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.

IAS Part 39

Mot. Seq. No. 042

MEMORANDUM IN SUPPORT OF TRIAXX'S MOTION PURSUANT TO CPLR 4401 FOR JUDGMENT DURING TRIAL DENYING PETITIONER'S APPLICATION

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PRELIMINARY STATEMENT

Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1 (together, "Triaxx") make this Motion for Judgment During Trial under C.P.L.R. 4401.[1] Central to this motion are 49 Covered Trusts governed by a Pooling and Servicing Agreement ("PSA") providing that Countrywide Home Loan Services ("Countrywide" or "CHL") may agree to a loan modification if it "purchases the Modified Mortgage Loan from the Trust Fund immediately following the modification." Another provision states that other than with respect to limited circumstances not present here, majority consent of Certificateholders is required in order to amend the terms of the PSA. The 49 Covered Trusts hold a total of 51,608 modified loans, with a total unpaid principal balance at the time of modification of $11.1 billion.

This motion presents two narrow issues that the Court can decide as a matter of law based on the evidence at trial. The first is whether the proposed Settlement improperly amends the 49 PSAs by eliminating the unambiguous Modified Mortgage Loan repurchase requirement and replacing it with a provision that deems the modification without repurchase "permissible under the Governing Documents." Because the Trustee failed to obtain majority consent for this change, under settled New York law, such amendment is impermissible. The second issue is whether the Trustee acted in accordance with the Proposed Final Order and Judgment ("PFOJ") by releasing over $31 billion in modified loan repurchase claims *for free* without first investigating or valuing the claims. The evidence establishes that the Trustee did not. Accordingly, the Trustee has failed to demonstrate that the proposed Settlement should be approved. The Application should be denied and Petitioners' case dismissed without prejudice.

[1] In order to streamline the issues before the Court and to avoid redundant briefing, this pleading also serves as Triaxx's Supplemental Opposition to Petitioners' Brief in Support of Entry of Proposed Final Order and Judgment. As the trial is not over, Triaxx reserves the right to amend its Supplemental Opposition.

STATEMENT OF FACTS

A. Undisputed Documents and Uncontested Facts

PSA provisions governing loan modification fall into three general categories: Category 1 comprises PSAs that unambiguously require repurchase of any modified mortgage loan; Category 2 PSAs also unambiguously require repurchase, and impose as an additional requirement that the modification "be in lieu of refinance;" and Category 3 PSAs expressly do not require repurchase of modified loans or are otherwise silent on the issue. *See* Moon Aff., Exhibit A (demonstrative exhibit of repurchase provisions for modified loans). These three categories contain seven specific variants of PSA provisions regarding loan modifications as follows: Category 1 contains Variants 1 and 2; Category 2 contains Variants 3 through 5; and Category 3 contains Variants 6 and 7. For the purposes of this motion, Variant 1 and Category 2 are relevant. *See* Moon Aff., Exhibit B (demonstrative exhibit of variations among PSAs).

During trial, the Court admitted into evidence two summary exhibits by stipulation among the parties. The first, R-4126, summarizes the language of the PSAs concerning loan modification and organizes the provisions into the seven variants discussed above. *See* Moon Aff., Exhibit C. The PSAs in Variant 1 ("Variant 1 Trusts") each contain an unambiguous provision requiring Countrywide Home Loans, Inc. ("CHL" or "Countrywide") to purchase Modified Mortgage Loans immediately after modification. *Id.* The second, Exhibit R-4127, establishes that within those Variant 1 Trusts, 51,608 loans were modified, having an unpaid principal balance of $11.1 billion at modification as of May 3, 2013. *See* Moon Aff., Exhibit D. It further establishes that Category 2 Trusts hold an additional $20.7 billion in modified loans. *See id.* The combined $31 billion in Modified Mortgage Loans held in Variant 1 and Category 2 Trusts was never repurchased by CHL.

For the Variant 1 Trusts, § 3.11(b) or § 3.12(a) provides that:

> The Master Servicer may agree to a modification of any Mortgage Loan (the "Modified Mortgage Loan") if **(i) CHL purchases the Modified Mortgage Loan** from the Trust Fund immediately following the modification as described below….

Exhibit R-4126. There can be no dispute that this unambiguous language applies to each of the 49 Variant 1 Trusts, and that this is the only language in the PSAs for those Trusts that addresses loan modification requirements.

Section 10.01 of the PSA for the Variant 1 Trusts sets forth when the PSAs may be amended. Under this provision, Certificateholders must consent to any amendment of the PSAs. Though there are five discrete circumstances in which PSAs may potentially be amended without consent, § 10.01 provides that "notwithstanding [such circumstances], no amendment that **significantly changes** the permitted activities of the trust created by this Agreement may be made without the consent of Certificateholders representing not less than 51% of the Voting Rights of each Class of Certificates **affected by such amendment**." *See, e.g.*, Moon Aff., Exhibit E (R-3436 at § 10.01 (emphasis added)). There can be no dispute that this provision applies to each of the 49 Variant 1 Trusts, and that § 10.01 is the only provision in the PSAs for those Trusts that addresses amendment of the PSAs.

The Settlement Agreement contains detailed loan modification procedures and states that "the modification and/or other loss mitigation strategy so implemented **shall be deemed to be permissible** under the terms of the applicable Governing Agreement." Settlement Agreement ¶ 5(e) (emphasis added). Hence, if approved, the Settlement Agreement loan modification provisions will become the operative provisions. However, the new provisions imposed by the Settlement eliminate the obligation unambiguously set forth in the 49 Variant 1 Trusts to

"purchase any Modified Mortgage Loan immediately following the modification." As conceded by Mr. Kravitt when asked if this specific language was included in the Settlement Agreement mortgage loan modification provisions, "It's not there." *See* Moon Aff., Exhibit F8 (Kravitt testimony, July 12 Tr. at 1933:22-23). Moreover, there is no dispute that consent by the majority of Certificateholders to amend this provision of the 49 PSAs was not given.

ARGUMENT

I.

THE PSAS OF 49 COVERED TRUSTS UNAMBIGUOUSLY REQUIRE REPURCHASE OF $11.1 BILLION IN MODIFIED MORTGAGE LOANS

A. Legal Standard

"[A]s CPLR 103(b) makes clear, the procedure in special proceedings is the same as in actions and is governed by the CPLR provisions applicable to actions except as otherwise prescribed by law." *Human Dev. Servs. v. Zoning Bd. Of Appeals*, 67 N.Y.2d 702, 705 (1986). "A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997). "[I]n considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." *Id*.

B. The PSAs of 49 Trusts Unambiguously Require Repurchase of Modified Mortgage Loans

The PSAs are contracts that govern the rights and obligations of CHL/Bank of America, the Trustee, and Certificateholders. What these contracts mean is a question for the Court to

resolve. And, as the Court is well aware, the PSAs are not all the same. Forty-nine PSAs are unambiguous with respect to the *immediate* repurchase of Modified Mortgage Loans. *See* Moon Aff., Exhibit C at 1, 21-23. For those 49 Variant 1 Trusts, § 3.11(b) or § 3.12(a) provides:

> The Master Servicer may agree to a modification of any Mortgage Loan (the "Modified Mortgage Loan") if (i) CHL [(Countrywide)] purchases the Modified Mortgage Loan from the Trust Fund immediately following the modification as described below. . . .

Id. at 1.

Faced with this unambiguous contract provision, the Inside Institutional Investors looked to find an ambiguity to exploit. Finding none among the Variant 1 PSAs, they proffered to this Court language found in PSAs of Category 2 (Variants 3, 4 and 5) Trusts among the 530 Covered Trusts. *See* Doc. No. 763 at 25-27. Those PSAs impose a second requirement on the modification of mortgage loans — that the modification be "in lieu of a refinancing." *See* Moon Aff., Exhibit C at 3, 4, 5, 8-22. For example, § 3.11(b) of the Variant 5 PSAs state as follows:

> Countrywide may agree to a modification of any Mortgage Loan (the "Modified Mortgage Loan") if (i) **the modification is in lieu of a refinancing,** (ii) the Mortgage Rate on the Modified Mortgage Loan is approximately a prevailing market rate for newly-originated mortgage loans having similar terms and (iii) **Countrywide purchases the Modified Mortgage Loan from the Trust Fund as described below**.[2]

Id. at 3,4,5 (emphasis added).

The Inside Institutional Investors have proffered the case *Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v. Countrywide Financial Corp.*, Index No. 650474/2008, 2010 N.Y. Misc. LEXIS 6820 (Sup. Ct. Oct. 7, 2010) (dismissed for lack of standing), where Countrywide expended substantial resources arguing to this Court the meaning of "in lieu of

[2] *See* Doc. No. 710, Ex. B. To be clear, 391 of the 401 PSAs contain this identical language. The remaining 10 have slightly different conditions, but nonetheless require repurchase.

refinancing." The first problem with their argument is that this language is nowhere to be found in the 49 Variant 1 PSAs. Thus, whatever the meaning of the term, it has no bearing on the 49 Variant 1 PSAs. The meaning of the contract should be based on the terms that are included – not those that the parties chose *not to include*. Because the Variant 1 PSAs do not distinguish between "loss mitigation" and "in lieu of refinance" modifications, and, instead, require the repurchase of *any* Modified Mortgage Loan, there is no basis on which to limit the repurchase requirement to "in lieu of refinance" modifications.

The second problem is that the "in lieu of refinancing" provision is only one of three prerequisites for Countrywide to modify a mortgage loan in a Category 2 Trust. Category 2 PSAs include an additional unambiguous requirement that "(iii) Countrywide **purchases** the Modified Mortgage Loan from the Trust Fund." Significantly, Countrywide's repeated breach of this provision involved 392 Category 2 Trusts and $20.7 billion in modified loans. *See* Moon Aff., Exhibits A, B, C, D.

C. Section 3.01 Does Not Trump the Provisions of the PSAs that Specifically Address Loan Modifications

"The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings." *NFL Enter. LLC v. Comcast Cable Commc'ns, LLC*, 51 A.D.3d 52, 60-61 (1st Dep't 2008); *see also W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162-63 (1990) (contract should be "read as a whole to determine its purpose and intent"). "Even if there was an inconsistency between a specific provision and a general provision of a contract, the specific provision controls." *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 47 (1956) (citing 1 Restatement, Contracts, § 235, subd. [c]), *cited in DRK, LLC v. Burlington Ins. Co.*, 74 A.D.3d 693, 695 (1st Dep't 2010) ("[T]he Separation of Insureds provision is a general

provision, while the Cross Liability exclusion is specific, and therefore the latter would control to the extent there is a conflict"). Here, the specific provisions governing repurchase of Modified Mortgage Loans in Variant 1 and Category 2 PSAs prevail over the general provision applicable to standards of practice of prudent loan servicing in § 3.01, which does not even mention loan modifications.

Despite the Institutional Investors' efforts to make it so, this is not a complicated question. The Variant 1 and Category 2 PSAs have only one provision that addresses what must happen if a loan is modified. That provision requires repurchase of Modified Mortgage Loans without distinction between "loss mitigation" and "in lieu of refinance" modification. Even if, as the Institutional Investors urge, the prudent servicing requirement in § 3.01 allows the Master Servicer to modify loans through some implicit authority, this has nothing to do with whether a loan, once modified, must be repurchased. The answer to that question is put forth squarely in the Variant 1 and Category 2 PSAs – the loan must be repurchased. In *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) the Court held, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Because there is nothing ambiguous about the requirement in Variant 1 PSAs to "purchase[] the Modified Mortgage Loan from the Trust Fund immediately following the modification as described below," or in Category 2 PSAs, that "Countrywide purchases the Modified Mortgage Loan," the Inside Institutional Investors' position is untenable.

Significantly, the 62 PSAs in Variant 6 permit the Master Servicer to modify mortgage loans without repurchasing them. *See* Moon Aff., Exhibit C at 6, 14, 15, 19, 20. For example, § 3.12(a) of the PSA for CWL 2007-10 provides:

> Nothing in this Section 3.12(a) restricts the ability of the Master Servicer to modify a Mortgage Loan in a manner that is consistent with the servicing standard set forth in Section 3.01; provided, however, that CHL [(Countrywide)] **shall have no obligation to purchase any such modified Mortgage Loan**.

Id. at 6 (emphasis added).

No PSA containing such language are among the Variant 1 or Category 2 Trusts relevant to this Motion. Rather, when Countrywide wanted to be able to modify loans without having to repurchase them, it so provided — and the Certificateholders agreed to it. The presence of this language in PSAs for 62 Variant 6 Trusts defeats the Inside Institutional Investors' argument that *all* of the PSAs allow the Master Servicer to modify loans without repurchase. It runs counter to settled rules of contract interpretation to give the same meaning to different language. *See Frank B. Hall & Co. v. Orient Overseas Assoc.*, 48 N.Y.2d 958, 958 (1979); *see also NFL Enters. LLC*, 51 A.D.3d at 60-61.

D. The Plain Meaning of the Unambiguous Contractual Provision Requiring Repurchase Cannot Be Undone with Extrinsic Evidence.

The intent of the parties may be determined by turning to extrinsic evidence only where the contract is ambiguous. *See Greenfield,* 98 N.Y.2d at 569; *Metro. Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (applying New York law). As discussed above, there is nothing ambiguous about the requirement to repurchase Modified Mortgage Loans governed by the Variant 1 or Category 2 PSAs. Consequently, none of the extrinsic evidence cited by the Institutional Investors is proper. For this reason, "general industry practices" have no bearing on the unambiguous terms of the PSAs at issue here.[3]

[3] Furthermore, even if "general industry practices" are considered, commentators recognize that the repurchase obligation in Countrywide PSAs is unique. *See, e.g.*, Diane E. Thompson, *Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior*, National Consumer Law Center, at 7 (October 2009),

Likewise, the Institutional Investors' reference to the Home Affordable Modification Program ("HAMP") is a *non-sequitur*. That HAMP encourages modification for distressed borrowers has nothing to do with whether Countrywide must abide by its promise in the Variant 1 and Category 2 PSAs to repurchase Modified Mortgage Loans immediately after modification. Thus, this is not a question of whether modifications should have occurred in the first place, it is simply a matter of requiring Countrywide or the Master Servicer to abide by its obligations in what they have acknowledged are the governing documents for the Trusts.[4]

II.

PETITIONER IMPROPERLY URGES THIS COURT TO MODIFY 49 PSAs

Where the contract "on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield*, 98 N.Y.2d at 569-70; *see also Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (internal quotation marks omitted)). An ambiguity cannot be created by the interposition of some alternate interpretation by a party. *See Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir.

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http://www.nclc.org/images/pdf/pr-reports/report-servicers-modify.pdf ("Some PSAs, primarily those involving loans originated by Countrywide prior to 2007, require the servicer to buy all modified loans out of the pool[.]"); *see also* John P. Hunt, *What Do Subprime Securitization Contracts Actually Say About Loan Modifications: Preliminary Results and Implications*, Berkeley Center for Law, Business, and the Economy, at 9-10 (Mar. 25, 2009), http://www.law.berkeley.edu/files/Subprime_Securitization_Contracts_3.25.09.pdf, (Countrywide PSAs provide "unqualified authority" to modify "if a Countrywide entity purchases the loans from the pool.").

[4] If what the Institutional Investors are saying is that HAMP allows the Trustee to modify the PSAs in order to eliminate the repurchase obligation, this is false. Courts have uniformly acknowledged that loan modifications under HAMP are subject to contractual prohibitions against modifications contained in Pooling and Servicing Agreements. *See, e.g., Edwards v. Aurora Loan Servs., LLC*, 791 F. Supp. 2d 144, 148 (D.D.C. 2011) ("The HAMP SPAs recognize that loan servicers are bound by these pre-existing agreements with the investors" (citation omitted)); *Alpino v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 43210, at *5 (D. Mass. Apr. 21, 2011).

1999) (Sotomayor, Cir. J.). "If a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself." *Id.*; *see also Muzak Corp.*, 1 N.Y.2d at 47 ("[N]o provision of a contract should be left without force and effect." (citing 1 Restatement, Contracts, § 235 subd. [c])). A court in an Article 77 proceeding "cannot rewrite the language" of a trust instrument. *In the Matter of the Construction of a Trust*, 39 N.Y.2d 663, 667 (1976).

The PFOJ approves the Settlement Agreement "in all respects." PFOJ, ¶ (n). Petitioners' Application must be denied because the PFOJ would approve a Settlement Agreement that effectively modifies 49 contracts, releases $11.1 billion in repurchase claims, and nullifies the amendment provision. The Settlement Agreement states that "the modification and/or other loss mitigation strategy so implemented shall be deemed to be *permissible* under the terms of the applicable Governing Agreement." Settlement Agreement, ¶ 5(e) (emphasis added). And it releases BNYM and CHL/BofA from liability for any claim related to the failure to repurchase Modified Mortgage Loans. *Id.* at ¶ 9(a). The PFOJ would make these changes without the consent of the majority of Certificateholders, as required by PSA § 10.01 for the Variant 1 Trusts. *See, e.g.*, *Perosi v. LeGreci*, 98 A.D.3d 230, 235 (2d Dep't 2012) ("Where a trust instrument specifies a procedure by which the trust may be amended, an amendment will only be valid where that procedure has been followed").

As set forth above, § 10.01 requires the majority of Certificateholders to consent to any amendment—even those proscribed in § 10.01(i)-(v)—if it "significantly changes the permitted activities of the trust." *See* Moon Aff., Exhibit E R-3436 at § 10.01. There can be no question that the elimination of Countrywide's requirement to repurchase $11.1 billion of Modified Mortgage Loans is a significant change to the terms of the trust. Hence, the Petitioners have

come to this Court asking it to do something that it cannot do under the law—modify the terms of the PSAs, even though proper consent of Certificateholders has not been obtained. This request is both unfair to the Certificateholders, and impermissible under the law.

III.

THE TRUSTEE FAILED TO INVESTIGATE MODIFIED MORTGAGE LOAN REPURCHASE CLAIMS AND GAVE AWAY $31 BILLION FOR FREE

Prior to trial, the Inside Institutional Investors claimed that they and the Trustee had properly taken into account and evaluated claims for the failure to repurchase Modified Mortgage Loans. *See* Doc. 763 at 22. However, trial testimony conclusively demonstrates otherwise. The following facts have been established at trial[5]:

- The Trustee treated all of the PSAs the same with regard to the Modified Mortgage Loan repurchase obligation even though it recognized that the PSA modification provisions are not the same. *See* Moon Aff., Exhibit F1 (citing Kravitt testimony, July 12 Tr. at 1922:18-1923:9).
- The Trustee did not undertake any effort to determine the value of the Trusts' claims for the failure to repurchase Modified Mortgage Loans before agreeing to release the claims. *See id.*, Exhibit F2 (citing Kravitt testimony, July 12 Tr. at 1923:17-1924:10; Kravitt testimony, July 16 Tr. at 2172:8-18; Bailey testimony, July 18 Tr. at 2412:5-11)
- The Trustee's corporate trust law expert conceded that it would be a breach of fiduciary duty for a Trustee to release a claim without first determining its value. *See id.*, Exhibit F3 (citing Landau testimony, July 19 Tr. at 2684:10-19).

[5] For the Court's convenience, the relevant trial testimony referenced herein is attached as Exhibit F to the Moon Affirmation.

- The Trustee did not pursue any recovery from Bank of America or Countrywide for the failure to repurchase Modified Mortgage Loans from all or any of the Covered Trusts, and, in fact, did not even mention the claim during settlement negotiations. *See id.*, Exhibit F4 (citing Stanley testimony, July 25 Tr. at 3195:10 – 3196:4).
- No portion of the $8.5 billion proposed Settlement amount is compensation for the failure to repurchase Modified Mortgage Loans. *See id.*, Exhibit F5 (citing Stanley testimony, July 25 Tr. at 3195:10 – 3196:4; Waterstredt testimony, June 11 Tr. at 972:11-973:2).
- When determining whether the proposed Settlement amount was an adequate recovery relative to Bank of America and Countrywide's total potential liability to the Covered Trusts, the Trustee did not take into account the potential liability attributable to the failure to repurchase Modified Mortgage Loans. Instead, the proposed Settlement amount was evaluated solely in regard to the total potential representative and warranty liability (a liability that is distinct from the loan modification repurchase liability). *See id.*, Exhibit F6 (citing Kravitt testimony, July 12 Tr. at 1923:10-16; 1925:25-1926:13).
- The release of claims relating to the failure to repurchase Modified Mortgage Loans was a benefit to Bank of America for which no compensation was provided to the Covered Trusts. *See id.*, Exhibit F7 (citing Kravitt testimony, July 12 Tr. at 1930:11-1931:9).
- The Settlement Agreement eliminates the provision of the 49 PSAs that require the immediate purchase of Modified Mortgage Loans, and replaces the provision

with language that omits any reference to any obligation to repurchase Modified Mortgage Loans as a result of modification. *See id.*, Exhibit F8 (citing Kravitt testimony, July 12 Tr. at 1931:10-1933:23).

Under these circumstances, the Trustee is not entitled to the findings it asks this Court to adopt. Petitioners ask the Court to find that the "Trustee appropriately evaluated the strengths and weaknesses of the claims being settled," *see* PFOJ, ¶ (i), that the "Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims," *see* PFOJ, ¶ (j), and that the "Settlement Agreement is the result of factual and legal investigation [sic] by the Trustee." *See* PFOJ, ¶ (h). These findings cannot be squared with the undisputed evidence elicited during trial that the Trustee did not meaningfully evaluate or pursue claims related to the repurchase of Modified Mortgage Loans.

The Trustee seeks to release over $31 billion in claims (an $11 billion claim for Variant 1 Trusts and a $20 billion claim for Category 2 Trusts) *for free*. However, in light of the undisputed trial evidence, the Trustee—who as this Court recognizes has fiduciary duties to the Certificateholders (*see* August 2, 2012 Tr. at 159:23-160:11)—cannot show that it acted prudently, loyally or reasonably. *See In re Estate of Donner*, 82 N.Y.2d 574, 584 (1993) (holding fiduciaries "owed a duty of undivided loyalty to the decedent and had a duty to preserve the assets . . . entrusted to them"); *In re Heller*, 23 A.D.3d 61, 65 (2d Dep't 2005) ("The trustee thus owes to the beneficiaries of the trust a duty to act with prudence in the manner in which he or she manages the assets of the trust."), *aff'd*, 6 N.Y.3d 649 (2006); *cf. In re N.Y. Title & Mortg. Co.*, 257 A.D. 19, 27 (1st Dep't 1939) (holding trustee that seeks to settle beneficiaries' claims may not do so "without ascertaining the fair value of [its beneficiaries'] claims" and that the burden of proving the value of the claims rests upon the trustee representing the

certificateholder); *Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416 (4th Dep't 1986) (holding that where a fiduciary seeks release from beneficiary, "there must be proof of full disclosure by the trustee of the facts of the situation and the legal rights of the beneficiary, and there must be adequate consideration paid" (citing Bogert, *The Law of Trusts and Trustees* (Rev. 2d. ed. 1982), § 943, pp. 475-78)).

CONCLUSION

The 49 Variant 1 PSAs and 392 Category 2 PSAs expressly require the repurchase of Modified Mortgage Loans. Notwithstanding this unambiguous requirement, the Trustee proposes to release over $31 billion in claims without meaningful investigation, or any recovery. Moreover, the Trustee has presented for a approval a Settlement that materially modifies these PSAs by eliminating the obligation to repurchase Modified Mortgage Loans. Regardless of the meaning of the term "in lieu of refinancing" in the Category 2 Trusts, the court may not modify the 49 Variant 1 PSAs whose provisions on loan repurchases are completely unambiguous. Because the Trustee did not obtain proper consent from Certificateholders for this change, as a matter of law, the Settlement Agreement cannot be approved. For these reasons, the relief sought by the Petitioner should be denied, and the Court should enter Judgment pursuant to CPLR 4401 in favor of Triaxx.

Dated: October 29, 2013

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