Amchem Prods., Inc. v. Windsor*, which denied certification of a settlement class because "[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer." 521 U.S. 591, 593 (1997) (quoted at S+S 2). Here, the overwhelming evidence in this case, which all of the objectors studiously ignore, is directly to the contrary. Bank of America understood that [redacted] Mirvis Tr. 91 (Ex. 22). It understood in particular that the Trustee could and would hire a firm like Gibbs & Bruns to represent the trusts:

[redacted]

Id. at 94-95. Thus, the assertion that the Trustee was "willing to represent [the Institutional Investors] in an extra-judicial resolution, [but] would still not institute suit on their behalf" (S+S 7), is both incorrect and irrelevant. [redacted] (Griffin Tr. 105:20-23 (Ex. 6); Kravitt Tr. 128:14-19) (Ex. 7) (indeed, the Trustee was negotiating a direction with the Institutional Investors before settlement discussions commenced (Kravitt Tr. 433:18-434:8)), and it is equally undisputed that the Institutional Investors would have attempted to sue derivatively had the Trustee not done so. Patrick Tr. 239:9-240:14 (Ex. 9).[16]

3. The Court cannot amend the Settlement Agreement or order mediation.

Remarkably, Scott + Scott asks the Court to order the Trustee to sue Bank of America; order non-party Bank of America to turn over all documents that it produced in the *MBIA* litigation (which involved wholly different trusts not at issue here); and then order the Trustee, non-party Bank of America, non-party Countrywide, and others to engage in mediation. S+S 3-4. AIG likewise requests that the Court engage a mediator to oversee a new round of settlement discussions. AIG 7. While this request for renewed settlement discussions completely undercuts the extreme position of AIG's experts that the Trustee lacks authority to settle, the request is nevertheless bereft of legal authority, and there is no evidence that it offers hope of greater recovery, let alone sufficient hope to warrant throwing away $8.5 billion in cash and unprecedented mortgage servicing improvements.

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[16] In any event, as Scott + Scott implicitly concedes, neither the Trustee nor the Institutional Investors actually discounted the value of the claims to account for the possibility that no one would bring a repurchase claim. S+S 12 n.4; *see* Scrivener Tr. 299:23-300:2 (Ex. 32) ([redacted]"). That "presentation discount," as described by Bank of America, was also excluded from Brian Lin's expert analysis. Lin Tr. 582:6-23 (Ex. 29) ([redacted]).

Courts in equity do not have free rein to displace the trustee and fashion a new strategy. *See In re Baylies' Estate*, 104 N.Y.S.2d 238, 242 (Sur. Ct. N.Y. Cnty. 1950) ("No ruling, however, will be made at this time prescribing [a course of conduct]. The power . . . is by its nature discretionary and like any other such power its exercise will be controlled only upon a showing that it has been improperly used."). A trustee may agree to a settlement "conditionally upon the subsequent approval of the court" (*Restatement* § 192 cmt. D), but the court will *not* tell the trustee how to exercise its settlement discretion. *Id.* § 259 cmt. d ("Where a matter rests within the discretion of the trustee, the court ordinarily will not instruct him how to exercise his discretion."); *In re Lykes' Estate*, 305 A.2d 684, 686 (N.H. 1973) ("This court will not give advice establishing maximum and minimum limits within which the trustee's discretion shall be exercised in the future. Nor will we substitute our judgment or discretion for his.") (citations omitted).

In fact, a trustee's failure to exercise discretion is one of the few circumstances in which courts will decline to instruct. *See Harris Trust & Savs. Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 641 (7th Cir. 1991) ("the vision of trustees without judicial guidance, however unpleasant, is eclipsed by a more disturbing vision—trustee after trustee . . . coming into federal court and pleading, 'We do not know what to do, Judge. Give us some instruction.'"); *City Bank Farmers' Trust Co. v. Smith*, 189 N.E. 222, 223 (N.Y. 1934) ("Trustees are not entitled to instructions with reference to questions relating to the administration of a trust where the trustees were authorized to exercise their discretion with reference thereto.") (internal quotation omitted). Thus, while courts will decide whether a decision that the trustee has already made is an abuse of discretion, they will not exercise that discretion—the province of the trust—in the first instance. *See In re*

Hagymas, 46 Misc. 2d 492, 495 (Sur. Ct. Rensselaer Cnty. 1965) ("All that I could possibly review would be an issue of any abuse of that discretion.").[17]

More specifically, and as dictated by common sense, reviewing courts cannot rewrite settlements. In approving the multi-state tobacco settlement, Justice Crane made this very point:

> The *amici curiae* seem to misconceive the court's role in applying the standard of review. They imply that the court can change the terms of the settlement. Many of the anti-smoking and public health goals that they lament the settlement has not achieved, as laudable as they are, *cannot be inserted by the court*. After all, this is a consent settlement and decree that the parties are presenting, and any change in their terms would permit one or another of the parties to withdraw . . . . Quite the contrary, *the court is confronted with a take-it-or-leave-it proposition*. I must decide to approve or reject what the parties have placed before the court.

State v. Philip Morris, Inc., 179 Misc.2d 435, 439-40 (Sup. Ct. N.Y. Cnty. 1998) (emphasis added), *aff'd*, 236 A.D.2d 400 (1st Dep't 1999); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (courts cannot "delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety.") (internal quotation omitted). In short, Scott + Scott's requests that the Court rewrite the Settlement, order the production of documents from other cases, and/or mandate that the parties engage in a mediation with non-parties should be rejected out of hand.[18]

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[17] *See also In re Shiel's Will*, 120 N.Y.S.2d 632, 636 (Sur. Ct. Westchester Cnty. 1953) ("It is well settled that the exercise of a discretionary power in trustees to invade principal is not subject to the control of the courts except that their acts in such respect may be reviewed to prevent an abuse of discretion, bad faith, arbitrary action or fraud."); *McEntee v. Halloran*, 391 S.W.2d 266, 268 (Mo. 1965) ("A court of equity as a part of its general supervisory power over trusts has the authority to instruct and advise trustees as to their powers and duties. However, the exercise of such power does not contemplate that the court should act as legal adviser of the trustees.") (citations omitted).

[18] Scott + Scott's requests also ignore the fact that, under the Settlement Agreement, Bank of America and Countrywide are permitted to withdraw from the Settlement (which thus becomes null and void) if it is altered, or not approved, in any material respect. *See* Settlement Agreement ¶¶ 2(a), (b).

4. <u>There is no evidence that the trusts would fare any better under the objectors' alternatives.</u>

Finally, Scott + Scott's claims that the Settlement could somehow be improved rest on a series of false factual premises. First, they say Bank of America never expected litigation if a settlement could not be reached. S+S 4. That is flat wrong. *See supra* at 39. Next, they assume that if Countrywide and Bank of America turned over the discovery material from the recently-settled *MBIA* litigation, those documents would enhance the trusts' claims. S+S 4. Generally, this reasoning reflects the fallacious "assumption that further investigation and delay of the proceeding would only have increased the Settlement Payment . . . [and] completely ignores the possibility . . . that delay and further investigation might have caused Bank of America to withdraw its settlement offer altogether and make the expected outcome of any settlement lower than $8.5 billion." Fischel Report 10-11 (Ex. 38 in Support). More specifically, the *MBIA* litigation disproves any idea that those documents would alter the calculus in the trusts' favor. That litigation lasted for nearly five years before the parties settled at the summary judgment stage, and in all that time MBIA recovered nothing, as Justice Bransten held that MBIA could not prove either primary or successor liability or secure the repurchase of *any* loan absent a trial (likely years in the future). *MBIA Ins. Co. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008 (Slip op. on Mot. Seq. Nos. 57, 58, 60, and 61, Apr. 29, 2013). The *MBIA* litigation, moreover, involved wholly different trusts, none of which are at issue in this case. And in any event, with respect to successor liability, *MBIA's own expert*, who has access to all of that discovery, opined *in this case* that a reasonable estimate of his client's success on the successor liability issue alone could be as low as 45%. Coates Tr. 227:24 (Ex. 33). The Trustee's successor liability expert, Professor Daines, reviewed both sides' expert reports in *MBIA*—reports that were based on all of the discovery that Scott + Scott wants—and concluded that "the opinions expressed in [his pre-Settlement] report remain[] unchanged." Daines Report 1 (Ex. 49 in Support).

In such circumstances, it would be reckless for the Trustee, or the Court, to throw away $8.5 billion in the hopes that Scott + Scott might succeed where Gibbs & Bruns "failed." Judge Batts of the Southern District of New York recognized the wisdom of taking a sure deal when she approved AIG's own settlement of claims that it defrauded its stockholders. She held that modifying "the Settlement Agreement's release of liability would be improvident as it would all but frustrate the Settlement with no sound basis to assume the Class would fare better." *In re AIG, Inc. Sec. Litig.*, 2013 WL 68928, at *12 (S.D.N.Y. 2013). She denied an objector's "demand that the Court mandate action [*i.e.*, "new negotiations"] based on sheer speculation." That sound reasoning applies equally here.

III. The Trustee Did Not Violate the Duty of Care.

Because the Trustee acted in good faith, the only other question is whether it abused its discretion. The objectors describe this as an inquiry into the "duty of care," but they never explain what the duty of care means. AIG 28-29. In fact, the AIG Objection spends five pages arguing about an Event of Default (*id.* at 29-33), despite acknowledging that it has nothing to do with the standard by which the Trustee's conduct is judged—good faith and reasonableness.

A. The Trustee's decision is subject to the business judgment rule.

The duty of care is subject to the business judgment rule, which "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 (2d Cir. 1980). The "substantive decision not to prosecute," in particular, is a matter "falling within the ambit of the business judgment doctrine and thus excluded from judicial scrutiny." *Auerbach* v. *Bennett*, 47 N.Y.2d 619, 636 (1979); *see also Wolfert v. Romit*

Int'l Corp., 119 N.Y.S.2d 91, 92 (Sup. Ct. N.Y. Cnty. 1953) (the decision to litigate, in particular, "is a matter within the discretion of the directors and the courts will generally not interfere with that discretion."). "Absent evidence of bad faith or fraud . . . the courts must and properly should respect" such decisions. *Auerbach*, 47 N.Y.2d at 631.

Although that rule is best developed in the context of corporate directors' fiduciary duties, it applies equally to trustees. *See, e.g.*, *Frostbaum v. Ochs*, 277 B.R. 470, 475-76 (E.D.N.Y. 2002) ("it was appropriate to rely on the Trustee's business judgment in abandoning collection of this claim. The Trustee's decision . . . was well within the scope of decisions left to the Trustee's business judgment. So long as this decision was not made arbitrarily, or in bad faith, it was appropriate for the Bankruptcy Court to accept this decision for the benefit of the estate and to grant the Trustee's final application.").[19] Thus, no-action clauses, like the one in Section 10.08, ensure that "the *judgment of the Trustee* concerning whether to resort to the courts is controlling upon all of the bondholders." *Campbell v. Hudson & Manhattan R.R. Co.*, 277 A.D. 731, 734 (1st Dep't 1951) (emphasis added), *aff'd*, 302 N.Y. 902 (1951).

That judgment must be evaluated as of the time of the Settlement, and not with the benefit of hindsight:

> With regard to prudence, . . . the question is not what appears to be prudent in light of our current understanding of the law, but rather what was prudent in light of what could reasonably have been known to the Trustees at the time they allegedly should have made the motion. Even if this were not now law of the case . . . , it is compelled by logic.

[19] *See also In re Batt*, 488 B.R. 341, 353 (Bankr. W.D. Ky. 2013) ("This rule protects a disinterested trustee so long as any decision falls within the range of what an informed businessman would have rationally decided under the circumstances. . . . Moreover, this [settlement] agreement does not have to be an agreement the Court would enter, but must simply be above the lowest point in the range of reasonableness.").

LNC Invs., Inc. v Nat'l Westminster Bank, N.J., 308 F.3d 169, 176 (2d Cir. 2002); *see also Hazzard v. Chase Nat'l Bank*, 159 Misc. 57, 73 (Sup. Ct. N.Y. Cnty. 1936) ("Hindsight is not helpful in fixing responsibility. The conduct of the trustee must be measured by what was before it on the date when the acts complained of were committed.").

B. The Trustee conducted an appropriate investigation before settling.

The objectors offer two criticisms of the Trustee's investigation, both relating to the Notice of Non-Performance and loan repurchase claims. AIG 33-37. Their third "investigation" point (*id.* at 37-39) is really a critique of the negotiations and is addressed in Part III.C.below.

1. <u>Investigation of alleged servicing breaches</u>

First, the objectors argue that the Trustee should have investigated the allegations in the Notice of Non-Performance. AIG 33-35. The Trustee (supported by the Institutional Investors) did so. Bailey Tr. 235:24-236:20 (Ex. 19) ([redacted]). It also determined that it was not in the trusts' interests to fight with Bank of America over whether these specific allegations concerning servicing were true, and if so, whether they were "material[]" breaches that "materially affect the rights of the Certificateholders" (PSA § 7.01(ii)). [redacted]. Kravitt Tr. 358:6-359:3, 490:7-19 (Ex. 7). [redacted]. Kravitt Tr. 485:12-20 (Ex. 7).

2. <u>Investigation of repurchase claims</u>

The objectors also say that "BNYM *did not investigate* the underlying liabilities" (AIG 35 (emphasis added)), but in the next sentence they retreat to "BNYM did *next to* nothing" (*id.*), and then they spend 20 pages (*id.* at 51-70) dissecting the Trustee's expert reports. Even if what they really mean is that the Trustee did not investigate *adequately*, they are still wrong.

First, the objectors disregard the Trustee's right to rely on outside advisors, which is codified in Section 8.02(ii) of the PSAs and in comment (b) of Section 77 of the *Restatement (Third) of Trusts*. Limiting that doctrine to cases in which the advisor is ultimately vindicated "would eviscerate" the Trustee's right to rely on advisors. *Cruden v. BNY*, 957 F.2d 961, 972 (2d Cir. 1992); *see also In re Cox Radio, Inc. Shareholders Litig.*, 2010 WL 1806616, at *13-*14 (Del. Ch. 2010) ("While the Appraisal Objectors correctly note that CEI's projections proved to be overly pessimistic, so long as those projections were made in good faith, there is nothing wrong with them."). After all, the Trustee cannot *rely* on an advisor if the Trustee is itself responsible for the accuracy of the advice.

Even the claimed "incorrectness" of one or more opinions does not undermine the Trustee's good faith. *See Cruden*, 957 F.2d at 972 ("the record discloses nothing beyond the 'incorrectness' of counsel's opinion to support an inference that the Trustees' reliance was not in good faith. There is nothing, for example, to indicate that the Trustees went 'lawyer shopping' in an attempt to secure a favorable opinion of counsel."); *In re AIG*, 2013 WL 68928, at *12 ("Though the NYAG contends that the Lead Plaintiff's loss causation analysis included a grave error that would have changed the approach and outcome of settlement talks, . . . this is uncertain at best. Parties claim to have taken a holistic approach to settlement, and that they considered the relevant information that was available to them.").

Second, the objectors ignore the costs of obtaining more information. These costs take many forms. Loan file review is expensive. *See* Fischel Report 24 (Ex. 38 in Support). It also takes a lot of time, delaying any recovery. *See id.* at 23-24. And most importantly, it does not produce conclusive results. *See id.* at 11. More subtly, it does not make a greater recovery any more likely. Additional information could well have shown that the defenses were stronger than previously thought, or the claims themselves were weaker. *See id.* at 8. [redacted], (Scrivener Tr. 277:18-278:10 (Ex. 32))—not just a one-sided "review"—and concluded that this data, adjusted to account for differences in the two portfolios, left it adequately informed about the value of repurchase claims, particularly when the amount recoverable on those claims likely was capped at Countrywide's net worth anyway.

The AIG Objection points out that BNYM did sue another securitization sponsor (GE-WMC) based on a review of loan files (AIG 36). This fact is impossible to square with AIG's "pocket trustee" conflict theory and the suggestion that the Trustee would never sue its clients. But that aside, what the objectors fail to point out is that the GE-WMC loan file review was conducted by investors, at their own expense, not by the Trustee, and that the litigation was filed at those investors' direction as well. The Trustee has never asserted that loan-file review is useless, only that, on the specific facts here, the GSE data was at least as informative (if not more so) as an expensive, time-consuming, and inconclusive review.

3. <u>The Trustee's experts were independent.</u>

The objectors go overboard when they assert that the Trustee hired legal advisors "to pronounce BofA's legal positions to be 'reasonable.'" AIG 36. Professors Daines and Adler both understood that their mandate was to produce objective opinions, not to "rubber stamp" predetermined results. *See* Adler Tr. 244 (Ex. 30) ("I wanted it to be clear in the retention letter that I represented no one and my only obligation was to issue an honest opinion."); Daines Tr. 155 (Ex. 28) ([redacted]); Bingham Tr. 67:15-68:10 (Ex.

34) ("I was asked to quantify the maximum amount that the trustees would have to distribute if a judgment were rendered against them. It had nothing to do with the external process of whether a settlement should be a trillion or 10 trillion. I was working strictly to quantify the maximum settlement amount); Lin Report 1 (Ex. 35) ("BNYM has engaged me to render an independent professional opinion relating to the settlement amount of 530 Trusts."). On the key question of successor liability, the choice of expert seems to make little difference—even the expert hand-picked to advocate for MBIA and AIG agrees that a reasonable estimate of success might not exceed 50%. Coates Tr. 225 (Ex. 33).

This particular objection, like the accusation of "collusion" with Bank of America, does not merely allege carelessness by the Trustee. It requires finding that every one of BNYM's witnesses, *and* every one of the experts, lied when they were asked about the purpose of those engagements.

C. The entire negotiation took place against the backdrop of threatened litigation.

The objectors further fault the Trustee for not saying, "We will sue you," as if mouthing those words would have altered the course of negotiations. The negotiations began when counsel for the Institutional Investors sent a Notice of Non-Performance that the objectors find so powerful and well-supported that they rely on it as their only evidence of servicing breaches. A roomful of lawyers participated in each negotiation, and most of them were litigators. The Institutional Investors gave detailed presentations estimating damages in the tens of billions of dollars. Against this backdrop, litigation was not merely possible; Bank of America and its counsel understood that litigation was a certainty if a satisfactory settlement could not reached, because either the Trustee would hire Gibbs & Bruns or the Institutional Investors would satisfy the no-action clause and sue derivatively. BNYM Statement 6-7, 20; Laughlin Tr. 241:24-242:16 (Ex. 36): ("[redacted]

[redacted]); *Id.* 237:6-12 ([redacted]); Mirvis Tr. 90:12-91:16 (Ex. 22) ([redacted]); Koplow Tr. 80:9-81:21 (Ex. 37) ([redacted]); Mirvis Tr. 82 (Ex. 22) ([redacted]). The idea that the threat was insufficiently explicit is risible.

Equally absurd is the idea that converting the Notice of Non-Performance, which Bank of America vociferously disputed, into a draft pleading, with numbered paragraphs and a caption on the top, would have led Bank of America to open its checkbook even wider. AIG 38. The claim that the Trustee could somehow have persuaded Bank of America to admit to successor liability by inviting expert witnesses to "advocate" for it ranks in the same league. *Id.* at 39 n.140. There is certainly no authority that such practices are required by a monolithic duty of care. *See Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) ("The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise.").

The objectors also suggest the Trustee "embark[ed] on a path straight to settlement," which was somehow intended to protect "its business partner Bank of America." AIG 1, 38. There is no evidence whatsoever to support this claim—like several others, accepting it requires finding that every Trustee witness, and every participant in negotiations, lied at his or her deposition. The fact is that beginning negotiations was an easy decision (and well within the Trustee's discretion), because the Forbearance Agreement also tolled statutes of limitations, and there appeared to be at least a chance of obtaining recovery without the uncertainty and delay of litigation. *See* Kravitt Tr. 136:7-18 (Ex. 7). There was no reason not to at least see how negotiations would play out, given that litigation always remained an option if Bank of America would not agree to a satisfactory settlement. Once the Settlement was negotiated, the Trustee began a separate process of evaluating the proposal before signing it, and even then it was conditional on the outcome of this proceeding. As with so many of the objections, it would be much easier to find fault if the Trustee had done the opposite—ruled out negotiation, or insisted on years of discovery and pre-trial practice before considering it. At a minimum, nothing in this objection comes close to a violation of the duty of care.

Perhaps even more importantly, when the Trustee made the final decision to settle, it did so after comparing the negotiated settlement to a litigation alternative. Loretta Lundberg, a managing director in BNYM's corporate trust group and one of the key participants in the settlement process, made this perfectly clear:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Lundberg Tr. 248-50 (Ex. 38) (objections omitted). [redacted]

[redacted]

Bailey Tr. 201:25-202:18 (Ex. 19); *see also*, *e.g.*, Stanley Tr. 181:9-16 (Ex. 39).

There is a mountain of evidence of what should be obvious from the face of an $8.5 billion settlement—namely, that everyone knew Bank of America was settling claims that could be brought in court. The objectors' attempt to bury that mountain with tiny spoonfuls falls far short of proving a breach of the duty of care.

D. The objectors misstate the Trustee's role, which is irrelevant anyway.

Some objectors argue that the Trustee did not participate "meaningfully" in the negotiations over the settlement amount. AIG 39-41. The relevance of this point is never articulated or defended. It is also false. The objectors seem to argue that if a satisfactory settlement simply landed on the Trustee's desk, it would be obliged to reject it—no matter how large the settlement or how flimsy the claim—unless it was the lead negotiator. Trust law plainly does not require that result; indeed, it probably prohibits it. It is difficult to understand how a trustee could, in good faith, reject a reasonable settlement that was good for its beneficiaries solely because it could not assert pride of authorship. It is common practice in the corporate trust industry for investors with economic interests to lead such negotiations. *See also* Landau Report 16 (Ex. 44 in Support) (noting that "less participation [by the Trustee] also would have been appropriate under the circumstances"). Here, the PSAs authorize investors to do much more—if they comply with the holdings requirements and other terms of the PSAs, investors can *direct* the Trustee how to behave, they can *compel* the Trustee to terminate the Master Servicer, and they can *sue* on behalf of the trusts, without any Trustee participation at all. Investor participation is hardly the anathema that the objectors make it out to be. The PSAs surely do not require that if a melee breaks out in the negotiating room (Koplow Tr. 86:15-25 (Ex. 37)), the Trustee's counsel must be the chief pugilist.

In any event, though it was not required to participate at all, here the Trustee was involved every step of the way. The objectors again contradict one another on this control point,[20] but the record is clear that the Trustee's participation in the negotiations was robust. [redacted] (Ex. 40) [redacted] Patrick Tr. 291:5-12 (Ex. 9).[21] *See also* Kravitt Tr. 510 (Ex. 7) ("Kathy told [Scrivener that $4.5 billion was inadequate], but I would have told him that if she hadn't."); *Id.* 323:12-15 ("We participated in negotiating [the Settlement], so it wasn't a set of terms that was given to us in a take it or leave it fashion. It was a set of terms that we had a role in formulating."). [redacted]

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20 AIG says that the Trustee had a "complete lack of involvement" and "allowed the Inside Institutional Investors to negotiate the most critical settlement term." AIG 39, 40. Meanwhile, Scott + Scott accuses the Trustee and its counsel of orchestrating the whole negotiation and blocking the investors from suing Countrywide. *See* S+S 6; pp. 33-41 above.

21 As this Court noted at a prior hearing in this case, the evidence makes it "seem[] like Bank of New York Mellon was at an awful lot of these meetings…" 10/12/2012 Hearing Tr. 136 (Ex. 42).

[redacted]. Mirvis Tr. 246:8-19 (Ex. 22); Scrivener Tr. 36:10-37:2 (Ex. 32); (Ex. 41), And the Trustee received and marked up each of the more than two dozen drafts of the settlement agreement. It is not clear why the objectors bother trying to portray the Trustee as "passive," but that is a story the evidence does not support.

One final point: the objectors' insistence that the Trustee failed in its duty to "maximize recoveries for the certificateholders" (AIG 41) must be considered in light of their failure to offer *any* evidence either that more could have been achieved in litigation or that Bank of America would have paid more in settlement. After nearly two years of discovery, the absolute silence on that point is deafening.

E. The Trustee need not have signed 530 separate Settlements.

In a one-paragraph afterthought, the objectors argue that the Trustee should have "perform[ed a] trust-by-trust analysis of the proposed settlement." AIG 47. But the Settlement Agreement does that. As Jason Kravitt explained at length, paragraph 3(c) of the Settlement Agreement—to which no one has objected—fairly allocates the $8.5 billion payment among the 530 trusts based on past and expected future losses. Kravitt Tr. 586-89 (Ex. 7). Hence, if the Settlement is fair in the aggregate, there is no reason to think—and no one has argued—that it makes any trust worse off. In fact, the objectors identify no prejudice that any trust has suffered, or any relevant differences among trusts that the Settlement allocation does not account for. Any suggestion that the Institutional Investors' interests diverged from those of other holders is undermined by the use of an allocation formula that ignores their holdings entirely; indeed, the Institutional Investors are receiving precisely the same benefit as other, similarly situated holders. The objectors cannot even bring themselves to argue that the trusts actually would have been better off with 530 different trustees fighting over "a limited amount of settlement funds." And as Cranberry Park explains, a global settlement provides global certainty for which Bank of

America would likely pay a premium (CP 21), and there is undisputed evidence that the servicing improvements would have been impossible in one-off settlements (Burnaman at 32) (Ex. 51 in Support).[22]

The objectors take issue with the Settlement Agreement's requirement that the Trustee perform an allocation *after* the Settlement is approved, rather than in June 2011. But courts routinely approve class action settlements with post-effective allocation procedures, rather than specific allocation amounts. *See, e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987) ("The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement."); *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 922 (S.D.N.Y. 1991) ("The Settlement is fair notwithstanding that the actual amounts to be distributed to class members will be subject to further allocation procedures within each of the Subclasses."), *aff'd*, 960 F.2d 285 (2d Cir. 1992). "An allocation formula need only have a reasonable, rational basis." *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (quoting *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358,367 (S.D.N.Y. 2002)). There is no dispute that the allocation formula is fair.

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[22] The Trustee joins in the Institutional Investors' more detailed opposition to the Cranberry Park objection, as well as their opposition to the Supplemental Objection filed by the Federal Home Loan Banks of Boston, Chicago, and Indianapolis (the "FHLBs") and the Triaxx entities ("Triaxx"). Counsel for the Trustee and Institutional Investors have coordinated in an effort to avoid duplication in the answering papers to be filed today. The Trustee notes briefly that the claim of the FHLBs and Triaxx that the Master Servicer has an obligation to repurchase modified loans was raised and abandoned by at least one of the Institutional Investors, Kore Capital L.L.C, which now supports the Settlement, and was discussed in correspondence among Countrywide, the Institutional Investor, and the Trustee in 2009. *See* FHLB/Triaxx Br. 5 (quoting Kore Capital letter). Kore Capital's support for the Settlement is unsurprising—the theory of a Master Servicer repurchase obligation advanced in the FHLBs and Triaxx's Supplemental Objection is contradicted by the clear language of the PSAs.

F. The Trust Committee served its function as a process check.

The objectors zero in on one 45-minute meeting to contend that the Settlement should be rejected because there were questions that the objectors asked the Trustee's witnesses in deposition that the Trust Committee did not ask. AIG 45-46. The objectors, of course, pointedly ignore what the Trust Committee actually does—[redacted]. *See* Stanley Tr. 173:10-23 (Ex. 39); Landau Report 10 (Ex. 44 in Support) ([redacted]) The relevant decisionmakers, including the responsible trust officer, Loretta Lundberg, and the internal counsel, Robert Bailey, [redacted]. *See* Lundberg Tr. 167:24-168:4, 168:17-169:2 (Ex. 38); Bailey Tr: 154:11-19, 69:4-8; 69:20-22 (Ex. 19); *see also* Stanley Tr. 171:15-19 (Ex. 39) [redacted]). Many of the topics that the objectors contend the Trust Committee ignored are actually within the ambit of its advisors' reports—that is, they are topics covered by experts that the Trustee was entitled to, and did, rely on upon.

G. The Trustee does not need to "represent" Certificateholders to settle its own claims.

The final "duty of care" objection rests on a word game. The objectors argue that because no one "represented" AIG and other objectors, the Trustee somehow breached unspecified fiduciary duties. AIG 49. This is a simple *non sequitur*. The Trustee has a duty of care. There is no fiduciary duty of representation.

In any event, The Bank of New York Mellon negotiated *as Trustee*. *See, e.g.*, Kravitt Tr. 133:11-12 (Ex. 7) ("I was representing the Bank of New York Mellon as trustee."). It is in that capacity that it owns the Mortgage Loans (PSA § 2.01(b)), receives the representations and warranties (§ 2.03(a)), and has the right to enforce them, including through settlement (§ 2.04; *see also* BNYM Statement 13-14). It holds title to the loans "for the *benefit of* the Certificateholders" (PSA § 2.01(b)), but neither the PSAs nor trust law says that it *represents* them. MBS certificateholders are "contractually obligated to speak with one voice" (*In re Innkeepers USA Trust*, 448 B.R. 131, 144 (Bankr. S.D.N.Y. 2011)), and here that is the voice of the Trustee.

That is why the Trustee's witnesses declined to adopt the objectors' premise that either BNYM or Mayer Brown "represented" (*i.e.*, had an attorney-client relationship with) particular groups of holders. The Trustee was required to act in the Certificateholders' interests, and the Trustee did so. *See* Kravitt Tr. 424:11-19; 136:11-18 (Ex. 7).

*   *   *

This standard for evaluating the Trustee's care is familiar, because it is almost identical to the one that this Court applied in the Article 78 proceeding. There, the Court wrote that

> it is not for this Court to oversee or to review the practices of the Superintendent or the NYID. The issue before this Court is whether there was a rational basis . . . , or whether it was an arbitrary decision, taken without regard to facts. The inquiry is not whether the result would have been different had the NYID hired certain experts or conducted the review on a different time line or with different resources. Absent statutes or regulations that prescribe the manner in which the NYID must review the applications it receives, this Court cannot say that it was arbitrary and capricious for the NYID not to have taken the course that Petitioners insist, after the fact, would have been more prudent.

ABN AMRO Bank N.A. v. Dinallo, Index No. 601846/2009 (Mar. 4, 2013), at 55.

CONCLUSION

Though the objectors have managed to delay recovery by nearly two years, this Settlement remains the largest private settlement in history. Even with hindsight, the objectors do not challenge the merits of the agreement, and they come up with only the most trivial and misguided complaints about the Trustee and its process.

For all of the foregoing reasons, the Court should grant the Trustee's Verified Petition.

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New York, New York

Respectfully submitted,

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