To be Argued by:
JAMES M. MCGUIRE

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 –

BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY,

(For Continuation of Caption See Inside Cover)

BRIEF FOR PETITIONER-APPELLANT-CROSS-RESPONDENT THE BANK OF NEW YORK MELLON

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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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INTRODUCTION

Appellants seek to rectify an error of law relating to the Supreme Court's review of an historic settlement worth more than $8.5 billion. The agreement—the largest private settlement ever reached—was between The Bank of New York Mellon (BNYM) in its role as trustee for 530 mortgage-backed securities trusts, and Bank of America and Countrywide Home Loans. BNYM and many of the largest institutional investors in the world vigorously negotiated the settlement with Bank of America and Countrywide over the better part of a year. After extensive discovery and a nine-week evidentiary hearing, the trial court broadly approved the settlement. That decision was legally correct and, as BNYM will show in briefing on objectors' cross-appeals, was compelled by the evidence before the trial court and firmly-established precedent. In one narrow respect, however, the trial court misapplied the very legal standard it had properly articulated in its approval of the settlement—that a trustee has broad discretion to settle claims on behalf of its trusts. On this single issue, the court incorrectly held BNYM's settlement decision to an improper standard. As a result, the landmark settlement now has been called into question.

The settlement arises from Bank of America's and Countrywide's roles in the creation and servicing of 530 securitization trusts for which BNYM is trustee. It resolved hundreds of different and highly complex breach of contract claims. Unless reversed by this Court, the trial court's error will jeopardize the ability of trustees to settle all complicated financial disputes in future cases. It invites the judiciary to second-guess the discretionary judgment calls that trustees necessarily must make. As in this case, an objection voiced by a tiny group of investors could derail a settlement that nearly all of the other interested parties (numbering in the thousands) recognize is in the best interest of the beneficiaries and support.

The sole question presented in this appeal is straightforward: did BNYM abuse its discretion as trustee when it determined that a single claim not only was weak and unlikely to increase the overall settlement value, but that pressing that claim would diminish its overall negotiating position, and that the best strategy was to focus on the strong claims? The trial court held that it did.

Respectfully, that holding is erroneous. BNYM retained one of the nation's preeminent securitization attorneys as its lead negotiating counsel. As the trial court itself acknowledged, when developing BNYM's set-

tlement strategy, that attorney specifically considered the type of claim at issue on this appeal (the so-called loan modification theory) and judged it to be a losing argument. He concluded that urging this theory would *not* produce a bigger settlement. Quite the contrary: given the broader implications of this theory for other matters beyond the settlement's scope, his judgment was that pressing the argument could hinder the prospects for the most favorable possible settlement on *all* the claims. Much like an appellate advocate selecting the strongest issues to present on appeal, he concluded that pursuing the weak loan modification claims would dilute the trusts' other, stronger claims.

If the trial court's decision on the loan modification claim accurately reflected the law, it would subject trustees to ceaseless second-guessing of their discretionary judgments. It would make it impossible for a trustee to settle even a modest claim, because an objector could always imagine a variant claim that the trustee did not exhaustively consider (or did not consider sufficiently in the objectors' hindsight allegation), precisely because it was so dubious. A mandate to paper over every imaginable ramification of the trustee's decision, rather than to exercise reasoned business judgment, would come at the expense of increasing overall settlement value. Where the variety of potential claims is so vast, as in the RMBS con-

text, the risk of that result is especially acute. And it would imperil settlements like this one, even when the settlement would deliver enormous value to the sophisticated investors who overwhelmingly support it. That makes no sense.

Trustees settling complex financial disputes act well within the bounds of reasonable judgment to focus on the claims that appear to be and are substantial. This type of decision should not be open to judicial second-guessing. The trustee's decision to settle should have been upheld in its entirety.

QUESTION PRESENTED

1. Does a trustee act within its discretion when it makes threshold judgments in developing its settlement strategy that (i) certain claims are weak at best; (ii) pressing those weak claims would not as a practical matter result in a larger settlement sum, and would risk undercutting settlement negotiations relating to stronger claims; and (iii) it is unnecessary to conduct further investigation of weak claims including a precise potential dollar valuation on the hypothesis that the claims (contrary to expectations) nevertheless prevail?

Supreme Court's answer: no.

STATEMENT OF THE FACTS AND THE CASE[1]

A. Residential Mortgage Backed Securities, Generally

The financial instruments that underlie the claims in this case comprise residential mortgages that have been "securitized." This means that "a mortgage lender sells pools of mortgages into trusts created to receive the stream of interest and principal payments from the mortgage borrowers," and "[t]he right to receive trust income is parceled into certificates and sold to investors." *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 173 (2d Cir. 2012). In this way, a mortgage-backed security allows sophisticated investors to purchase shares of the cash flows (the principal and interest payments) generated from large pools of residential home mortgages. *See In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, No. 09 Civ. 2137 (LTS) (MHD), 2010 WL 3239430, at *2 (S.D.N.Y. Aug. 17, 2010) (detailing the securitization process).

The terms of most of the trusts at issue in this case, "as well as the rights, duties, and obligations of the trustee, seller, and servicer [of the

[1] "R. __" refers to the record on appeal. Appellants' appeal of the Judgment is limited to Supreme Court's ruling regarding loan modifications, which requires a review of only a small portion of the hearing record. Appellants recognize, however, that the record before the Court is voluminous. The majority of the joint record consists of the portion of the hearing record pertaining to Respondents/Cross-Appellants' cross-appeals.

underlying mortgage loans,] are set forth in a Pooling and Servicing Agreement ('PSA')" and various accompanying offering documents, including a prospectus supplement. *BlackRock*, 673 F.3d at 173. Servicers manage the ongoing relationship with individual borrowers on behalf of the trusts, collect payments from them, and (when necessary) initiate foreclosures. *Id.*

As relevant here, BNYM serves as trustee under various PSAs (and indenture trustee under a smaller number of indentures) for 530 residential mortgage-backed securitization trusts.[2] Each trust received mortgage loans from Countrywide Home Loans, Inc. ("Countrywide"). The loans in the trusts were originally serviced by a Countrywide entity, and all of the loans are today serviced by Bank of America, N.A. ("Bank of America").[3]

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[2] Unless the context requires specificity, we refer to the Pooling and Servicing Agreements, the Sale and Servicing Agreements, and the Indentures collectively as the "PSAs" and cite to provisions in one sample PSA that was filed in this proceeding. R-3462. By stipulation, this exhibit and certain others were omitted from the Joint Appendix because they were bulky in nature and voluminous, and will be kept in readiness by the parties to be delivered to the Court on telephone notice. R. 20499.

[3] The loans formerly were serviced by Countrywide Home Loans Servicing, LP, which was renamed BAC Home Loans Servicing, LP ("BAC HLS") following Bank of America Corporation's acquisition of Countrywide in July 2008, which occurred after the trusts at issue had been created. Shortly after the parties entered into the Settlement Agreement, BAC HLS merged into Bank of America, N.A., which is now the Master Servicer.

B. Two types of Loan Modifications: Loss Mitigation and "In Lieu of Refinancing"

As discussed further in the next section, one of the principal claims at issue in the negotiation of the settlement was alleged breaches of representations and warranties for the loans in the 530 trusts. The narrow issue in this appeal, however concerns a different theory: whether and when the PSAs obligate the seller (or in some cases the servicer) to repurchase from the trusts loans that have been modified after they are securitized. Modifications may take place for primarily one of two reasons. R. 415-16 (Smith).

In most cases, modifications are done to mitigate the trust's losses on a nonperforming loan, by making payments more affordable and thereby reducing the risk of foreclosure and attendant losses to the trust. *See* R. 415-19 (Smith). The servicer's obligation to service loans in accordance with "customary and usual standards of practice of prudent mortgage loan lenders" includes a duty to modify loans when appropriate, to maximize their value to the trust. *See, e.g.,* R-3462.103 (PSA § 3.01). Federal law mandates that loss mitigation plans, including loan modifications, "shall constitute standard industry practice for purposes of all Federal and State Laws." 15 U.S.C. § 1639a(c). Witnesses for both sides in this case agreed. *See* R. 1189 (Scrivener) (modifying delinquent loans "is very standard

practice"); R. 5426 (Levitin) (objectors' expert testifying that loss mitigation modifications is "part of prudent servicing").

The second type of modifications, modifications "in lieu of a refinancing," serve a different purpose and are authorized by separate provisions of the PSAs. R. 13310-33, R. 10215-38; R. 415-17 (Smith). Those sections permit the servicer to reduce the interest rate for a performing loan, as an alternative to a refinancing, in which the borrower would repay the loan and take out a new loan from another lender. A modification in lieu of a refinancing benefits the servicer (or seller) because it allows the servicer (or seller) to maintain a servicing (or customer) relationship with a performing borrower. But it reduces income to the trust beneficiaries, because the loan would otherwise be repaid in full if the mortgage were refinanced with another lender. *See* R. 416 (Smith). Accordingly, the servicer's authority to make such modifications is conditioned on making the trust whole by first purchasing the mortgage out of the trust. R. 13310-33, R. 10215-38.

As discussed below, the theory that BNYM regarded as too weak to advance in settlement negotiations was that the repurchase obligation applies not only to modifications in lieu of refinance, but also to modifications that are intended simultaneously to assist struggling borrowers and to

minimize losses to investors. It is undisputed that neither Countrywide nor Bank of America had a practice of making modifications in lieu of refinance. R. 1201 (Scrivener). Accordingly, the only loans that could have been subject to a blanket repurchase requirement under the rejected theory would have been those that were modified for loss mitigation purposes, *i.e.*, to *benefit* the trusts.

C. The Institutional Investors' Allegations

In 2010, many of the largest investors in the world—including funds run by the Federal Reserve Bank of New York, major life insurance companies, asset managers, and financial institutions, who together held tens of billions of dollars' worth of interests in the trusts at issue here—approached BNYM in its role as trustee for the 530 trusts. They alleged that Countrywide and Bank of America had breached the governing PSAs. R. 11595-600, R. 11601-18, R. 11619-32, R. 11633-35, R. 11636-37. This group of investors (the "Institutional Investors") alleged various types of claims, including principally: (1) Countrywide failed to repurchase from the trusts loans that were in breach of the representations and warranties in the trust documents;[4] (2) Countrywide Home Loans Servicing and Bank of

[4] The PSAs required Countrywide to warrant certain facts concerning the quality of the underlying loans, including (among many others) their maximum loan-to-value ratios, the non-delinquency of payments, and compliance with applicable

America violated their servicing obligations; and (3) Countrywide failed to deliver certain loan documents to the trusts, and the trusts were damaged when the missing documents impeded foreclosures on delinquent loans. *See e.g.* R. 11595-600, R. 11633-35. Despite the Institutional Investors' enormous holdings, the governing documents do not permit them (or any other certificateholder) to pursue legal claims directly against Countrywide or Bank of America. For repurchase claims, for example, they were required, instead, to seek action by BNYM, which alone had the right as trustee to sue on behalf of the trusts.[5] *See e.g.,* R. 11595-600, R.11636-37.

Both BNYM and the Institutional Investors recognized several obstacles to litigating. In similar cases, for example, defendants had argued (with some success) that certain of these claims must be litigated on a loan-by-loan basis, a process that could have taken many years and consumed enormous resources in light of the 1.6 million loans held by the 530

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laws. R-3462-074-094 (PSA § 2.03). If any of the warranties were breached, and that breach had a material and adverse effect on the interests of investors, subject to other conditions BNYM was entitled to demand a repurchase of the affected loans. R-3462-092-94 (PSA § 2.03(e)).

[5] *See, e.g.*, Section 10.08 of the PSAs. R-3462-171. The PSAs are clear that the Trustee has no duty to act against the Seller or Master Servicer unless instructed to do so by Certificate-holders representing at least 25% of the Voting Rights of each trust (or in some cases, each Class of Certificates or Notes), and offered an adequate indemnity. R-3462-151-52 (PSA §§ 8.01, 8.02(iv)); *see Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012). Even then, the Trustee retains the discretion to refuse to act.

trusts. *See e.g.* R. 1341 (Kravitt). It also was unclear what remedies were available in litigation; according to the PSAs, forcing a repurchase was BNYM's sole remedy for Countrywide's breach of the representations and warranties. *See* R-3462-098-99 (PSA § 2.03). Moreover, BNYM recognized that the repurchase obligations would be subject to largely untested causation and materiality requirements. *See e.g.* R. 2213 (Kravitt). And even if BNYM could achieve victory in the courtroom, Countrywide's resources were far short of those needed to satisfy the potential claims. *See e.g.* R. 6371-79. Some plaintiffs had attempted to reach beyond Countrywide and recover from Bank of America, but as of 2010, those efforts had been uniformly unsuccessful, foundering on the difficulty of veil-piercing.[6]

In November 2010, with these obstacles to recovery through litigation in mind, BNYM and the Institutional Investors began lengthy settlement negotiations with Countrywide and Bank of America.

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[6] Before the settlement, nine different judges had issued ten decisions granting motions to dismiss successor liability claims against Bank of America. R. 3236 (Daines); *see, e.g., Maine Ret. Sys. v. Countrywide Fin. Corp.,* No. 10-cv-0302 MRP (MANx), 2011 WL 1765509, at *8-*9 (C.D. Cal. Apr. 20, 2011). Since the settlement, three different judges have issued 19 more decisions agreeing that Bank of America cannot be held liable as a successor to Countrywide Home Loans Inc. R (Hr'g Tr. (Daines) 3237-3238); *see e.g.*, *Franklin Bank, S.S.B. v. Countrywide Secs. Corp.,* No. 12-cv-03279-MRP-MAN, Doc. No. 122, Order at 3 (C.D. Cal. Aug. 26, 2013); *Prudential Life Ins. Co., Ltd., v. Countrywide Fin. Corp.*, No. 13-CV-5883-MRP (MANx), Doc. No. 107, Order at 3 (C.D. Cal. Mar. 25, 2014.

D. The Settlement Negotiations

A defining feature of BNYM's strategy in the ensuing settlement negotiations was its focus on strong claims over weak claims. R. 2138-40 (Kravitt). BNYM's lead negotiating counsel was Jason Kravitt, one of the nation's preeminent attorneys in the field of securitization agreements generally and residential mortgage-backed securities specifically. R. 1315-18 (Kravitt). Early in the negotiation process, Kravitt considered not only the theories of liability raised by the Institutional Investors but also other claims that BNYM could potentially bring on behalf of investors against Countrywide and Bank of America relating to the trusts. R. 2138-40 (Kravitt).

Based on his knowledge of the industry (R. 1926-27), Kravitt considered specifically the possibility of a claim that the PSAs obligated either Bank of America or Countrywide to repurchase from the trusts all modified loans. R. 1926-27, R. 2138-40 (Kravitt). He "thought about the different categories" that different PSA provisions relating to loan modifications "would fit into." R. 2171 (Kravitt). And he included the loan modification theory on a "List of Settlement issues" that he sent to counsel for Bank of America and Countrywide early in the negotiations. R. 11659-61.

This possible repurchase obligation referred to a loan modification theory distinct from the repurchase obligation alleged by the Institutional Investors, which was predicated on breaches of representations and warranties. But BNYM's view was that the loan-modification repurchase theory "was not a strong argument" because it conflated the different forms of modifications—those to mitigate losses and those in lieu of refinancings. R. 1926-27, R. 1933-35, R. 2138-40 (Kravitt).

The theory that loss-mitigation modifications—the type of modifications that the servicer was actually doing with regularity at the time—required repurchase appeared to Kravitt to be "a losing argument legally." R. 1926-27, R. 2138-40 (Kravitt). He concluded that "the total amount of money" that the trusts "would get in the end" would not "be any less because [BNYM] didn't push that argument." R. 2140 (Kravitt).

Kravitt was mindful as well of a pragmatic concern: Bank of America "would have a difficult time agreeing" to pay anything on account of loan modification claims, especially because "credit loss mitigation was really becoming the central policy strategy of many different levels of the United States government" and "State AGs," and Bank of America was "negotiating with regulators at that time with regard to that subject matter." R. 2138-40 (Kravitt). The strong and uniform government policy in favor of

modifying the loans of struggling borrowers "certainly did not make up [his] mind." *Id.* But the centrality of modifying delinquent loans to the government's response to the housing crisis made it unlikely that Bank of America would agree that it had exposure for a repurchase obligation for those modifications. *Id.* Accordingly, he concluded that advancing the theory during the negotiations would risk "detract[ing]" from the investors' stronger claims. R. 2138-40 (Kravitt).

Like BNYM, the Institutional Investors—whose allegations prompted the settlement negotiations in the first place and who, as owners of nearly a quarter of the certificates in the trusts, had every incentive to maximize the settlement amount—did not advance the loan modification claims during the settlement talks with Bank of America either. R. 1935 (Kravitt); R. 972 (Waterstredt). And like BNYM, their decision not to press the loan modification claims was a considered one (R. 426-27 (Smith)); it was grounded in their judgment that the claims lacked merit and were unlikely to advance the discussion (R. 971-72 (Waterstredt)). One of the Institutional Investors, Kore Capital, initially held the view that the PSAs mandated this repurchase obligation for all modified loans (R. 649 (Smith)); yet even *it* did not pursue the claims during the settlement negotiations and fully supports the settlement.

Based on BNYM's reasoned judgment, shared by the Institutional Investors, that the loan modification claims would not help BNYM extract a larger settlement amount—and that, on the contrary, pressing those claims might *undermine* the settlement negotiations—BNYM did not hire an outside academic expert to calculate a dollar value of the claim. R. 1923-24 (Kravitt); R. 972-73 (Waterstredt). Because the claim was far-fetched, the Institutional Investors, like BNYM, also saw no need to calculate the hypothetical losses that might be claimed. R. 972-73 (Smith).

Between November 2010 and June 2011, the settlement negotiations among the four parties (BNYM, the Institutional Investors, Countrywide, and Bank of America) were hard-fought, adversarial, and contentious, (R. 706, R. 807 (Laughlin); R. 826 (Waterstredt); R. 1388, R. 1429 (Kravitt)), with face-to-face meetings, nearly daily conference calls, and thousands of emails, including no fewer than 80 drafts of terms and provisions of the Settlement Agreement. R. 10118-27; R. 1388-90 (Kravitt).[7] The threat of

[7] The parties disputed, for example, whether the servicer had breached its servicing obligations; the scope of damages caused by the Countrywide's alleged failure to repurchase loans that breached representations and warranties; the Institutional Investors' argument that the trusts had been damaged by Countrywide's failure to deliver all the required mortgage documentation; Bank of America's willingness to put Countrywide into bankruptcy if Countrywide's repurchase exposure became too great; and Bank of America's argument that even if loans materially breached a representation and warranty, to require repurchase, BNYM would still have to prove a causal relationship between each breach and the harm to investors.

becoming "mired in years of heated and costly litigation" permeated the discussions. R. 12453-56; R. 699-700, R. 717, R. 816 (Laughlin); R. 1368-69 (Kravitt).

The parties reached an agreement in June 2011. In exchange for finality—*i.e.* a release of all repurchase claims (regardless of the underlying theory (R. 1928-30 (Kravitt), R. 524a (Proposed Settlement ¶ 9A(iii))), servicing claims, and the document deficiency claims—Countrywide and Bank of America agreed to three main forms of consideration:

- A payment of $8.5 billion, to be paid by Countrywide and/or Bank of America;
- Industry precedent-setting improvements in Countrywide's mortgage servicing procedures, valued at more than $3 billion, (R. 16003) including transfer of high-risk loans to specialty subservicers, concrete criteria for loan modifications, monthly comparisons of the servicer's performance against industry standard benchmarks, and servicing fee adjustments where the servicer's performance fails to satisfy those benchmarks; and
- An agreement by Bank of America to indemnify the trusts (not BNYM) against certain losses caused by an alleged failure by the seller to deliver mortgage loan files in the proper form.

R. 493a-585a (Proposed Settlement). To the same critical end of finality, the settlement agreement provided, however, that it would not become effective unless and until a court confirmed that the decision to enter into the settlement was reasonable and within BNYM's discretion as trustee under the PSAs. R. 746a (Proposed Order and Final Judgment ¶ k); R.

476a (Trustee Petition ¶ 58); *see also* R. 1353-54 (Kravitt) (discussing risks faced by each party by entering into a settlement absent assurances of finality).

E. The Article 77 Proceeding And Trial Court's Decision

In June 2011, BNYM filed a proceeding pursuant to Article 77 of the C.P.L.R., which allows a trustee to seek judicial review of its proposed action, gives all trust beneficiaries the opportunity to be heard, and authorizes the court to resolve any challenges. *See In re Matter of IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322 (1st Dep't 2000); *In re Matter of IBJ Bank & Trust Co.*, No. 101530/1998, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (Article 77 proceeding approving settlement involving assets of a securitization trust); RESTATEMENT (SECOND) OF TRUSTS § 192 cmt. d (1959).[8] The trial court permitted objectors to the Settlement or the Proposed Final Order and Judgment to file detailed statements of their objections and the grounds for those objections.

Although the Settlement affected many thousands of investors in the 530 trusts, only 44 potential objectors initially appeared. By the time the

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[8] *See also Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950) ("[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.").

hearing commenced, after extensive discovery in which all potential objectors were allowed to participate, those numbers had dwindled to 17, with certain notable intervenors, such as the New York Attorney General, the Delaware Attorney General, and the Federal Housing Finance Administration, deciding not to object. By the end of the hearing, at which all objectors were permitted to participate actively, only 15 remained, and only nine signed the post-trial opposition briefs.

Of the remaining intervenors, only one, Triaxx,[9] pressed the issue in this appeal: namely, that BNYM abused its discretion by ostensibly failing to consider adequately the loss modification claims before agreeing to release them in the settlement. In other words, not only did the Trustee and the Institutional Investors view the loan modification claims as too frail to pursue, but the two attorneys general, and dozens of objectors likewise did not deem the claim worthy of advancing during the Article 77 proceedings.[10] Indeed, objector AIG—the only party to retain and present experts

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[9] The three relevant Triaxx entities are Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1. As of September 2013, Triaxx represented less than 1% of the outstanding principal in the 530 trusts.

[10] No other certificateholder joined Triaxx's brief on this point, and none made more than a fleeting reference to the argument in the joint briefs. *See e.g.* Joint Brief Objecting to Settlement dated May 3, 2013 at 4-5, 45-46, 67-68 (R. 15056-57, 15097-98, 15119-20); Joint Response to Statement in Support of Settlement dated May 13, 2013 at 8-9, 17; Joint Brief in Opposition to Approval of Proposed Settlement Dated October 29, 2013 at 48 (R. 16915).

to contest the settlement—did not treat the claim as important enough to retain and present an expert witness to evaluate or support this theory.

After two years of litigation, exhaustive discovery, and a 36-day evidentiary hearing that included live testimony from 22 witnesses, the trial court broadly approved the settlement. The court correctly recognized that "judicial intervention is warranted only when there is an abuse of discretionary authority" and, after reviewing the objectors' arguments, rejected all but one of them. R. 91a, R. 120a. As to that one, the trial court expressly found "that the Trustee was aware of the issue" of the loan modification claims "and did include it in a list of settlement issues to discuss with Bank of America." R. 115a (citing Hr'g Tr. (Kravitt) at 1927-28). However, the court concluded that BNYM "acted unreasonably or beyond the bounds of reasonable judgment." R. 120a. Specifically, the court faulted BNYM for "exercising its power to settle the loan modification claims without," in the court's view, "investigating their potential worth or strength." *Id.*

In support of this narrow ruling, the court pointed to Kravitt's testimony that, prior to settlement, he had not reviewed different PSAs to identify variations in language among them; did not review trust reports to see how many loans had been modified and not repurchased under any category of PSA; did not calculate the unpaid principal balance at the time

of modification for each PSA; and did not know the hypothetical value of the claims. R. 115a-119a. However, the court expressly acknowledged that Kravitt had determined that "Bank of America had the better legal argument, namely, that the language in the PSAs did not require it to repurchase loans modified for loss mitigation purposes." Importantly, the court did not disagree with the substance of that conclusion. In addition, the court recognized that BNYM "wanted to focus on strong arguments" (R. 118a-119a) and did not of course find fault with that strategic decision. But in the trial court's view, Kravitt had provided no "explanation whatsoever as to what [BNYM] actually did to evaluate the claims." R. 118a (citing Hr'g Tr. (Kravitt) at 2138).

Rather, the court observed that BNYM "could have retained an expert to opine on the contract interpretation of the various provisions of the PSAs that address the repurchase of modified loans," which led it to conclude that "there is no evidence to suggest that [BNYM] evaluated Bank of America's legal argument that the language in the PSAs do not require repurchase of modified loans." R. 119a. The court also reasoned that "the fact that loss mitigation loan modifications may have occurred as a result of certain policy decisions has no bearing on whether or not the PSAs required the repurchase of such modified loans." *Id.*

The court did not reach the underlying merits of loan modification theory. Correctly acknowledging that "the issue of whether any of the PSAs mandate the repurchase of modified loans" was not before it, the court decided only "the issue of whether [BNYM] abused its discretion in settling the loan modification claims." R. 120a. On "this issue only," the court found that BNYM acted unreasonably by settling the loan modification claims "without investigating their potential worth or strength." *Id.*

This appeal followed. R. 10a.

SUMMARY OF ARGUMENT

When a trustee determines that some claims are so weak that pressing them in negotiations will not advance settlement efforts and could even jeopardize the settlement talks as a whole—thereby impeding the trustee from extracting the largest possible settlement sum from the opposing party—the trustee must have the discretion to shelve those weak claims unless that judgment is entirely unreasonable. That is the judgment that was made here, and it was entirely *reasonable*.

From a hindsight perspective, and an erroneous one at that, the trial court nevertheless held that it was "beyond the bounds of reasonable judgment" for BNYM to decide not to "retain[] an expert"—other than its own outside counsel—"to opine on" the loan modification claims and calcu-

late their specific value. R. 119a. That holding improperly turned the exhaustive review that the Trustee conducted on the more serious claims into a *minimum* standard of care that no trustee can meet for every aspect of every decision it must make in negotiating a global settlement of very complex trust claims.

"Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith." *Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010). Here, the evidence is clear that BNYM made a reasonable, good faith judgment that further investigation of the loan modification claims would be fruitless under all the complex circumstances:

- the claims were unlikely to succeed in litigation;
- the claims would not induce Bank of America to pay a larger settlement figure;
- pressing the claims risked detracting from the trusts' stronger claims, and potentially *reducing* the value of the settlement that could be obtained; and
- BNYM's judgment that the claims were weak was entirely reasonable.

BNYM evaluated the strength of the loan modification claims and the utility of pressing them in the negotiations with the assistance of one of the country's foremost practitioners in the field of securitization of resi-

dential mortgages; reasonably assessed them to be weak; reasonably concluded that pressing them in the negotiations would undermine its pursuit of the investors' other claims; and thus reasonably elected *not* to pursue a deeper investigation into the claims' minutiae. BNYM's decision that further investigation would not have been "appropriate" reflected an "exercise [of] reasonable effort and diligence," RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b, and should have been approved.

ARGUMENT

The power of a trustee to settle litigation on behalf of a trust is discretionary. RESTATEMENT (SECOND) OF TRUSTS § 192 & cmt. a. "Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (citing RESTATEMENT (SECOND) OF TRUSTS: *Control of Discretionary Powers* § 187). According to that standard, a court must not "substitute its judgment for that of the board or body it reviews," and instead evaluates only whether "the decision under review is arbitrary and unreasonable." *Perez v. Rhea*, 20 N.Y.3d 399, 405 (2013); *see also Firestone*, 489 U.S. at 111 (trustee decisions "will not be disturbed if reasonable"); *Haynes*, 72 A.D.3d at 536 (trustee must exercise its discretion "reasonably and in good faith"); *In re Matter of IBJ Bank & Trust Co.*, No.

101530/1998, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (concluding, in the context of an Article 77 proceeding, that "the trustee's decision to compromise the . . . action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference"). "[J]udicial intervention is not warranted merely because the court would have differently exercised the discretion." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b. That is because "'[i]t is for the trustees, not judges, to choose between reasonable alternatives.'" *Govoni v. Bricklayers, Masons and Plasterers International Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (citation and internal quotation marks omitted).

BNYM'S CONSIDERATION OF THE LOAN MODIFICATION CLAIMS WAS REASONABLE

The court below faulted BNYM primarily for "fail[ing] to evaluate the potential loan modification claims or to include [their specific value] in the total liability calculations." R. 118a. But the evidence leaves no room for doubt that BNYM *did* evaluate the claims, and on the basis of that evaluation, concluded that the claim was unlikely to increase the overall settlement consideration. That only one of the dwindling band of objectors even actively pressed this objection in court is unsurprising. The evidence is clear: BNYM's discretionary decision as trustee was reasonable. The

trial court erred in concluding that BNYM was under some obligation to do more.

A. The Evidence Is Clear That BNYM *Did* Evaluate The Loan Modification Claims.

The evidence unequivocally demonstrates that BNYM *did* evaluate the loan modification claims. Lead negotiating counsel for BNYM, Jason Kravitt, "was aware of the issue" and focused on it (R. 1927 (Kravitt)), which was only to be expected given his decades of experience in securitization and residential mortgage-backed securities. R. 1315-18 (Kravitt). The "List of Settlement Issues" sent to counsel for Bank of America and Countrywide early in the negotiations reflected this awareness. *Id.*; R-11661 ("How will the study deal with . . . loan mods (and servicer litigation related to same), etc.?"). He also considered the "different categories" of PSA provisions relating to loan modifications. R. 2171 (Kravitt). And Kravitt confirmed at the hearing that BNYM took the loan modification claims into account in developing its negotiation strategy. R. 2138-40 (Kravitt).

Kravitt also was clear why BNYM did not thereafter pursue the loan modification claims in its investigation or negotiations. BNYM's negotiating strategy, in lockstep with the Institutional Investors, was to press strong claims rather than weak ones, and the loan modification claims

were based on "a losing argument legally." R. 2138-40 (Kravitt). In BNYM's reasoned judgment, Bank of America "had the best of the argument" regarding the PSAs' language. *Id.*

The Institutional Investors were highly sophisticated and highly motivated to drive the best possible bargain, yet they, too, did not undertake to calculate a hypothetical value for the claims when appraising Bank of America's total potential liability. R. 972-73 (Waterstredt). This was because they too "believed it was not a strong argument" and was unlikely to produce a larger settlement value. R. 1926; R. 2139 (similar). The witness from Institutional Investor PIMCO testified that, in his extensive experience, he had never seen even a single instance of a loan modified for loss mitigation purposes purchased out of any mortgage securitization. R. 426 (Smith). That same witness later confirmed that the issue was not something that had been missed or overlooked in the negotiations because "these contracts provisions are well known." R. 426-27 (Smith).[11]

The evidence is therefore clear that BNYM, together with the Institutional Investors who had an enormous interest in the settlement, considered the loan modification claims and "did not feel that the total

[11] *See also* R. 427 (Smith) (witness for Institutional Investors testifying that he was aware of loan modification theories in *Greenwich Financial Service Distressed Mortgage Fund 3, LLC v. Countrywide Fin. Corp.*, No. 650474/2008 (Sup. Ct. N.Y. Cnty) (Kapnick, J.))).

amount of money that [they] would get in the end would be any less because [they] didn't push the argument." R. 2140 (Kravitt). The trial court's contrary conclusion—that BNYM "chose not to evaluate the potential loan modification claims" at all (R. 115a) and that "there is no evidence to suggest that [BNYM] evaluated" the claims (R. 119a)—overlooks these aspects of the (admittedly gigantic) record.

Ultimately, the trial court's holding is not that BNYM ignored or overlooked the loan modification claims—the court's own language quoted above correctly recognizes that BNYM consciously "chose" how to approach those claims. R. 115a. Rather, the court reasoned that BNYM, as part of its chosen negotiating strategy, did not evaluate the loan modification claims *in great enough detail*. Where there is a conscious and reasonable judgment not to undertake further review, that judgment itself is an act of discretion that requires deference.

Although BNYM did retain numerous experts to advise it in connection with its decision on important issues, BNYM did not retain a separate expert to comb through all 530 PSAs looking for variances in language addressing loan modifications clauses or to calculate the number of loans that were modified and the potential value of the loan modification claims if successful. But that is because, having judged that these claims were

unlikely to succeed and that it would be counterproductive to pursue the claims, BNYM decided that undertaking further investigation was not warranted.

Whether in hindsight that was the ideal strategy (and there is no evidence whatsoever in the record that it was not) is not the measure of the validity of the trustee's decision. What matters is that it was a *strategy*—a path the trustee consciously chose in the midst of a complex negotiation. And it was obviously a reasonable strategy. The rule cannot be that a trustee must hire an expert (other than its outside counsel) to validate each aspect of its discretionary decision—including an expert on any conceivable claim, no matter how weak—any time it determines it to be in the best interest of beneficiaries to enter into a global settlement that by its very nature includes the release of weak claims. While the trial court did not articulate that standard, that appears to be precisely the rule that it adopted.

B. The Loan Modification Claims Were Unlikely To Increase The Overall Settlement Value and Might Have Lowered It.

BNYM reasonably determined that, even apart from their weakness on the merits, the loan modification claims were unlikely to increase the settlement value for wholly practical reasons.

In deciding whether to press the loan modification argument during the settlement negotiations, BNYM considered the fact that loss mitigation loan modifications—which avoided foreclosures—had become "central to national policy" at the federal and state level. R. 2138-40 (Kravitt). "Although that certainly didn't make up [BNYM's] mind" concerning the value of the claims, Kravitt testified that in light of the strong national policy to encourage loan modifications in lieu of foreclosures, "B of A would have a difficult time agreeing" (*id.*) to respond to a theory of liability that would have impaled it on the horns of an intractable dilemma. Bank of America would be forced to choose between antagonizing the public and its regulators, on the one hand, and incurring enormous liabilities for actions taken that would benefit the trusts by mitigating their losses, on the other.

The trial court missed the key point when it observed that national policy considerations had "no bearing on whether the PSAs required the repurchase of such modified loans." R. 119a. BNYM was *not* concerned about the importance of state and federal regulatory policies because it believed those policies shed light on the meaning of the PSAs or prospectus supplements. Rather, it reasonably believed that those policy considerations did not enhance the Trusts' recovery in any settlement because as-

serting these weak claims would impede the settlement negotiations. *See* R. 2138-40 (Kravitt). *That* is what Kravitt plainly meant when he said he "did not think that Bank of America would agree." R. 2140 (Kravitt).

In light of the broader implications of any concession from Bank of America that it was liable for the loan modification claims, BNYM judged that pressing the claims would have risked *reducing* the value of the settlement. R. 2138-40 (Kravitt). At a more general level, moreover, BNYM had adopted a negotiating strategy that focused on its strong arguments—the types of claims that other trustees have actually litigated (unlike loan modifications) and on which BNYM recovered over $10 billion in consideration—and it was concerned that throwing in the kitchen sink would detract from those strong arguments. *Id*. Thus, even supposing that the loan modification claims were stronger and had large theoretical values—and the record demonstrates that BNYM understood that they *were not* and *did not*—it was reasonable for BNYM to decide not to pursue them independently in the settlement negotiations.

C. The Loan Modification Claims Were Weak.

The trial court was not required to decide the merits of the loan modification claims—or any other settled claims—in evaluating the reasonableness of the trustee's discretionary decision. The trial court was correct

that "the issue of whether any of the PSAs mandate the repurchase of modified loans [was] not before th[e] Court." R. 120a. The question is instead whether BNYM acted wholly *unreasonably* in concluding that any claims based on such a theory were not only weak on their own but would affirmatively undermine the broader settlement negotiations and not increase the value of the settlement overall.

That question does not permit a court to substitute its judgment for that of BNYM on *de novo* review of the issue, and will support an invalidation of BNYM's decision only if it is shown to have been wholly arbitrary. RESTATEMENT (THIRD) OF TRUSTS § 77 & cmt. b. The lone objector actively pushing the loan modification theory, Triaxx, did not come close to satisfying that standard. Without having to ultimately decide the merits, the court had before it ample evidence about the infirmities of the loan modification claim to conclude that the trustee's assessment of those claims as weak and not worth pursuing was at least eminently reasonable—far from arbitrary. The trial court was wrong to conclude otherwise.

1. The Hypothetical Value of the Loan Modification Claim Was A Fraction Of The Huge Number Triaxx Contended Below.

Triaxx asserted during the hearing that the loan modification claims were worth $32 billion. R. 5835 (Moon Summation). They produced this ti-

tanic sum simply by adding up the alleged repurchase price, without accounting for the value of the loans that would be removed from the trusts. Thus, even assuming that the PSAs require repurchase of every modified loan, the claims still would be worth only a small fraction of that figure.

First, any loans modified for loss mitigation would continue to have substantial value as trust assets—it is precisely the point of a modification to retain as much value as possible for the *benefit* of the trusts. The possible value of the loan modification claims, therefore, was not the hypothetical gross proceeds of the loan repurchases, but the harm suffered by the trusts as a result of the modification.[12] During the 36-day hearing, the objectors offered no evidence of such harm.

Second, many of the allegedly affected loans would have been subject to overlapping repurchase claims that were already accounted for in the Trustee's valuation of the rep-and-warranty claims. *See* R. 4061 (expert Brian Lin testifying that his report on the potential exposure for repur-

[12] For example, assume a house with a $200,000 principal remaining on the loan has lost value such that it is now worth only $150,000 and would cost $30,000 to foreclose upon, yielding a recovery of $120,000. The struggling borrower, however, might be able to pay mortgage payments if the principal was reduced to $180,000. This type of loss mitigation modification would therefore *increase* the value of the loan by transforming it from a flat $120,000 recovery in foreclosure to a performing $180,000 loan generating a steady stream of revenues to the trusts. If the damages recoverable for failure to repurchase are the damages from the "unauthorized" modification, then if in fact the modifications increased value, there is no loss at all.

chase claims predicated on breaches of representations and warranties accounted for losses on modified loans); R. 427 (Smith). Triaxx's assertion that the Trustee "gave away" these claims, "for free," at a minimum requires double counting the same damages under two different theories of liability.

Finally, and fundamentally: the possibility of success on the claims was, in BNYM's judgment (and that of the Institutional Investors), very low, if not zero. *See supra* 25-27.

2. The Plain Language of the PSAs and Prospectuses Contradict Triaxx's Argument.

Even setting aside those threshold weaknesses, the contract language on which Triaxx bases its repurchase obligation theory plainly compels BNYM's interpretation. Triaxx's argument rests on the fallacy that language that *authorizes* interest rate modifications on *performing* loans, as an alternative to refinancing, where the loans are purchased out of the trust (also known as modifications "in lieu of refinancing"), somehow also requires the servicer to purchase *troubled* loans that are modified to mitigate losses as part of the servicer's prudent servicing obligation. *See supra* 7-9.

During the hearing, Triaxx argued that the loan modification theory affected the PSAs and the associated prospectus language for 441 of the

trusts, divided into "variants" identified as Variants 1, 3, 4 and 5. R. 16785 (Triaxx Brief at 2); R. 13310-33); R-3462 (PSA §§ 3.11, 3.12). "Variant 1," which includes only 49 of the 530 trusts, is the group that Triaxx argued contained the contract language most supportive of its argument.

Even for the 49 Variant 1 trusts, however, the operative contract language, read as a whole, leaves little (if any) doubt that the repurchase obligation applies only to modification in lieu of refinancing. The PSAs for the Variant 1 trusts state that the "Master Servicer may agree to a modification of *any Mortgage Loan*" if the seller repurchases it. R. 13310 (emphasis added). The provision—which is permissive ("may agree")—does not expressly distinguish between modifications in lieu of refinancings and modifications for loss mitigation. *Id.*[13] But both caselaw and the PSAs themselves establish that a PSA must be read in light of its corresponding prospectus supplement. *See Wells Fargo Bank, N.A. v. Fin. Sec. Assur. Inc.,* 504 Fed. App'x 38, 40 (2d Cir. 2012); R. 420 (Smith) (agreeing that PSAs should be interpreted in light of the prospectus supplements because a prospectus "is the marketing document that the investors receive at new

[13] The relevant PSA states that "The Master Servicer may agree to a modification of any Mortgage Loan (the "Modified Mortgage Loan") if . . . CHL purchases the Modified Mortgage Loan from the Trust Fund immediately following the modification as described below . . . .". R. 13310.

issuance" and "clarifies the intent of the PSA"). Indeed, the PSAs expressly contemplate that they may be amended "without the consent of any of the certificateholders" to "conform" the agreements "to the Prospectus Supplement or the Prospectus." R-3462-166 (PSA § 10.01); R. 1921-22 (Kravitt) (discussing Section 10.01 of the PSAs, which "says that if the description of whatever subject matter is covered in both the PSAs and in the [prospectus supplement] that the description in the [prospectus] can govern the – the provision in the PSA.").

Here, each and every one of the Variant 1 prospectus supplements makes clear that the repurchase obligation is meant to apply only to modifications in lieu of refinancing. They state:

> Countrywide Home Loans will be permitted under the [PSA] to solicit borrowers for reductions to the Mortgage Rates of their respective Mortgage loans. If a borrower requests such a reduction, the Master Servicer will be permitted to agree to the rate reduction provided that (i) Countrywide Home Loans purchases the Mortgage Loan from the Trust Fund immediately following the modification and (ii) . . .

R. 13310; R.10215. The prospectus also specifies that "[p]urchases of Mortgage Loans may occur when prevailing interest rates are below the Mortgage rates on the Mortgage loans and borrowers request modifications as an alternative to refinancing." R. 13310; R.10215; R. 421 (Smith).

Because the prospectus speaks of the repurchase obligation only with reference to modifications as an alternative to refinancing, by clear implication modifications designed to prevent a delinquent loan from defaulting are *not* subject to the repurchase obligation. There is no other way that the "terms of [the] contract [can] be harmonized." *Madison Hudson Assocs. LLC v. Neumann*, 44 A.D.3d 473, 480 (1st Dep't 2007). Thus, even Triaxx's supposedly strongest "Variant 1" argument fails.

As to the remaining 388 trusts allegedly affected by the weaker variants of Triaxx's argument, the "in lieu of refinancing" limitation is reflected in each of the governing PSAs or accompanying prospectuses. *See* R. 13312, R. 13314, R. 10217, R. 10219; R. 421-25 (Smith).

3. Triaxx's Interpretation Would Produce A Commercially Unreasonable Result.

Doubtless, the objectors will note that BNYM did not separately study the modification provisions of each and every one of the 530 PSAs and prospectus supplements individually, looking for variances in contract language. That is true. But looking at 530 contracts was unnecessary because, even if a court in a hypothetical lawsuit were to find the relevant provisions ambiguous, it would have to read the PSAs and prospectus supplements in light of the settled rule that a contract "should not be interpreted to produce a result that is absurd, commercially unreasonable

or contrary to the reasonable expectations of the parties." *Matter of Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003) (citations omitted). There can be no question that Triaxx's interpretation of the loan modification repurchase provisions would have produced an absurd and commercially unreasonable result.

As we have explained, a modification in lieu of a refinancing permits the servicer to reduce the interest rate on a performing loan when the borrower requests a reduction as an alternative to refinancing the loan with a different lender (and, likely, a different servicer). A refinance modification benefits the *servicer* (and the lender), not the trust, because it allows the servicer (or seller) to maintain a servicing (or customer) relationship with a performing borrower who would be lost if the mortgage were refinanced. But as a result of the modification, the loan is worth less as a trust asset—mortgages with lower interest rates produce less revenue, whereas a refinancing with a different lender would result in a full payoff of the loan. Such modifications are conditioned on the trust's being made whole by a repurchase of the mortgage out of the trust at the market rate, prior to the modification.

Loss mitigation modifications, by contrast, are designed to stem losses from troubled loans. These modifications benefit the *investors*, who

bear the risk that loans held in the securitization trust will become delinquent. At the conclusion of the modification, the nominal value of the loan is reduced (either because the principal is reduced, the interest rate is reduced, or both), but the *real* value is stabilized or increased as compared with the alternative of foreclosure. *See* R. 415-19 (Smith); R. 5788-89 (Rebuttal Summation).

It makes no economic sense to require repurchase of delinquent loans that are modified for loss mitigation purposes, which is, no doubt, why loss mitigation modifications are standard industry practice to begin with. R. 419 (Smith). A repurchase obligation for modified delinquent loans would shift to the seller or servicer the risk of loan defaults, which investors accept in exchange for the yield on their securities. But it would shift that risk *only* as to loans that are modified, an arbitrary distinction if the goal were to protect investors from credit losses. And because it is the servicer that decides whether to modify the loan at all, that rule would discourage modifications (even when they increase the value of the loan) and encourage foreclosures. R. 419 (Smith).

No rational lender, servicer, or investor would impose such a senseless condition to completion of modifications that benefit the trust. *See* R. 1199 (Scrivener) (Bank of America witness testifying that he did not

"think anybody in the room" during the negotiations would have suggested that Bank of America had an obligation to repurchase modified loans "because it would be absurd").

4. Successor Liability Was A Significant Obstacle To Recovery.

Beyond the weakness of the loan modification theory on its merits, the chances of BNYM actually recovering on such a claim suffered from the same successor liability problem that infected the investors' other, indisputably stronger claims. Specifically, and as demonstrated at the hearing below, the repurchase obligation for a substantial number of the trusts supposedly affected by the theory would have fallen on Countrywide Home Loans, and not Bank of America. *See* R. 421-25 (Smith).

BNYM received an expert opinion that Countrywide's assets would allow for a maximum recovery of $4.8 billion by all of its unsecured creditors, including (to the extent that the Trustee succeeded in proving its claims) BNYM as trustee. *See e.g.* R. 1435 (Kravitt); R. 2206 (Bailey); R. 7819. In other words, Countrywide clearly lacked the assets to satisfy all the claims being asserted against it in the negotiations with BNYM and by other litigants, and as of the date of the agreement (and even since that time), no plaintiff has ever succeeded in imposing successor liability on

Bank of America despite many attempts.[14] Thus, the assertion of the loan modification claims, to the extent Bank of America believed they might have the slightest merit, would simply increase the "risk that Bank of America would put Countrywide into bankruptcy if its repurchase exposure grew too large." *See* R. 367, R. 373, R. 422 (Smith); R. 717-19 (Laughlin). Such an occurrence would result in BNYM recovering next to nothing for *all* its claims against Countrywide.

Indeed, the trial court acknowledged BNYM's "concern[] that Countrywide would be unable to pay a future judgment," and that the only hope for recovery from Countrywide on *any* of the claims therefore turned on the possibility that "Bank of America would be subject to successor liability" for Countrywide's debts. R. 102a. This core problem applied with equal force to the loan modification theory, and BNYM's ability to achieve an $8.5 billion settlement of all claims—far more than the trustee's expert opined Countrywide could pay—was a resounding success.

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[14] Even certain of the *objectors*, including AIG, have tried and failed to impose successor liability on Bank of America. In fact, after its successor liability claims were dismissed, AIG sought leave to amend by putting the entire discovery record from the *MBIA v. Countrywide* litigation before the court. Even with that additional record, the *AIG* court rejected successor liability claims at the pleading stage. *See AIG v. Countrywide Fin. Corp.*, No. 2:11-CV-10549 MRP, Doc. No. 286, Order Re Motion for Leave to File SAC (C.D. Cal. June 27, 2013); R. 3237-38, R. 3361-62 (Daines)).

D. BNYM Reasonably Declined To Further Investigate or Quantify Claims It Had Decided Were Weak.

A review of the merits of the loan modification claims confirms, therefore, that BNYM reasonably exercised its discretion not to investigate in any greater depth a theory of liability that it not only had deemed flimsy but believed would not advance its overall settlement goals.

In finding that BNYM had acted "beyond the bounds of reasonable judgment," R. 119a, the trial court appeared to hold that a trustee in BNYM's position *must always* scrutinize the specific details of each and every claim released by a settlement agreement, or hire an expert to do so, regardless of whether a particular type of claim is legally viable on its face or whether it is likely to increase the settlement's value. That is not the law. On the contrary, it is well-settled that, when "claims are weak or of little or no probable value . . . , it is fair to bar those claims as part of the overall settlement" without detailed scrutiny. *In re Triarc Companies, Inc.*, 791 A.2d. 872, 876, 878 (Del. Ch. 2001); *see also Manacher v. Reynolds*, 165 A.2d 741, 747 (Del. Ch. 1960) (finding that weak claim released as part of larger settlement could "properly be assimilated with and disposed of as a part of the compromise"). The reason why is clear: releasing weak claims is essential to achieving global settlements that deliver value to beneficiaries, defendants, and courts alike. *See Sullivan v. DB Invs., Inc.*, 667 F.3d

273, 310-11 (3d Cir. 2011) (explaining the value of "global peace—*i.e.,* the resolution of as many claims as possible"). "From a practical standpoint . . . [the goal of] achieving global peace is . . . valid and valuable." The point of "[s]ettlements [is to] avoid future litigation with all potential plaintiffs—meritorious or not." *Sullivan*, 667 F.3d at 311.

More fundamentally, the court's approach cannot be squared with the hornbook rule that the *trustee*, not the *court*, is empowered to make decisions for the trusts' beneficiaries, including determining what degree of investigation is "appropriate" under the circumstances. RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b. A contrary rule—the rule adopted by the trial court below—would subject trustees to unlimited second-guessing of any discretionary judgment. Indeed, no trustee could ever agree to settle even a modest claim, because an objector could always imagine a variant claim that the trustee did not investigate in depth, for the very reason that the claim was feeble.

A mandate to paper over every imaginable ramification of the trustee's decision, such as by hiring an expert to verify the exercise of reasoned business judgment, would come at the expense of investors. And it would endanger settlements just like this one—even when the settlement would deliver enormous value to the highly sophisticated investors who over-

whelmingly support it and would achieve certainty where the alternative is chaos.

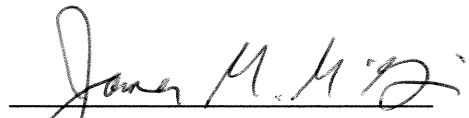
As the trial court recognized, "'[t]he mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.'" R. 91a (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 at cmt. e.). The court stumbled when it did not adhere to that bedrock principle and intervened in the trustee's discretionary judgments concerning the loan modification claims.

For all the reasons stated, BNYM's decision not to pursue further the loan modification claims was reasonable and BNYM's conduct should have been upheld in its entirety.

CONCLUSION

This Court should modify the judgment to approve the trustee's conduct in entering into the settlement in its entirety.

Dated: New York, New York
May 28, 2014



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PRINTING SPECIFICATIONS STATEMENT

Pursuant to section 600.10(d)(1)(v), the undersigned attorney for Petitioner-Appellant-Cross-Appellee Bank of New York Mellon hereby certifies that this brief complies with § 600.10(a). The brief was prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger. Footnotes and point headings comply with section 600.10(a)(3).

The brief contains 9697 words as calculated by Microsoft Word.

Dated: New York, New York
May 28, 2014

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.*,	Index No. 651786/2011
Petitioners,	**PRE-ARGUMENT STATEMENT**
for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	

PLEASE TAKE NOTICE that Petitioner The Bank of New York Mellon ("BNYM"), by its counsel, Dechert LLP and Mayer Brown LLP, hereby submit this Pre-Argument Statement pursuant to 22 N.Y.C.R.R. § 600.17(b).

1. The full title of this action is set forth below:

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.

2. The full names of the original parties are set forth below:

Original Petitioners:

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)

Original Respondents:

Cranberry Park II LLC; Cranberry Park LLC; Federal Home Loan Bank of San Francisco; Federal Home Loan Bank of Seattle; TM1 Investors, LLC; Walnut Place II LLC; Walnut Place III LLC; Walnut Place IV LLC; Walnut Place IX LLC; Walnut Place LLC; Walnut Place V LLC; Walnut Place VI LLC; Walnut Place VII LLC; Walnut Place VIII LLC; Walnut Place XLLC; Walnut Place XI LLC; Federal Deposit Insurance Corporation; RMBS Acquisition Co, LLC; Federal Home Loan Bank of Boston; Federal Home Loan Bank of Chicago; Federal Home Loan Bank of Indianapolis; Federal Home Loan Bank of Pittsburgh; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policeman's Annuity and Benefit fund of the City of Chicago; The Westmoreland County Employee Retirement System; The Western and Southern Life Insurance Company; Western-Southern Life Assurance Company; Columbus Life Insurance Company;

Integrity Life Insurance Company; National Integrity Life Insurance Company; Fort Washington Investment Advisors, Inc. (on behalf of Fort Washington Active Fixed Income LLC); Mortgage Bond Portfolio LLC; Triaxx Prime CDO 2006-1, Ltd.; Triaxx Prime CDO 2006-2, Ltd.; Triaxx Prime CDO 2007-1, Ltd.; 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 Company; 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; Knights of Columbus; American Equity Investment Life Insurance Company; American Equity Investment Life Insurance Company of New York; Amici Associates, LP; Amici Fund International Ltd., Amici Qualified Associates; Blue Mountain Credit Alternatives Master Fund, LP; 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; LibreMax Capital LLC; Lincoln Investment Solutions, Inc.; Lincoln Life & Annuity Company of New York; Lincoln National Reinsurance Company (Barbados) Limited; LL Funds LLC; Manichean Capital, LLC; NCMIC Group, Inc.; NCMIC Insurance Company; NexBank, SSB; Peoples Independent Bank; Radian Asset Assurance Inc.; Stone Creek LLC; Taconic Capital Advisors LP; The Collectors' Fund LP; The Lincoln National Life Insurance Company; Thomaston Savings Bank; Valley National Bank; CIFG Assurance North America, Inc.; American Fidelity Assurance Company; United States Debt Recovery VIII, LP; United States Debt Recovery X, LP; Bankers Trust Company; Bankers Life Insurance Company; Bankers Specialty Insurance Company; First Community Insurance Company; Sterling Federal Bank, FSB; Oriental Bank and Trust; Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; Washington State Plumbing and Pipefitting Pension Trust; Goldman Sachs & Co. Securities Division; 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; Syncora Guarantee Inc.; Federal Housing Finance Agency as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; National Credit Union Administration Board as Liquidating Agent of US Central Federal Credit Union, Western Corp. Fed. Credit Union, Members United Corp. Fed. Credit Union, Southwest Corp. Fed. Credit Union, Constitution Corp. Fed. Credit Union; Ballantyne Re Place; the State Attorneys General for the State of New York and Delaware.

Since the commencement of this proceeding, the following Respondents have withdrawn their objection to the settlement at issue:

Federal Home Loan Bank of San Francisco; Federal Home Loan Bank of Seattle; TM1 Investors, LLC; Walnut Place II LLC; Walnut Place III LLC; Walnut Place IV LLC; Walnut Place IX LLC; Walnut Place LLC; Walnut Place V LLC; Walnut Place VI LLC; Walnut Place VII LLC; Walnut Place VIII LLC; Walnut Place XLLC; Walnut Place XI LLC; Oriental Bank and Trust; Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; Washington State Plumbing and Pipefitting Pension Trust; LibreMax Capital LLC; Clayhill Investors LLC; Syncora Guarantee Inc.; Federal Deposit Insurance Corporation; RMBS Acquisition Co, LLC; Federal Housing Finance Agency as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; National Credit Union Administration Board as Liquidating Agent of US Central Federal Credit Union; Western Corp. Fed. Credit Union, Members United Corp. Fed. Credit Union, Southwest Corp. Fed. Credit Union, Constitution Corp. Fed. Credit Union; National Credit Union Administration; Cranberry Park II LLC; Cranberry Park LLC; V Re-Remic, LLC; Federal Home Loan Bank of Boston; Federal Home Loan Bank of Chicago; Federal Home Loan Bank of Indianapolis; Columbus Life Insurance Company; Fort Washington Investment Advisors, Inc. (on behalf of Fort Washington Active Fixed Income LLC); Integrity Life Insurance Company; National Integrity Life Insurance Company; The Western and Southern Life Insurance Company; Western-Southern Life Assurance Company; Ambac Assurance Corporation; The Segregated Account of Ambac Assurance Corporation; Monarch Debt Recovery Master Fund Ltd.; Monarch Opportunities Master Fund Ltd.; Monarch Capital Master Partners LP; Monarch Structured Credit Master Fund Ltd.; Monarch Capital Master Partners II LPP.; Monarch Recovery Ltd.; Monarch Alternative Solutions Master Fund Ltd.; Oakford MF Limited.; Monarch Cayman Fund Limited.; Monarch Capital Master Partners II-A LP; American Equity Investment Life Insurance Company; American Equity Investment Life Insurance Company of New York; Blue Mountain Credit Alternatives Master Fund, LP; Lincoln Investment Solutions, Inc; NCMIC Group, Inc.; NCMIC Insurance Company; Stone Creek LLC; Taconic Capital Advisors LP; Goldman Sachs & Co. Securities Division; Vertical Capital, LLC.

3. The names, address and telephone number of counsel for Petitioner BNYM are:

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6. This appeal is taken from the Decision/Order/Judgment of Supreme Court of the State of New York, County of New York (Justice Barbara R. Kapnick), entered in the office of the Clerk of Supreme Court of the County of New York on February 21, 2014 (the "Judgment"). Attached hereto as Exhibit A is a true and correct copy of the Judgment.

7. On June 29, 2011, Petitioner BNYM, as trustee for 530 residential mortgage backed securities (RMBS) trusts, filed a Verified Petition, pursuant to CPLR Section 7701, seeking approval of its decision to enter into a settlement of certain trust claims. Under the settlement, certificateholders in the trusts will receive $8.5 billion in cash, as well as more than $2 billion in landmark servicing improvements for the mortgages still held in the trusts, upon entry of a final, non-appealable judgment finding that BNYM acted reasonably and within the scope of its discretion and authority in entering into the settlement.

8. On June 3, 2013, Supreme Court commenced a nine-week evidentiary hearing that concluded on November 21, 2013. On January 31, 2014, Supreme Court issued the Judgment and held:

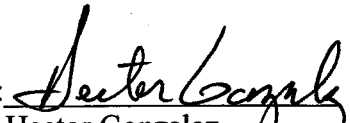
> After reviewing the voluminous record and carefully considering the arguments presented by all counsel, this Court finds that, except for the finding below regarding the loan modification claims, the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment.
>
> . . . . What is before this Court, however, is the issue of whether the Trustee abused its discretion in settling the loan modification claims. On this issue only, the Court finds that the Trustee acted "unreasonably or beyond the bounds of reasonable judgment," *(supra* at 25), in exercising its power to settle the loan modification claims without investigating their potential worth or strength. *(See* Hr'g Tr. 2684:10-19, July 19, 2013 (Trustee's corporate trust law expert states that a Trustee cannot release a claim without understanding its value).) As a result, paragraphs (h), (i), (j), (k) and (t) of the PFOJ are approved to the extent that they do not apply to the loan modification claims.
>
> Accordingly, it is hereby ORDERED and ADJUDGED that the Settlement Agreement is approved except to the extent that it releases the loan modification claims.

9. Petitioner BNYM appeals the Judgment with respect to Supreme Court's erroneous ruling regarding loan modification claims in the settlement.

10. There is not a related action or proceeding pending in any court of this or any jurisdiction.

11. There is currently an appeal pending in this action. On May 28, 2013, certain Respondents filed an appeal in this action relating to Supreme Court's grant of Petitioners' Order to Show Cause to strike Respondents' jury demand. Dkt. No. 841. Respondents served entry of the order of May 28, 2013. Dkt. No. 834. Attached hereto as Exhibits B and C are the relevant notice of appeal and pre-argument statement, respectively.

Dated: February 21, 2014
New York, New York

By: 

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