

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

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**RESPONSE TO PETITIONERS' SUPPLEMENTAL BRIEF
REGARDING STATUS OF THE COVERED TRUSTS**

The members of the Steering Committee respectfully submit this Response to Petitioners' "Supplemental Brief Regarding Non-Judicial Status of the Covered Trusts" (Doc. No. 907).

Contrary to Petitioners' position, New York law recognizes trusts as legal entities. 106 N.Y. Jur. 2d Trusts § 44 (citing *Robb v. Wa. & Jefferson College*, 78 N.E. 359 (N.Y. App. 1906); *In re Ihmsen's Estate*, 253 A.D. 472, 475 (3d Dep't 1938); *Pinckney v. City Bank Farmers Trust Co.*, 249 A.D. 375, 377 (3d Dep't 1937)); see also *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 766 (1st Cir. 2011) (describing mortgage-backed securitization process, and stating that, as part of the process, mortgages are transferred to "the eight trusts [at issue], *all of which are separate legal entities*") (emphasis added). The concept of a trust as a legal entity "is increasingly and appropriately reflected both in language (referring, for example, to the duties or liability of a trustee to 'the trust') and in doctrine, especially in distinguishing between the trustee personally or as an individual and the trustee in a fiduciary or representative capacity." Restatement (Third) of Trusts § 2, cmt. a (2003).

The distinction between the Trustee in its individual capacity and the Trustee in its fiduciary or representative capacity is the relevant consideration for the Court when evaluating whether the Bank of New York Mellon ("BNYM"), as Trustee, acted consistently with its fiduciary duties during the course of the settlement negotiations and in entering the settlement agreement. As Mr. Kravitt himself recognized on cross-examination, "[w]hat is good for the trustee may not necessarily be the same thing as what is good for the trust." 7/11/13 Trial Tr. 1675:14-17. Here, the only counsel that the Trustee hired as part of the settlement process understood its job to include protecting the Bank from any liability, including from lawsuits by

certificateholders. 7/11/13 Trial Tr. 1675:26-1676:14; 1676:26-1677:4; 1680:18-24. This charge manifested itself in, among other things, the seeking of a broad indemnity and release for the Trustee's conduct beyond its settlement conduct, and the Trustee working hard to prevent an Event of Default which counsel recognized was not in the Bank's self-interest. 7/9/11 Trial Tr. 1654:3-24; 7/11/13 Trial Tr. 1757:16-19; 7/12/13 Trial Tr. 1885:13-23, 1886:16-18, 1887:4-10, 1888:23-1889:8; R-1445.

Petitioners' argument—which seems to simply be that any legal action by or against the trusts must be litigated through the Trustee—entirely misses the point. That a trust cannot take action on its own supports, rather than negates, the importance of the Trustee ensuring that its desire to protect itself from liability does not impact the actions that it takes as Trustee for the benefit of certificateholders. BNYM as Trustee could have, but did not, hire counsel whose only charge was to advise the Trustee on whether the actions being taken were in the best interests of the trust beneficiaries. Instead, the Trustee hired counsel who was tasked with protecting the Bank from liability and who, as conceded by Mr. Bailey, did not represent the interests of the certificateholders. In so doing, the Trustee blurred (if not completely disregarded) the distinction between its individual and fiduciary capacities.

DATED: July 21, 2013

REILLY POZNER LLP

By: s/ Michael A. Rollin
Daniel Reilly
Michael Rollin
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
Telephone: (303) 893-6100
Fax: (303) 893-1500
dreilly@rplaw.com
mrollin@rplaw.com

Attorneys for AIG Entities

MILLER & WRUBEL P.C.

By: s/ John G. Moon
John G. Moon
570 Lexington Avenue
New York, New York 10022
Telephone: (212) 336-3500
Fax: (212) 336-3555
jmoon@mw-law.com
chuene@mw-law.com

Attorneys for the Triaxx Entities

KELLER ROHRBACK LLP

By: s/ Derek W. Loeser
Derek W. Loeser
David J. Ko
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384
dloeser@kellerrohrback.com
dko@kellerrohrback.com

Gary A. Gotto
3101 North Central Avenue
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Fax: (602) 248-2822
ggotto@krplc.com

*Attorneys for Federal Home Loan Banks of
Boston, Chicago, and Indianapolis*