New York County Clerk's Index No. 651786/11

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

In the Matter of the Application of

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

Petitioners,

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

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

Petitioner-Appellant-Cross-Respondent,

and

(Additional Caption On the Reverse and Following Pages)

BRIEF OF *AMICI CURIAE* THE AMERICAN BANKERS ASSOCIATION AND THE NEW YORK BANKERS ASSOCIATION IN SUPPORT OF PETITIONER-APPELLANT-CROSS-RESPONDENT THE BANK OF NEW YORK MELLON

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BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY, TRUST COMPANY OF THE WEST and affiliated companies controlled by The TCW Group, Inc., NEUBERGER BERMAN EUROPE LIMITED, PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, GOLDMAN SACHS ASSET MANAGEMENT, L.P., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, INVESCO ADVISORS, INC., THRIVENT FINANCIAL FOR LUTHERANS, LANDESBANK BADEN-WUERTTEMBERG, LBBW ASSET MANAGEMENT (IRELAND) PLC, DUBLIN, ING BANK FSB, ING CAPITAL LLC, ING INVESTMENT MANAGEMENT LLC, NATIONWIDE MUTUAL INSURANCE COMPANY and its affiliated companies, AEGON USA INVESTMENT MANAGEMENT LLC, authorized signatory for Transamerica Life Insurance Company, AEGON FINANCIAL ASSURANCE IRELAND LIMITED, TRANSAMERICA LIFE INTERNATIONAL (BERMUDA) LTD., MONUMENTAL LIFE INSURANCE COMPANY, TRANSAMERICA ADVISORS LIFE INSURANCE COMPANY, AEGON GLOBAL INSTITUTIONAL MARKETS, PLC, LIICA RE II, INC., PINE FALLS RE, INC., TRANSAMERICA FINANCIAL LIFE INSURANCE COMPANY, STONEBRIDGE LIFE INSURANCE COMPANY, WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, FEDERAL HOME LOAN BANK OF ATLANTA, BAYERISCHE LANDESBANK, PRUDENTIAL INVESTMENT MANAGEMENT, INC., and WESTERN ASSET MANAGEMENT COMPANY,

Intervenors-Petitioners-Appellants-Cross-Respondents,

against

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, CHARTIS PROPERTY CASUALTY COMPANY, CHARTIS SELECT INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, FIRST SUNAMERICA LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, SUNAMERICA ANNUITY AND LIFE ASSURANCE COMPANY, SUNAMERICA LIFE INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, WESTERN NATIONAL LIFE INSURANCE, UNITED STATES DEBT RECOVERY VIII, LP, UNITED STATES DEBT RECOVERY X, LP and AMERICAN FIDELITY ASSURANCE COMPANY,

Respondents-Respondents-Cross-Appellants,

and

STERLING FEDERAL BANK, F.S.B., BANKERS INSURANCE COMPANY, BANKERS LIFE INSURANCE COMPANY, FIRST COMMUNITY INSURANCE COMPANY, BANKERS SPECIALTY INSURANCE COMPANY, FEDERAL HOME LOAN OF PITTSBURGH, AMICI ASSOCIATES, LP, AMICI FUND INTERNATIONAL LTD., AMICI QUALIFIED ASSOCIATES, CEDAR HILL CAPITAL PARTNERS LLC, CEDAR HILL MORTGAGE FUND GP LLC, CEDAR HILL MORTGAGE OPPORTUNITY MASTER FUND LLP, DECLARATION MANAGEMENT & RESEARCH LLC, DOUBLELINE CAPITAL LP, FIRST BANK, FIRST FINANCIAL OF MARYLAND FEDERAL CREDIT UNION, FIRST NATIONAL BANK & TRUST CO. OF ROCHELLE, ILLINOIS, FIRST NATIONAL BANKING COMPANY, FIRST PENN-PACIFIC LIFE INSURANCE COMPANY, KERNDT BROTHERS SAVINGS BANK, LEA COUNTY STATE BANK, LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK, LINCOLN NATIONAL REINSURANCE COMPANY (BARBADOS) LIMITED, LL FUNDS LLC, MANICHAEAN CAPITAL, LLC, NEXBANK, SSB, PEOPLES INDEPENDENT BANK, RADIAN ASSET ASSURANCE INC., THE COLLECTORS' FUND LP, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, THOMASTON SAVINGS BANK, VALLEY NATIONAL BANK, MORTGAGE BOND PORTFOLIO LLC, FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY, LIBERTY VIEW, PLATINUM UNDERWRITERS BERMUDA, LTD., PLATINUM UNDERWRITERS REINSURANCE, INC., RELIANCE STANDARD LIFE INSURANCE COMPANY, SAFETY NATIONAL CASUALTY CORPORATION, SUN LIFE INSURANCE COMPANY OF CANADA, CA CORE FIXED INCOME FUND, LLC, CA CORE FIXED INCOME FUND, LTD., CA HIGH YIELD FUND, LLC, CA HIGH YIELD FUND, LTD., STRATEGIC EQUITY FUND, LLC, STRATEGIC EQUITY FUND, LTD., SAND SPRING CAPITAL III MASTER FUND, LLC, CIFG ASSURANCE NORTH AMERICA, INC., BANKERS TRUST COMPANY, PINE RIVER FIXED INCOME MASTER FUND LTD., PINE RIVER MASTER FUND LTD, SILVER SANDS FUND LLC, TWO HARBORS ASSET I LLC, GOOD HILL PARTNERS LP, and BALLANTYNE RE PLACE,

Respondents-Respondents,

and

THE KNIGHTS OF COLUMBUS,

Intervenor-Respondent-Respondent.

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STATEMENT OF INTEREST OF AMICI CURIAE

association of the financial services industry in the United States. Founded in

two million employees. ABA members are located in each of the fifty states and the District of Columbia, and include financial institutions of all sizes and types. The ABA, members of which hold a substantial majority of domestic assets of the banking industry and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry. The

banks in providing corporate trust services, provide more than 95 percent of corporate trust services in the United States and are recognized in the industry as the leaders in offering corporate trust services.

association of more than 140 community, regional and money center commercial banks and federal savings associations located in New York State. Its members have aggregate assets in excess of $9 trillion and employ more than 200,000 people in New York State. NYBA members include national banks chartered pursuant to the National Bank Act, federal savings associations chartered pursuant

chartered pursuant to the New York Banking Law. The NYBA has a vibrant Trust & Investment Division.

PRELIMINARY STATEMENT

The ABA and NYBA submit this *amicus curiae* brief solely to address the

[1] [2] should

gh the Trustee may have hired

counsel . .

conspicuously failed to retain counsel to represent *certificateholders*

(emphasis in original). The ABA and NYBA urge the Court to affirm the Order

retained separate counsel to represent certificateholders.

securities issued by that trust is well-established and well-understood by the market. Those rights are embodied in the PSAs,[3] which are typical of the agreements that govern the trillions of dollars of securities that have been issued by RMBS trusts. The agreements that govern RMBS transactions typically provide, *inter alia*, that: (i) the RMBS trustee is vested with rights to sue and enforce claims of the trust, which rights are held for the benefit of the investors in the trust; (ii)

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claims on behalf of the trust except in limited circumstances; and (iii) unlike a

set forth in the transaction agreements. RMBS transaction agreements do *not* require RMBS trustees (or any other party to the transaction for that matter) to appoint separate counsel for investors under any circumstance.

This paradigm for RMBS trusts is a practical solution reached by

to

enforce the claims of the trust in a trustee helps to ensure that value is maximized for the benefit of all investors. It also helps ensure a robust securitization market by providing some assurance to transaction parties that they will not be subjected to a multitude of legal actions brought by individual investors with divergent

[3] The Pooling and Servicing Agreements, the Sale and Servicing Agreements, and the Indentures

sample PSA found at R.6404-6550 (PTX-71) are referred to here *See also* R.20499.

economic interests. A healthy securitization market, in turn, helps homeowners and prospective homeowners secure affordable financing on competitive terms.

Investors like the Objectors bought into this RMBS market paradigm, and RMBS trustees priced their services upon this same paradigm. The vesting of legal rights to pursue legal remedies in the securitization trustee is no secret to the sophisticated investors who invest in RMBS securities. Provisions defining the respective rights of the trustee and investors are consistent across RMBS

documents. The Objectors, sophisticated investors who hold only a small

the Trustee would hold and exercise rights for the benefit of the investors. Any requirement imposed by this Court that RMBS trustees hire counsel separately to represent the interests of investors would thus contravene the express terms of the PSAs and the reasonable expectations of the parties thereto.

A finding that the Trustee here should have retained separate counsel to represent the interests of investors would have far-reaching and negative consequences beyond this particular case. The role of the Trustee in respect of these Trusts is, for all intents and purposes, identical to the role played by banks serving as trustees for thousands of other RMBS trusts. Were the Court here to

across the entire RMBS marketplace, potentially altering the rights and duties of trustees in thousands of transactions in one fell swoop. A separate counsel requirement would also introduce substantial uncertainty as to the circumstances

counsel must report, and responsibility for implementation of such counse advice, all at a time when participants in the RMBS market are already facing many legal and business challenges. It could also undo the substantial work that has been done to reach consensual resolution of claims similar to the ones at issue here against other mortgage loan obligors. Accordingly, the ABA and NYBA submit this *amicus curiae*

that an RMBS trustee is required to retain separate counsel to represent investors.

BACKGROUND

The Structure of RMBS Securitizations and the Role of the Trustee

The typical residential mortgage-

transaction begins when a lending institution, which has made residential mortgage loans to borrowers, sells a pool of such loans to a party that plans to securitize

and warranties regarding the characteristics and quality of the mortgage loans and the underwriting and origination thereof, the real property securing the mortgage

loans, and the borrowers. The securitizer then typically sells the pool of mortgage

of the loans into a trust

to be held by a trustee on behalf of the trust. In exchange for such deposit, the trust issues securities representing, in the aggregate, interests in the assets of the trust.

The certificates issued by the trust are usually

varying seniority, which entitle the investors to receive from borrower collections principal and/or accrued interest at a specified rate. The certificates are ultimately sold to investors, such as the Objectors. *See* Order at 14; *see generally MBIA Ins. Corp. v Countrywide Home Loans, Inc.*

Securitization involves packaging numerous mortgage loans into a trust, issuing debt securities in the trust and selling those notes, known as residential mortgage-

appointed to perform servicing duties in connection with the mortgage loans, such as billing and collecting mortgage payments, reporting information related to the mortgage loans, and carrying out necessary loss mitigation procedures.

The rights and obligations of the parties to an RMBS securitization are memorialized in a variety of transaction agreements, including but not limited to a pooling and servicing agreement for some transaction structures, or an indenture and sale and servicing agreement for other transaction structures (collectively, the

[4] Unlike a traditional common law trustee, the RMBS

se specifically set forth in the Transaction Documents.[5] This limitation of duties, like many provisions in RMBS Transaction Documents, has its historical genesis in indentures written to conform with the requirements of the Trust Indenture Act of 1939.[6] *See* 15 U.S.C. § 77ooo(a)(1). The functions of a trustee in an RMBS transaction typically include, among other things: (i) holding the assets of the trust for the benefit of the investors;[7] (ii) calculating and making payments to investors;[8] (iii) preparing and making available reports to investors;[9] (iv) maintaining a register of security holders;[10] (v) delivering notices;[11] and (vi) exercising certain rights granted to it under the Transaction Documents, including rights with respect to the mortgage loans.[12] The RMBS trustee exercises such rights for the benefit of investors in the RMBS trust. As described in the Argument below, the rights of the RMBS trustee include the rights to pursue and settle claims arising from breaches of the representations and warranties made by mortgage loan sellers.

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[4] *See* n. 3, *supra*.
[5] Discussed in detail at Point I.B, *infra*.
[6] It should be noted, however, that the Trust Indenture Act has long been understood not to apply to certificates of participation in New York trusts governed by pooling and servicing agreements.
[7] *See* PSA §§ 2.01, 2.02.
[8] *See* PSA § 4.02.
[9] *See* PSA § 4.06.
[10] *See* PSA § 5.02.
[11] *See* PSA § 10.05.
[12] *See* PSA § 2.03.

Under typical Transaction Documents, investors have no rights to control or manage the corpus of the RMBS trust beyond what is expressly provided for in the Transaction Documents. *See, e.g* ficateholder shall have any right to vote (except as provided in [the PSA]) . . . or in any manner otherwise control the operation and management of the Trust Fund, or the obligations of the

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trusts, except under limited circumstances defined in the Transaction Documents. *See, e.g.*, PSA § 10.08 ([n]o Certificateholder shall have any right . . . to institute any suit . . . with respect to this Agreement, unless such Holder previously shall have given to the Trustee written notice of an Event of Default . . . , and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action . . . and shall have offered to the Trustee such reasonable indemnity as it may require . . . and the Trustee . . . shall have neglected For an investor to prosecute a claim itself, no-action clauses typically require: (i) the occurrence of an Event of Default as defined in the Transaction Documents, (ii) notice of such Event of Default to the trustee, (iii) a written notice by no less than a specified percentage of the certificateholders (often 25%) directing the trustee to assert the claims in question

along with a promise to indemnify the trustee in connection with the assertion of such claims, and (iv) a refusal by the trustee to assert such claims. *See id.* In particular, no-action clauses in RMBS transactions have been construed to limit investors to suing solely in respect of Events of Default as defined by the Transaction Documents, rather than all defaults by parties to the Transaction Documents. *See, e.g.*, *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96

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not a defined Event of Default,

and no-action clauses therefore generally preclude investors from bringing suits pursuing remedies for such breaches.

Investors in RMBS transactions are typically large, sophisticated financial institutions, such as banks, pension funds, mutual funds, and hedge funds.[13] The Objectors here, municipal pension funds, are thus typical RMBS investors. RMBS securities are not typically marketed and sold directly to individuals.

[13] *See* Schwarcz, Steven L., *The Roberta Mitchell Lecture: Structuring Responsibility in Securitization Transactions*, 2012 (citing *K Inside Mortgage Finance Publications, Inc., Mortgage-Related Securities Holdings by Investor* (The Mortgage Market Statistical Annual Vol. II CD-ROM, rel. 2010)), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3116&context=faculty_scholarship

The identities of investors in a given RMBS trust are not publicly available, and are usually unknown even to the party that maintains the certificate register. While in some isolated instances the investor holds a physical certificate, it is common for certificates to be held in book-entry form through a depository,

ties of investors

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and not the name of the investors, appears in the certificate register.[14] Because most classes of RMBS securities can only be held in book-entry form, the identities of the investors in a given RMBS transaction are often unknown to the parties to the RMBS transaction, including the trustee.

ARGUMENT

I. There Is No Basis for the Objectors' Argument that the Trustee Should Have Retained Separate Counsel

The Objectors argue that the Trustee abused its discretion in failing to retain

the flawed assumptions that the certificateholders held rights to sue Bank of America, N.A. directly and that the Trustee owed an extra-contractual duty to investors to retain separate counsel. Neither position finds any support in the PSAs or controlling law.

[14] *See* PSA § 5.02(e).

A. The Trustee Exercises the Rights at Issue Here For the Benefit of All Certificateholders

1. The Transaction Documents Expressly Vest Rights in Respect of Trust Assets in the Trustee

The Objectors are simply wrong when they suggest that the rights implicated by the Settlement belonged to them. *See* PB45. The PSAs at issue here, like countless other RMBS Transaction Documents, provide that it is the Trustee who holds, for the benefit of all investors, the rights in respect of the mortgage loans in the Trusts. *See*

and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all right, title and interest of the Depositor in and to the Trust Fund together with the

of a representation or warranty made in [the PSA] by such Seller or to repurchase

see also PSA § warranties made pursuant to this Section 2.03 shall survive the delivery of the respective Mortgage Files to the Trustee for the

holds and will hold . . . the Mortgage Files, and that it holds and will hold such other assets as are included in the Trust Fund, in trust for the exclusive use and

other courts have consistently confirmed that where Transaction Documents vest in

pursue claims for breaches of representations and warranties under the Transaction Documents. *See, e.g.*, *Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12

LaSalle Bank

Nat'l Assoc. v. Lehman Bros. Holdings, Inc., 237 F. Supp. 2d 618, 633 (D. Md.

provisions of the PSA, grants [the trustee] the authority to institute this action as

In fact, here, as is typical in RMBS Transaction Documents, the mortgage

loans and related matters directly to the Trustee. *See* PSA § 2.03(a); *see also LaSalle Bank Nat'l Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001) (noting that representations and warranties regarding mortgages under applicable Transaction Documents were made directly to the trustee). It is thus the Trustee, not the Objectors, who possessed the right to sue for breaches of representations and warranties, servicing breaches, and document deficiencies, and does so for the benefit of all investors as a whole.

With the right to pursue claims, the Trustee also enjoyed the power to settle them for the benefit of all investors. Courts have long recognized that along with

the power to sue and enforce claims comes the power to settle them. *See In re IBJ Schroder Bank & Trust Co*

provision of the trust agreement which . . . gave the trustee the power to commence *Levine v. Behn*

to sue or be sued is the power to compromise or set *aff'd*, 257 A.D. 156 *rev'd on other grounds*, 282 N.Y. 129 (1940); *In re Delta Air Lines, Inc*

to commence proceedings to remedy defaults is the power to negotiate and agree *aff'd sub nom.*, *Kenton County Bondholders Comm. v. Delta Air Lines, Inc.*, 374 B.R. 516 (S.D.N.Y. 2007), *aff'd*

Cir. 2009). Not surprisingly, this Settlement is not the only instance in which an RMBS trustee has relied on its authority to commence litigation to settle claims for the benefit of RMBS investors. *See, e.g.*, *In re Residential Capital, LLC*, 497 B.R.

representation and warranty and mortgage loan servicing claims); *In the Matter of the Application of U.S. Bank N.A.*, Index No. 652382/2014, Docket No. 1 (Sup. Ct.

of claims for breaches of representations and warranties and servicing deficiencies).

authority to enter into the Settlement Agreement for the benefit of certificateholders. *See* PB 45-46. The Objectors re decision in *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 565 (2014), but the bond indentures in *Quadrant* were materially different from the sense to

of Default. Here, the PSAs narrowly define Events of Default (*see* PSA § 7.01), and they do not specify the occurrence of an Event of Default as a precondition to the Trustee exercising its rights. In particular, the PSAs expressly authorize the Trustee to pursue claims for breaches of representations and warranties, with no requirement that an Event of Default have occurred. *See* PSA § 2.01(b).

enforce claims in respect of representations and warranties in the absence of an Event of Default would, if accepted, leave *no one* with the authority to pursue such remedies for the benefit of certificateholders (prior to an Event of Default) since, as set forth below, individual investors are not entitled to do so. Such a result defies common sense and cannot be reconciled with the longstanding practice of RMBS trustees pursuing breach of representation and warranty claims.

2. The No-
Resolve Claims

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Trustee has unique authority to pursue and settle claims against transaction parties for the benefit of all certificateholders. As noted above, the no-action clause defines the limited circumstances in which certificateholders can pursue claims directly.[15] *See Quadrant*, 23 N.Y.3d at 566 o-action clause prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a Trustee upon request of a majority of the

McMahan & Co. v. Wherehouse Entertainment, 65 F.3d 1044, 1050- -action clauses frequently are included in indentures

noted in *Quadrant* -action clause makes it more difficult for individual bondholders to bring suits that are unpopular with their fellow bondholders . . . by delegating the right to bring a suit enforcing rights of bondholders to the trustee . . . and by delegating to the trustee the right to prosecute such a suit in the first

Quadrant, 23 N.Y.3d at 565-66 (internal quotations omitted).

[15] The typical no- [n]o Certificateholder shall have any right . . . to institute any suit . . . with respect to this Agreement, unless such Holder previously shall have given to the Trustee written notice of an Event of Default . . . , and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action . . . and shall have offered to the Trustee such reasonable indemnity as it may require . . . and the Trustee . . . shal *See* PSA § 10.08.

The typical RMBS no-action clause provides that certificateholders may commence litigation in respect of the relevant Transaction Documents only after the occurrence of a defined Event of Default. Breaches of representations and warranties usually do not constitute Events of Default under the Transaction Documents and, as a result, individual investors cannot bring such claims themselves. RMBS trustees therefore are the only parties authorized to commence suit on behalf of certificateholders to pursue and settle such claims.[16]

This Court has long-recognized that no-

operate for the benefit of . . . all of the bondholders acting through the trustee, so as to restrai *Campbell v. Hudson & Manhattan R.R. Co.* *aff'd*, 302 N.Y. 902 (1951).

No-

resort to the courts is controlling upon all of the bondholders, unless a large and

Id. The no-action clause is thus an essential feature of the PSAs as it protects all dividual bondholders from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund *Walnut Place LLC v Countrywide Home*

[16] Even where an Event of Default is defined to include breaches by the master servicer or servicer, the no-action clause still imposes limitations on suits by individual investors by, for example, requiring that a specified percentage of certificateholders first demand that the Trustee pursue such claims.

Loans, Inc., Index No. 650497/11, 35 Misc. 3d 1207(A), 2012 WL 1138863, at *5 (Sup. Ct. N.Y. Co. Mar. 28, 2012), *aff'd*,

Batchelder v. Council Grove Water Co., 131 N.Y. 42, 46 (1892)); *see also*

Quadrant

serve the primary purpose of a no-action clause, which is to protect issuers from the expense involved in defending [individual] lawsuits that are either frivolous or

(internal quotations omitted). Limiting the ability of individual investors to pursue

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action clauses and reinforces the conclusion that trustees alone are empowered to pursue such claims for the benefit of certificateholders.

the Settlement Agreement, the Trustee has compromised the rights of the Objectors and other investors is thus fundamentally flawed. The right to pursue claims in respect of the mortgage loans in the Trusts and the right to settle those claims on behalf of the Trusts belong exclusively to the Trustee, and the Settlement

rcise of those

rights.

B. The Duties Owed by the Trustee Are Limited to the Express Terms of the PSAs and Do Not Include a Duty to Retain Additional Counsel for the Certificateholders

There is no support in the PSAs or applicable law for the position that the

are carefully spelled out in the PSAs, and they do not contain a duty to appoint

forth explicitly in the PSAs. *See, e.g.*, PSA § 8.01.

No duty to appoint separate counsel arises following the occurrence of a contractually defined Event of Default. The PSAs here are typical of RMBS transactions. One uncontroversial feature of the PSAs is that after an Event of Default the Trustee must ex

scope

Subsequent to the occurrence of an Event of Default that has not been cured or waived, the Trustee must exercise such of *vested in it by [the PSA]*, and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such

Id. (emphasis added). In other words, even after the occurrence of an Event of Default, the Trustee continues to exercise the same rights and powers that it has prior to the occurrence of the Event of Default, *i.e.*, those set forth in the PSAs. The PSAs thus do not contemplate, pre- or post-Event

of Default, imposition of an *extra*-contractual duty on the Trustee to hire separate counsel for certificateholders. *See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*,

indenture . . . has his [or her] rights and duties defined, not by the fiduciary

omitted); *Meckel v. Cont'l Res. Co*

ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and

Moreover, nothing abo

retention of separate counsel for investors is required. Following an Event of Default, the Trustee is required to exercise its enumerated rights and powers using the same degree of care that a prudent pe

8.01. No prudent person would retain a second set of lawyers to assist in the management of his/her own affairs, as such a course would only increase expense and complicate decision-making. Instead, a prudent person would select a single experienced and capable firm to provide effective representation, which is precisely what the Trustee here did.

As the above-cited citations make clear, it is well-settled that a securitization tr

law fiduciary responsibilities. In making their investment decisions, the Objectors thus were well-

PSAs, regardless of whether an Event of Default had occurred. Accordingly, the

ies did not, under any circumstance, include a duty to appoint separate counsel. It is thus disingenuous for Objectors now to contend that the Trustee abused its discretion in failing to appoint separate counsel in connection with the Settlement. [17]

II. A Requirement that a Trustee Retain Separate Counsel Would Introduce Turmoil In the RMBS Securitization Marketplace By Upsetting the Bargain Struck by the Parties to the Transaction Documents and Investors

Important prudential considerations militate against the imposition of a separate counsel requirement. Such a requirement would effectively alter the terms of the PSAs here and in numerous other transactions with similar contractual terms, in contravention of the long-standing principle that a court should construe but not alter the terms of a disputed contract. A separate counsel requirement

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for the imposition of extra-contractual duties on the Trustee. *See Leavitt-Berner Tanning Corp. v. Am. Home Assur. Co*
to those rights which the original parties to the contract intended the third party to *Saska v. Metro. Museum of Art* -party beneficiaries do not have contractual rights that go beyond or contravene the explicit terms of the

as a third party beneficiary entitled it to the appointment of separate counsel.

would also be difficult, if not impossible, to implement, leaving trustees and eventually the courts to address implementation on a piecemeal basis, due to the absence of guidance in the Transaction Documents.

A. A Separate Counsel Requirement Would Upset the Expectations of Participants in the RMBS Market

PSA or other governing document that contemplates retention of separate counsel for investors in an RMBS transaction. That is because no such provision exists. Imposition of a duty to retain separate counsel for investors would be a material alteration to the terms of the PSAs, imposing new obligations on the Trustee and burdening the Trusts with additional expenses that were neither expected nor bargained for. Objectors should not be allowed to use this litigation to obtain additional rights and privileges that were not originally contemplated in the transaction. *See Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995) (noting

p (internal

quotations and citations omitted); *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d

Camperlino v. Bargabos, 96 A.D.3d 1582 (4th

(observing that courts should be extremely reluctant to interpret an agreement as

impliedly stating something which the parties have neglected to specifically include).

The PSA terms vesting sole authority to pursue remedies in the Trustee are -understood by market participants and routinely recognized and enforced by courts. These terms permeate the market for a reason: they promote efficient transaction administration and help ensure that diverse investors with potentially divergent economic interests share equally the risks and rewards associated with a pooled set of assets. The investors in a given trust typically do not know one another and potentially have conflicting strategies and interests. If the Court were to recognize extra-contractual rights in individual investors, the narrow interests of a small minority of investors could be advanced to the detriment of the larger majority of certificateholders. The expectations of the Trustee as to the scope of its responsibilities would also be upset.

A finding that the Trustee here should have retained separate counsel to represent the interests of investors would have far-reaching consequences. The role of the Trustee in respect of these Trusts is, for all intents and purposes, identical to the role played by BNYM and other banks serving as trustees for thousands of other RMBS trusts. Were the Court here to fault BNYM for failing to

marketplace, potentially altering the rights and duties of trustees in thousands of

transactions. It could also undo the substantial work that has been done to reach consensual resolution of claims similar to the ones at issue here against other mortgage loan obligors. *See, e.g.*, *In the Matter of the Application of U.S. Bank N.A.*, Index No. 652382/2014, Docket No. 1 (Sup. Ct. N.Y. County) (Article 77 representations and warranties and servicing deficiencies).[18]

Objectors and other RMBS investors are sophisticated entities capable of understanding complex contractual agreements. Prior to investing, prospective investors have access to broad disclosure regarding an RMBS transaction in the form of an offering document, such as a prospectus supplement or private placement memorandum. These offering documents include disclosures regarding contractual provisions such as the no-action clause, the vesting of rights in the mortgage loans in trustees and the limiting of the duties of the trustees to only those set forth in the Transaction Documents. Moreover, prospective investors have access to actual Transaction Documents, and those documents are available upon request to existing investors. Sophisticated and experienced investors like the Objectors are thus intimately familiar with terms vesting rights in the mortgage loans exclusively in trustees and limiting the duties of the trustees to only those set forth in the Transaction Documents. The Objectors have not, and cannot, claim

[18] As of the date of this Brief, a hearing in the *U.S. Bank* Article 77 proceeding is scheduled for December 16, 2014.

that they were ignorant of such terms or had an expectation that counsel would be retained specially to represent their interests. They also cannot claim that their rights in respect of this Settlement were not adequately advanced by counsel of their own choosing, since they actively participated in the proceedings below. Imposing a separate counsel requirement would drastically and needlessly upset the agreed-upon bargain struck in Transaction Documents that permeate the RMBS marketplace.

B. Imposing a Duty to Retain Separate Counsel Would Create Substantial Uncertainty and Confusion

If this Court were to embrace the separate counsel proposal, any RMBS trustee wishing to exercise its contractual rights would be obligated to consider whether to hire counsel separate and apart from its own. One need only play out

complexities, costs and uncertainties that a separate counsel requirement would create. As an initial matter, before a trustee even engages separate counsel, it would have to determine whether separate counsel was necessary. Without the benefit of a contractual provision to provide guidance, how is a trustee to determine what events trigger the newly created duty to appoint counsel? Is separate counsel required for every decision where the trustee intends to confer with its counsel? Or only certain decisions that may have a material impact on investors? If for only certain decisions, what standard of materiality should the

trustee apply? How does a trustee balance an extra-contractual requirement to hire separate counsel with the express no-action clause barring investors from independently instituting a lawsuit with respect to the Transaction Documents?[19]

Even after a trustee has determined that retention of separate counsel is required, it will only face additional questions for which there are no obvious answers. To whom would the separate counsel report? To the trustee? To investors? If investors, which ones, since the trustee is generally not able to identify who the investors are? How would separate counsel perform its internal conflict check to determine if it can represent the investors if the identity of the investors is unknown? Would the investors have input into which counsel is hired? If so how would that input be gathered? What if consensus cannot be reached by investors? Or if investors have divergent interests, as they do in the instant action, would multiple counsel for each group of investors be required? What should the

recommends another? And finally, who would be responsible for the fees of the separate counsel? The PSAs at issue here and those in other RMBS transactions simply do not address these issues, as no one ever contemplated retention of separate counsel for investors *under any circumstance*. Trustees would thus be left to struggle with these difficult implementation issues with no guidance whatsoever.

[19] A separate counsel requirement could render the no-action clause effectively meaningless if separate counsel insists a trustee pursue a remedy that only a small minority of investors favor.

It is therefore all but certain that the courts would face numerous Article 77 and other trust instruction proceedings in which trustees would present these issues to judges, until a judicially created set of rules emerges.[20]

untenable nature of hiring separate counsel to represent investors, and underscores why the existing RMBS paradigm makes sense. With all rights in respect of the trust assets vested solely in trustees for the benefit of all certificateholders and the

administered efficiently on behalf of all beneficiaries, and prospective investors have the ability to make an informed decision whether the RMBS paradigm is consistent with their desired risk/reward profile.

Imposing a requirement that an RMBS trustee must appoint separate counsel would fly in the face of the carefully tailored RMBS paradigm. The resulting confusion, costs and complexities associated with such a requirement would be disruptive to the RMBS marketplace and frustrate efforts currently underway to reinvigorate that market in the wake of the financial crisis of the last decade. For many years, transaction parties and investors in the RMBS market have understood

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[20] elating to any express *BlackRock Fin. Mgmt. Inc. v. Segregated Account of AMBAC Assur. Corp.*, 673 F.3d 169, 174 (2d Cir. 2012) (citing CPLR 7701). As this Court has explained, the scope of Article nterest to trustees, beneficiaries or adverse *Greene v. Greene (In re Greene)*, 88 A.D.2d 547, 548 (1st

that it is the trustees who have the right to pursue and settle claims in respect of trust assets, and that they can do so without hiring separate counsel to represent the interests of investors. Imposition of a separate counsel requirement would introduce uncertainty as to what actions trustees can and cannot take.

A separate counsel requirement would destabilize the RMBS market at a time when the housing market finally appears to be recovering in many areas throughout the country. RMBS transactions contribute to the liquidity of the mortgage loan market, increasing the availability of credit to potential homeowners.[21] Increased uncertainty and risk in the RMBS market would almost certainly have an adverse impact on the availability of credit and, in turn, the overall housing market. The ABA and NYBA therefore urge the Court to reject

-contractual separate counsel requirement.

[21] *See* Faten Sabry & Chudozie Oknogwu, *Study of Impact of Securitization on Consumers, Investors, Financial Institutions and the Capital Markets*, American Securitization Forum, June 17, 2009, available at http://www.americansecuritization.com/uploadedfiles/ASF_NERA_Report.PDF (finding that increases in secondary market activity help increase the amount of mortgage credit per capita); *see also Freddie Mac Mortgage Securities Product Overview*, January 2008, available at http://www.freddiemac.com/mbs/docs/mbs-product_brochure.pdf (stating that the secondary market drives down mortgage rates making homeownership affordable for more families and individuals than would be possible without the secondary market); *Schwarcz* at 807 (citing Patric H. Hendershott & James D. Shilling, *The Impact of the Agencies on Conventional Fixed-Rate Mortgage Yields*, 2 J. REAL ESTATE FIN. & ECON. 101 (1989) (finding that securitization of conforming fixed-rate mortgage loans significantly lowered interest rates on mortgage loans relative to what they would otherwise have been); Sirmans & John D. Benjamin, *Pricing Fixed Rate Mortgages: Some Empirical Evidence*, 4 J. FIN. SERVICES RES. 191 (1990) (finding significantly lower interest rates on fixed-rate mortgages that can be sold in the secondary market versus those that cannot, thereby indicating the value of the ability to securitize mortgages)).

CONCLUSION

The Court should modify the judgment to approve in its entirety the

Dated: September 18, 2014
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PRINTING SPECIFICATION STATEMENT

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 (text), 12 (footnotes)

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance or any authorized addendum is 6,959.

This brief and word count were prepared using Microsoft Word.