To be Argued by:
KATHY D. PATRICK
(*Of the Bar of the State of Texas*)
By Permission of the Court

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,

(For Continuation of Caption See Inside Cover)

BRIEF FOR INTERVENORS-PETITIONERS-APPELLANTS-CROSS-RESPONDENTS THE INSTITUTIONAL INVESTORS

KATHY D. PATRICK (*pro hac vice*)
ROBERT J. MADDEN (*pro hac vice*)
DAVID SHEEREN (*pro hac vice*)
GIBBS & BRUNS LLP
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805
kpatrick@gibbsbruns.com

KENNETH E. WARNER
WARNER PARTNERS, P.C.
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000
kwarner@warnerpc.com

Attorneys for Intervenors-Petitioners-Appellants-Cross-Respondents The Institutional Investors

– and –

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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Petitioners-Appellants the Institutional Investors[1] submit this brief in support of their appeal from a Decision/Order/Judgment dated January 31, 2014 (the "Judgment"), R.67a,[2] issued by the Supreme Court of the State of New York, New York County. The Judgment granted in part and denied in part the Petitioners' motion for entry of an order, pursuant to CPLR Article 77, approving a trustee's exercise of discretion in entering into a global settlement of trust-based repurchase and servicing claims. The Judgment finding the Trustee acted within the reasonable exercise of its discretion in connection with the settlement was correct in all respects except one: the finding that the Trustee acted unreasonably in settling the loan modification claims, as part of the global settlement, because there was "no evidence" that the Trustee evaluated that claim's "potential worth or strength." R.120a (Judgment at 53). As we explain below, the record contains

[1] The Institutional Investors are 22 of the largest certificateholders in the securitization trusts at issue in this proceeding. They are 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, and Western Reserve Life Assurance Co. of Ohio; Federal Home Loan Bank of Atlanta; Bayerische Landesbank, Prudential Investment Management, Inc.; and Western Asset Management Company.

[2] References to "R.___" indicate citations to the Record submitted by Petitioner-Appellant BNYM.

evidence that the Trustee did, in fact, investigate "the potential worth or strength" of the loan modification claims and used a reasonable process to do so. The Trustee retained counsel to assist it in evaluating its claims. R.1318:11-1319:6. Before it entered into the global settlement and included the loan modification claims within it, counsel evaluated the loan modification claims on the Trustee's behalf, *see infra* Part III(F), and concluded they were "a losing argument, legally," R.2140:5-6, because the repurchase of loans modified for loss mitigation purposes "were not required to be repurchased," R.2139:5-9. Therefore, the Judgment should be modified in that respect only—to delete the finding that the Trustee acted unreasonably in deciding to release these claims as part of the global settlement. In all other respects, the Judgment should be affirmed.

I. PRELIMINARY STATEMENT

In recent years, courts in New York (both state and federal) have been flooded with representation and warranty, repurchase, servicing, and other claims arising out of residential mortgage backed securitization (RMBS) transactions.[3] This case presents an important question: whether RMBS Trustees can exercise their discretion to resolve their trust-based claims by compromise and settlement

[3] The volume of such cases caused the Administrative Judge for Civil Matters in the First Judicial District to enter an Administrative Order, dated May 23, 2013, directing that all actions "alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential-mortgage-backed-securities ('RMBS actions')" are to be assigned to a single justice, the Honorable Marcy S. Friedman (Part 60). *See* Administrative Order, available at http://www.nycourts.gov/courts/1jd/supctmanh/AO_Mortgage_Secs_513.pdf.

without exposing themselves to liability or second guessing by the courts. If the judgment below is allowed to stand on the narrow issue that is the subject of this appeal, it will immeasurably complicate and impede settlements of trust-based RMBS claims, making them more difficult, more time consuming, more costly, and less frequent, all contrary to the public policy of this State.[4]

The difficulty in settling RMBS trust claims arises out of the fact that (as this Court has recently explained) such claims are owned, controlled, and can only be asserted by the trustees for the securitizations.[5] This complicates the practical ability to resolve such claims by settlement because (i) RMBS trust claims are hotly contested and of uncertain value; (ii) a decision to settle necessarily involves the exercise of discretionary judgment by an RMBS trustee; (iii) a trustee who elects to settle RMBS trust claims risks exposing itself to liability if its judgment is second guessed by even one certificateholder; and (iv) under the structure of

[4] "We recognize that strong policy considerations favor settlements, which avoid costly litigation, and preserve scarce judicial resources." *Mahoney v. Turner Constr. Co.*, 61 A.D.3d 101, 106 (1st Dep't 2009) (quotations and citations omitted).

[5] *See Ace Sec. Corp. v. DB Structured Prod., Inc.*, 112 A.D.3d 522 (1st Dep't 2013) (RMBS trustee, not certificateholder, is party with standing to assert claim for breaches of mortgage representations and warranties); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012) ("no action clause" in RMBS pooling and servicing agreement bars certificateholders from asserting claim for breaches of mortgage representations and warranties).

RMBS governing agreements, trustees are generally not required to take actions that expose them to the risk of liability, absent adequate protection.[6]

Article 77 of the New York CPLR provides a solution to this problem.[7] It allows a trustee to negotiate a settlement of trust claims that is conditioned on the entry of a court order finding that the trustee acted within the scope of its reasonable discretion in entering into the settlement.[8] Thus, an Article 77 proceeding streamlines a Trustee's exercise of its settlement discretion by allowing a trustee to act in the best interest of certificateholders (by obtaining value for disputed trust claims) while protecting the trustee from the risk that its settlement decision will expose it to a liability it has no obligation to incur. In such a proceeding, substantial deference is given to the trustee's judgment, and the role of the court is limited to ensuring that, given the circumstances presented, the trustee

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[6] *See, e.g.*, R.6517 (PTX 71.114, § 8.02(vi)) (PSA provision explaining that "the Trustee shall not be required to risk or expend its own funds or otherwise incur any financial liability in the performance of any of its duties or in the exercise of any of its rights or powers hereunder if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it.").

[7] CPLR Section 7701 provides, in relevant part, that "a special proceeding may be brought to determine a matter relating to any express trust . . . ."

[8] One of the recognized uses of an Article 77 special proceeding is for a court to pass on the propriety of proposed trustee action. *See, e.g.*, *In the Matter of Scarborough Props. Corp.*, 25 N.Y.2d 553 (1969) (Article 77 proceeding approving trustee's proposed purchase of trust property); *In re Application of IBJ Schroeder Bank & Trust Co.*, No. 101530/1998, slip op. (Sup Ct. N.Y. Cnty Aug. 16, 2000) (Article 77 proceeding approving trustee's exercise of discretion in settling claims of asset securitization trust); *BlackRock Fin. Mgmt., Inc. v. The Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 174 (2d Cir. 2012) ("Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper." (citations & quotations omitted)).

has not acted so far outside the range of reasonable conduct that its actions amount to an abuse of its discretion.

This case arises from the largest private settlement in history. The Bank of New York Mellon (BNYM or the "Trustee"), as trustee for 530 RMBS trusts (the "Trusts"), entered into a settlement of representation and warranty and servicing claims related to over 1.6 million mortgage loans held by the Trusts for which it served as trustee. Pursuant to the terms of the settlement agreement (the "Settlement Agreement"), certificateholders in the Trusts are to receive from Countrywide, its acquirer Bank of America, and certain of Bank of America's affiliates $8.5 billion in cash. The Settlement Agreement also mandates landmark reforms to servicing practices for mortgages in the Trusts. These reforms are estimated to confer an additional $2.5 to $3 billion in value on the Trusts. Finalization of the Settlement Agreement is conditioned on entry of a final, nonappealable order finding that the Trustee acted within the scope of its reasonable discretion in entering into the Settlement Agreement.

The Trustee's decision to settle and its request for relief in this proceeding, enjoy widespread support from certificateholders in the Trusts. The Institutional Investors, holders of $34 billion of certificates in the Trusts (24% of all such certificates), support the settlement and have intervened in this proceeding as co-petitioners. During proceedings in the trial court, additional certificateholders

came forward to publicly support the settlement. In total, a tiny minority of certificateholders, amounting to *only 7%* of the Trusts' certificates, objected to the settlement. Only 4% have come forward to appeal the Court's Judgment.

After nearly two years of pretrial proceedings and a 36-day trial, the trial court entered its Judgment. The objectors to the Settlement Agreement raised countless objections, challenging virtually every aspect of the Trustee's actions and decision making. The trial court rejected virtually all of those objections. It entered Judgment finding the Trustee acted within the reasonable exercise of its discretion in all respects save one.

The sole issue on which the trial court found that the Trustee abused its discretion relates to an argument that either the Seller or the Servicer of the Trusts' loans were required to purchase nonperforming loans from the Trusts if the loans were modified, as an alternative to foreclosure, to reduce trust losses. The evidence presented at trial established that the Trustee (i) was aware of this loan modification claim, (ii) retained highly qualified counsel with deep experience and knowledge of RMBS securitizations to analyze it (including reviewing the relevant contractual language for the Trusts), (iii) formed an opinion that it was a losing argument, (iv) made the strategic judgment to emphasize the Trusts' stronger claims (such as claims for breaches of representations and warranties and for poor mortgage servicing) in the settlement negotiations over weaker claims (such as the

loan modification argument), and (v) made the judgment that including this claim among those released as part of the settlement was in the best interest of certificateholders.

The trial court did not take issue with the Trustee's judgment that the loan modification argument lacks merit. In fact, the record evidence was that this claim is based on a highly selective misreading of the governing agreements controlling the Trusts. The loan modification argument wrongly conflates two different types of loan modifications, carried out for different purposes and controlled by different sections of the Trusts' governing agreements. Importantly, nowhere in the Judgment did the trial court take issue with the Trustee's judgment that releasing this tenuous, contorted claim as part of the overall settlement was in the best interest of trust certificateholders.

Instead, the trial court found that the Trustee abused its discretion with respect to this one claim because it concluded there was "no evidence" that the trustee evaluated the argument before including it among the claims released in the settlement. The record, however, contains abundant evidence that the Trustee evaluated the loan modification claim; retained skilled counsel to advise it concerning the claim; and made an informed, reasoned judgment concerning its strength and merits when it decided to release it. If this narrow aspect of the Judgment is not overturned, it threatens the finality of this landmark, $10 billion

settlement. Trustees are not required to expose themselves to financial risks when they resolve and settle Trust-based claims, but the Judgment's finding that the Trustee acted unreasonably in this one, limited respect has now created (wrongly) the risk of that liability. The Judgment also threatens to chill future settlements. If not modified, this aspect of the Judgment will replace appropriate deference to the discretionary judgment of a trustee with judicial micromanagement of the trustee's process. This will magnify uncertainty about how and when a trustee can or should settle the claims that belong to it, a result that is entirely inconsistent with the New York policy favoring settlement.

For these reasons, and those set out below, the Institutional Investors respectfully request that this Court modify the Judgment to eliminate the finding that the Trustee acted unreasonably in releasing the loan modification claims as part of the global settlement. In all other respects, the Judgment should be affirmed.

II. QUESTION PRESENTED

Whether the Trustee acted within the scope of its reasonable discretion in connection with its evaluation of a potential Trust claim relating to modified mortgage loans?

The trial court answered this question in the negative.

III. STATEMENT OF THE CASE

A. The Parties

1. The Trustee

Petitioner-Appellant the Bank of New York Mellon acts as trustee for the 530 RMBS Trusts at issue in this proceeding.[9] The duties and responsibilities of the Trustee, and the rules governing operations of the Trusts, are set out the in the Pooling and Servicing Agreements or Indentures for each Trust (collectively the PSAs), together with other documents made part of the securitization transactions, including the prospectus supplements issued in connection with the transactions. [10]

2. The Institutional Investors

Petitioners-Appellants the Institutional Investors are the largest group of certificateholders in the Trusts who have appeared in this action. Collectively, they hold more than $34 billion in certificates in the Trusts, representing 24% of the face value of all such certificates. R.3489:23-3490:18. The Institutional Investors intervened in this proceeding to support the settlement and to urge the trial court (and this Court) to enter a finding that the Trustee acted within the scope of its discretion in entering into the Settlement Agreement, so that the settlement can become fully effective and the settlement payment can be made to the Trusts.

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[9] *See* R.20499 (R-3001 to R-3529, R-4162 to R-4166, and R-4168-R-4178) (Pooling and Servicing Agreements and Indentures for the Trusts, identifying BNYM as trustee) (omitted from the record by stipulation).

[10] *See id.* (also identifying R-3530 R-4059) (Prospectus Supplement for the Trusts) (omitted from the record by stipulation).

3. The Objectors

Following a worldwide notice program ordered by the trial court, R.10149 (PTX 617:1-3),[11] only a tiny minority of certificateholders holding less than 7% of the total certificates objected to the settlement. R.3489:23-3491:9; R.3494:2-25. The most vocal and active objector was AIG. Its counsel took the lead in depositions, in hearings, and at trial. It retained and paid for all of the expert witnesses who appeared on behalf of the objectors. AIG, and the other objectors who joined in AIG's filings, asserted countless objections, raising questions about virtually every aspect of the Trustee's conduct in negotiating and entering into the settlement, including over 30 individual objections in AIG's final brief. R.16862 (Doc. 953, Respondents' Joint Brief in Opposition to Approval of Proposed Settlement). The certificateholder that focused its objection on the loan modification issue was an entity named Triaxx. R.16780 (Doc. 947, Triaxx objection). No other certificateholder joined Triaxx's brief on this point. *Id.*

B. The Settled Claims

The Trusts hold mortgages originated and sold by Countrywide Home Loans, Inc. (the "Seller"). When the mortgages were sold to the Trusts, the Seller (CHL) made certain representations and warranties about the mortgages. *See*

[11] The notice informed certificateholders of the details of the settlement, directed them to sources of additional information, informed them of their right to appear and object to the settlement, and advised them that silence would be treated as consent and a waiver of any objection. R.10155 (PTX 617.7).

R.6018 (Settlement Agreement) (PTX 1). At the time these representations and warranties were made, the Seller CHL was a wholly owned subsidiary of Countrywide Financial Corporation and was not affiliated with Bank of America in any way. *Id*. The mortgages in the Trusts were originally serviced by a different Countrywide entity, Countrywide Home Loan Servicing, LP. In July 2008, Countrywide merged into a Bank of America subsidiary. In 2011, Bank of America N.A. became the mortgage servicer ("Servicer"). *Id*. The Settlement Agreement resolves representation and warranty, servicing, and successor liability claims arising out of the sale and servicing of the over 1.6 million mortgage loans in the Trusts against the Released Parties, including Countrywide, Bank of America, and their respective affiliates. *Id*. at R.6049 (§9); R.1662:7-24.

C. The Settlement Agreement

The Settlement Agreement resulted from a process that was set in motion by the Institutional Investors, who joined together to assert collective certificateholder rights by issuing a "notice of nonperformance" in an attempt to bring about the prosecution of the claims that were eventually resolved by the Settlement Agreement. R.6708 (PTX 108).[12] The notice of nonperformance asserted that certain of the Released Parties were liable to the Trusts for failing to repurchase

[12] The PSAs for the Trusts provide that certificateholders with voting rights over a specified threshold may give notice of breaches of the governing agreements. *See, e.g.*, R.6512 (PTX 71.109, § 7.01(ii)).

mortgage loans that breached representations and warranties[13] and for failing to service the Trust's mortgages in a prudent manner. *Id*. Echoing the Trustee's later judgment that the loan modification argument at issue in this appeal lacks merit, the Institutional Investors chose not to include this argument in their notice of nonperformance, although they were aware of it and had analyzed it. *Id*.; R.972:2-8.[14]

The Settlement Agreement was entered into on June 28, 2011 by and between the Trustee, acting as trustee for the Trusts, and Countrywide, Bank of America, and their respective affiliates (the "Released Parties"). *See* R.6018 (Settlement Agreement) (PTX 1). The Settlement Agreement provides for the payment to the trusts of $8.5 billion in cash, together with certain specified reforms to the servicing practices for mortgages in the Trusts, and other remedies in return for a release of claims. R.6026, R.6031, R.6049 (Settlement Agreement) (PTX 1 at §§ 3(a), 5, & 9). The servicing remedies are estimated to yield an additional $2.5 to $3 billion in value for the Trusts. R.2730:2-2731:25. The effectiveness of most

[13] Bank of America's potential liability for representation and warranty breaches was well known in the marketplace. Bank of America's own financial statements contained detailed discussions of its potential liability for such claims. *See, e.g.,* R.12034 (R350.046-053.) (BofA 10-Q for 1st quarter 2011).

[14] "Q: Now at any point during the settlement negotiation process, did you determine the amount that the seller or the master servicer would have to pay to repurchase modified loans if either one of those entities had that obligation? A: The issue of repurchasing modified loans was discussed within the group. We did not include that in our final analysis after a group discussion." (Testimony of Scott Waterstredt, the lead negotiator for MetLife and a member of the Institutional Investors' Steering Committee).

of the Settlement Agreement is conditioned on the entry of a final, nonappealable order, finding that the Trustee acted within the scope of its reasonable discretion in entering into the Settlement Agreement. *Id*. at R.6022 (§2(a)).

D. The Article 77 Proceeding

On June 28, 2011, the Trustee filed a verified petition in the trial court commencing a special proceeding and invoking the court's equitable powers pursuant to Article 77 of the CPLR. It sought an order that the Trustee acted within the scope of its reasonable discretion in entering into the Settlement Agreement. R.11310 (R-2). The Institutional Investors intervened in the proceeding as co-petitioners supporting the settlement and the Trustee's request for relief. R.753a (Institutional Investors' intervention petition, Doc. No. 14). Other certificateholders, holding over $1 billion in certificates in the Trusts, likewise came forward to publicly support the settlement and urged the trial court "to approve the Settlement promptly for the benefit of all Certificateholders." R.14142 (Monarch letter)[15]; *see also* R.14216 (Fir Tree letter).[16]

[15] "Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire settlement based on the actions of what appears to be a small minority of objecting holders. We urge the Court to approve the Settlement promptly for the benefit of all of the Trusts' Certificateholders." R.14142 (Monarch letter).

[16] "Fir Tree supports the proposed settlement and views the settlement as fair and reasonable after taking into account the risks and costs of obtaining a judgment for the benefit of holders of Securities against the Countrywide and Bank of America entities that are parties to the

After the court-ordered notice described above, and a lengthy period of discovery, expert reports, and other proceedings in the trial court scrutinizing the Trustee's actions and decisions, only a small minority of certificateholders—holding only 7% of the Trusts' certificates—lodged an objection to the settlement. R.3489:23-3491:9; R.3494:2-25. Only 4% have come forward to appeal the Judgment.

E. The Judgment

On January 31, 2014, after a 36-day bench trial, the trial court entered its Judgment finding that, with one exception, the Trustee acted within the scope of its reasonable discretion when it resolved all of its trust-based claims in a global settlement and entered into the Settlement Agreement. R.67a. The sole exception relates to the Trustee's agreement to include a potential claim related to modified mortgage loans among the claims released in the Settlement Agreement. With respect to this potential claim, the trial court found that there was "no evidence" that the Trustee evaluated the strength or worth of this claim before agreeing to include it among the claims released. Based on this no evidence finding, the trial court then found that the Trustee abused its discretion in agreeing to include this potential claim among the claims in the settlement.

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settlement. Accordingly, Fir Tree urges the court to approve the settlement, enabling holders of Securities to see recoveries from the settling parties." R.14216 (Fir Tree letter).

F. The Trustee's Evaluation of the Loan Modification Argument

The trial court's "no evidence" finding is contrary to the record evidence establishing that the Trustee, in fact, evaluated this claim, formed an opinion as to its merits, and made a reasonable judgment that including it among the released claims was in the best interest of trust certificateholders. The Trustee engaged in an exhaustive process to analyze and evaluate the potential trust claims that would be released in the Settlement Agreement, and that process was examined in great detail in the trial below. The trial court, appropriately, found no fault in each aspect of the Trustee's process, save the loan modification issue. Because the focus of this appeal is limited to the narrow finding on the loan modification argument, this brief will focus solely on that aspect of the Trustee's process.

1. The Trustee Retained Highly Experienced Securitization Counsel to Advise It Regarding Legal Issues

The first step in the Trustee's process of analyzing the legal issues raised in the settlement negotiations, including the loan modification argument, was to retain experienced and highly regarded securitization counsel: Jason Kravitt and the law firm of Mayer Brown. R.1318:11-1319:6. Mr. Kravitt's experience in securitization is virtually without peer. He founded the Mayer Brown securitization practice 28 years ago and continues to head it to this day. R. 1314:25-26. He has worked on between 500 and 1,000 securitization transactions,

including 50 to 75 RMBS transactions, representing issuers, underwriters, investors, trustees, and rating agencies. R.1315:13-16; R.1316:3-10; R.1316:19-25. He has extensive experience in drafting RMBS governing documents. R. 1316:11-18. He is also the author of numerous scholarly articles on the subject of securitization, as well as the authoritative treatise *The Securitization of Financial Assets*. R.1317:3-9. He is a co-founder of the American Securitization Forum, R.1317:25-1318:10, the leading trade organization addressing concerns with regard to the securitization of financial assets. Finally, and importantly, Mr. Kravitt is an adjunct professor in the law of securitization at both New York University Law School and Northwestern Law School.[17] R.1317:10-19.

Upon being retained, Mr. Kravitt assembled a multidisciplinary team at Mayer Brown to assist him in the representation. R.1319:18-1320:12.[18] The

[17] Mr. Kravitt's status as a law school professor is noteworthy, given the trial court's conclusion that the trustee "could have retained an expert to opine on the contract interpretation but …did not do so." Elsewhere, the court cited favorably the Trustee's decision to retain Professor Robert Daines "to offer an opinion as to whether Bank of America would be obligated to pay the debts of Countrywide under theories of successor liability or veil piercing," R.103a (Judgment at 36), and its decision to retain Professor Barry Adler "to analyze the law and to provide his understanding of the competing interpretations of the 'materially and adversely affects' language [in the governing PSAs]." R.110a (Judgment at 43). That Mr. Kravitt rendered his advice as a practicing lawyer, rather than by invoking his status as a law professor, is not a basis on which to conclude the Trustee acted *unreasonably* and *abused its discretion* in relying on the counsel of the leading practitioner in the field.

[18] "[W]hat I did immediately was first put a team together. I first put a team together of litigators, especially Mr. Ingber, who I think everybody here is familiar with on the litigation side and his team. I also contacted others of my partners who were experienced in RMBS transactions. I added insolvency lawyers because of the potential insolvency issues that would arise. I don't remember now if I said it, real estate lawyers who were experts in real estate finance generally, who included assignments and mortgages perfection and things like that. . . . I

Mayer Brown team, led by Mr. Kravitt, advised the Trustee on the legal issues that arose in the course of the settlement negotiations, including, as discussed below, the loan modification argument. R.1860:25-1861:5[19]; R.2152:13-15[20]; R.1860:25-1861:5.[21]

2. The Trustee Analyzed the Loan Modification Argument

The Trustee was aware of the contention that certain PSAs allegedly obligated either the Seller or the Servicer to purchase a loan out of an RMBS Trust if the loan was modified to provide relief to a troubled borrower and mitigate the trust's losses. Modifications for this purpose are called "loss mitigation modifications." *See infra* Part V(B)(1). A second type of modification, performed in lieu of refinancing, is offered to performing (not troubled) borrowers and serves to preserve origination and servicing revenue for the Seller and Servicer. *Id*. The record established there were no modifications in lieu of refinancing in the Trusts. R.1201:14-17. Instead, the only modifications performed on the Trusts' loans

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also added tax lawyers, especially a tax lawyer, one of my partners, who is an expert in REMIC, which is the preeminent tax rule to govern these types of securitizations. . . . In addition to that, I, of course, signed up some of the associates in my practice area . . . ." (Testimony of Jason Kravitt)

[19] "[T]he Trustee, through its counsel, performed its own legal analysis. . . . The Trustee was advised by their own counsel which was Mayer Brown." (Testimony of Jason Kravitt)

[20] "We don't have to get an expert on every single legal issue that arises, that's why they [the Trustee] hired Mayer Brown." (Testimony of Jason Kravitt)

[21] "To the extent there were legal issues that arose, we tried to research and think about those issues and discuss them with the Trustee." (Testimony of Jason Kravitt)

were those undertaken to assist troubled borrowers who were having difficulty in making their payments.

Mr. Kravitt was aware of the modification repurchase argument from discussions within the securitization industry, R.1927:15-24, so he included it on a list of issues to discuss with Countrywide, Bank of America, and their counsel at the outset of the negotiations. R.6755 (PTX 179 at 179.3). The argument was not, in fact, new at all. It had been raised and fully briefed before the settlement negotiations even began in a case that was filed and then dismissed on standing grounds.[22]

During the settlement negotiations, the Trustee reviewed the PSAs for the Trusts. R.1478:26-1479:3; R.1480:25-1481:2; R.1481:3-7.[23] The Trustee also analyzed and considered the loan modification argument. R.2138:19-21.[24] The Trustee's review considered, among other things, the different categories of

[22] *See, e.g.*, Doc. No. 12, 17, & 23 in No. 650474/2008, *Greenwich Fin. Serv. v. Countrywide Fin.*; In the Supreme Court of the State of New York, New York County (motion to dismiss briefing regarding loan modification argument). This Court may take judicial notice of these court-filed documents. *RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 207-08 (1st Dep't 2009), *rev'd on other grounds*, 17 N.Y.3d 397 (2011) ("[I]t is well established that a court may take judicial notice of undisputed court records and files.").

[23] R.1478:26-1479:3 ("We had a team of lawyers who reviewed all the Pooling and Servicing Agreement or trust indentures for various aspects of them."); R.1480:25-1481:2 ("To the best of my knowledge, we had reviewed all 530 trust agreements as to the provisions that affected the various things that we were doing in the settlement."); R.1481:3-7 ("Q: So, is it your testimony that you, on behalf of Bank of New York Mellon, and therefore Bank of New York Mellon knew what differences were in the 530 trusts during the settlement negotiations? A: We believe that we did."). (Testimony of Jason Kravitt)

[24] "Q: Did the Trustee consider the issue of loan modifications during the negotiations? A: It did." (Testimony of Jason Kravitt)

language relating to loan modifications contained in various PSAs, R.2179:2-23,[25] as well as the role of the prospectus supplements in interpreting those provisions, R.1921:21-1922:11.[26]

3. The Trustee Formed an Opinion As to the Merits of the Loan Modification Argument

As a result of its counsel's legal analysis, the Trustee formed an opinion as to the merits of the loan modification argument. That opinion was that "the argument was a losing argument, legally." R.2140:5-6. Specifically, based on its analysis of the governing documents, the Trustee formed the opinion that "loan modifications on account of credit mitigation were not required to be repurchased by a BofA entity." R.2139:5-9.[27]

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[25] "Before entering into the settlement, I, of course, thought about the different categories that loan mods would fit into . . . ." (Testimony of Jason Kravitt)

[26] "One of the Sections of 10.01 [of the PSAs] says that if the description of whatever subject matter is covered both in the PSAs and in the ProSupp that the description in the ProSupp can govern the – the provision in the PSA. So, for example, if the PSA says that you can modify the interest rates pursuant to refinancing, provided that you repurchase it, you could look to the ProSupp to give additional meaning or additional context or meaning to that provision. For example, if the ProSupp in the Loan Modification Section describes refinancing loan modifications and also in the Servicing or Risk Factor Section describes credit mitigation, loan modifications and say you don't have to repurchase those, then the intent in the ProSupp governs." (Testimony of Jason Kravitt). As discussed in more detail in Part V(B)(1)(d) *infra*, the prospectus supplements for the Trusts provide important guidance as to the meaning of the PSAs.

[27] *See also* R.1926:4-5 ("[W]e didn't think it [the loan modification argument] was a strong argument."); R.1926:9-10 ("[W]e believed it [the loan modification argument] was not a strong argument."); R.1933:10-19 ("I did not believe that it [the obligation to repurchase mortgages] applied to loan modifications on account of credit mitigation.").

As discussed in Part V(B)(1) *infra*, the Trustee's opinion of the loan modification argument was both informed and reasonable. The argument is premised on a misreading of key contractual provisions that ignores other, highly relevant provisions authorizing relief to troubled borrowers. The argument, if true, requires reading the contract to mandate an absurd result, one that—if implemented as Triaxx advocated—would hurt the Trusts and magnify their loan losses.

4. The Trustee Made a Strategic Judgment with Respect to the Loan Modification Argument

Following its analysis of the loan modification argument, the Trustee made a strategic judgment that attempting to press this weak argument in the settlement negotiations would detract from and undermine the far stronger representation and warranty and servicing claims that were the focus of the Institutional Investors' notice of nonperformance. The record contains a clear, reasonable explanation of why the Trustee concluded that pressing this tenuous claim would impede, rather that enhance, its likelihood of maximizing certificateholder value in any settlement. As Jason Kravitt testified at trial:

> Well whenever you decide what you are negotiating as a strategy is going to be, you evaluate the different issues, their strength and what you think you can get out of them, how much time they will take whether they will detract from other things you are doing or whether they will be helpful to things you are doing. We thought, first of all, that BofA had the best of the argument. The better way to read the loan, the PSAs, were that loan modifications on account of credit

> mitigation were not required to be repurchased by a BofA entity. Secondly we took in consideration that loan modification, on account of credit loss mitigation was really becoming the central policy strategy of many different levels of the United States government. State AG's, different Federal agencies, we knew that BofA was negotiating with regulators at that time with regard to that subject matter. You could argue that central to the government's, the U.S. government agency, state strategy and BofA's own strategy to comply with those strategies were loan modification on account of loss mitigation. . . . So, we thought the argument was a losing argument, legally.

R.2138:24-2140:6. Mr. Kravitt also explained why the Trustee concluded that asserting this argument in the context of the negotiations would not advance the certificateholders' best interests or increase the settlement amount:

> We thought it was contrary to national policy, although that certainly didn't make up our mind, but because it was so central to national policy, we thought BofA would have a difficult time agreeing to it, we felt that it would detract from what we were focusing on, which are strong arguments, which is breach of warranty and breach of servicing obligations, and we didn't feel that the total amount of money that we would get in the end would be any less because we didn't push that argument.

Id. at 2140:6-13.

This fully informed, reasonable judgment was one the Trustee was entitled to make. The law required the trial court to defer to the Trustee's reasonable judgment about how best to press its claims, but the trial court failed to do so. In this aspect of the Judgment alone, the trial court erred. The Judgment should therefore be modified to delete the finding that the Trustee acted unreasonably with

regard to its evaluation and settlement of the loan modification argument. In all other respects, the Judgment should be affirmed.

IV. STANDARD OF REVIEW

A. Review of the Trial Court's Judgment

In reviewing a judgment rendered after a nonjury trial, this Court has the power to determine whether the trial court resolved factual questions correctly and to render the judgment the Court finds warranted. *Baba-Ali v. State*, 19 N.Y.3d 627, 640 (2012).[28] It "is not limited to whether the trial court's verdict is against the weight of the evidence." *We're Associates Co. v. Rodin Sportswear, Ltd.*, 288 A.D.2d 465 (2d Dep't 2001).[29]

B. Review of the Trustee's Exercise of Discretion

In reviewing a trustee's exercise of discretion, "the Court's role is limited to preventing an abuse of discretion." R.90a (Judgment at 23 (citing RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959))). Accordingly:

> If discretion is conferred on the trustee in the exercise of power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the

[28] "[W]here, as here, the Appellate Division reviews a judgment after a nonjury trial it has virtual plenary power to render the judgment it finds warranted by the facts." *Accord Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498 (1978) ("In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts. . . . [I]n cases not involving the right to a jury trial . . . the Appellate Division does have the power to make new findings of fact.").

[29] *See also Green v. Wm. Penn Life Ins. Co.*, 74 A.D.3d 570, 571 (1st Dep't 2010) (quoting *N. Westchester Prof'l Park Ass'n v. Town of Bedford*, 470 N.Y.S.2d 350 (N.Y. 1983).

> bounds of a reasonable judgment. The 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 power of the trustee.

R.91a (Judgment at 24 (quoting RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959); citing *Matter of Stillman*, 107 Misc. 2d 102, 110 (Sup. Ct. NY Cnty. 1980).[30] Thus, in an Article 77 proceeding in which a trustee seeks judicial review of its discretionary decision, the role of the court is *not* to determine if the court agrees with the trustee's judgment or to define best practices for trustees in making like decisions. Instead, the court's role is limited: it reviews the trustee's conduct *only* to ensure that the trustee has not acted so far outside the range of reasonable conduct that the trustee's decision amounts to an abuse of discretion.

V. ARGUMENT

The trial court erred when it found that the Trustee abused its discretion with respect to its evaluation of the loan modification argument. The trial court's conclusion that there was no evidence the Trustee evaluated this issue was erroneous. The record evidence establishes that the Trustee evaluated the issue. It also demonstrates that the Trustee acted within the scope of its reasonable discretion with respect to its evaluation of the loan modification argument and its decision to include it among the released claims. The Trustee's judgment with

[30] *See also Glenn v. Chase Lincoln First Bank, N.A.*, 201 A.D.2d 908, 909 (4th Dep't 1994) ("[W]e conclude that Supreme Court erred in interfering with the exercise of discretion by the trustee in absence of any showing of an abuse of discretion by the trustee.").

respect to the merits of the argument was not merely reasonable in substance, it was right. The process the Trustee undertook to arrive at this judgment was also reasonable. For these reasons, this Court should reverse the finding of the trial court and substitute in its place a finding that the Trustee acted within the scope of its reasonable discretion with respect to this issue.

A. The Trial Court Erred When It Found There Is No Evidence the Trustee Evaluated the Loan Modification Argument

The trial court erred when it found the Trustee abused its discretion with respect to the loan modification argument because its conclusion that there is "no evidence" in the record that the Trustee evaluated this argument was factually incorrect and is not supported by the record. R.119a (Judgment at 52).[31]

As set forth in Part III(F) *supra*, there is substantial record evidence establishing that the Trustee evaluated the merits of the loan modification argument. It retained highly experienced and knowledgeable counsel who reviewed and analyzed the relevant governing agreements for each of the 530 Trusts. *See supra* Part III(F)(1) & (2). The Trustee then formed an opinion, based on counsel's analysis, of the merits of the argument. *See supra* Part III(F)(3). The

[31] "[T]here is *no evidence* to suggest that the Trustee evaluated Bank of America's legal argument that the language in the PSAs do not require repurchase of modified loans." (emphasis added). *See also* R.115a (Judgment at 48) ("The Trustee chose not to evaluate the potential loan modification claim"); R.120a (Judgment at 53) ("[T]he Trustee acted 'unreasonably or beyond the bounds of reasonable judgment,' in exercising it power to settle the loan modification claims without investigating their potential worth or strength.").

Trustee then made the discretionary, strategic judgment it was entitled to make regarding the appropriate role of the argument in the context of the overall settlement negotiations. *See supra* Part III(F)(4). In light of this evidence, the trial court's finding that there is "no evidence" that the Trustee evaluated the loan modification argument was error and must be reversed.[32]

B. The Evidence Also Establishes That the Trustee Acted Within the Scope of Its Discretion in Its Evaluation of the Loan Modification Argument

The evidence also establishes that the Trustee's evaluation of the loan modification argument was reasonable, both in the conclusion that it reached and in the process that the Trustee undertook to reach that conclusion. Accordingly, the Trustee did not abuse its discretion, and the Judgment should be modified to reflect that the Trustee acted reasonably.

1. The Trustee's Judgment That the Loan Modification Argument Lacks Merit Was Reasonable

The loan modification argument rests on a claim that the governing agreements for the Trusts require either the Seller or the Servicer to purchase mortgages from the Trusts when those loans are modified by the servicer to mitigate losses. The Trustee reasonably concluded that this argument lacked merit

[32] *See Flannery v. Nassau Cnty. Police Dep't*, 26 A.D.3d 678 (3d Dep't 2006) (reversing no evidence finding as "factually incorrect and unsupported by the record"); *Ford v. Mizio*, 274 A.D.2d 329 (1st Dep't 2000) (reversing trial court's no evidence finding).

because, as explained below, it misreads the contracts and conflates two entirely different types of loan modifications. Equally important, the Judgment did not conclude the Trustee erred in concluding the argument lacked merit. As a matter of law, the Trustee could not have acted unreasonably in declining to press a meritless argument—regardless of the process by which it reached that conclusion. The Judgment should be modified on that basis as well.

a. There Are Two Types of Modifications and Each Is Governed by a Separate Term of the Governing Agreements

Triaxx's loan modification argument wrongly conflates two separate types of loan modifications: loss mitigation modifications and modifications in lieu of refinance. Each type of modification is governed by separate rules found in separate sections of the governing agreements. One section of the governing agreements permits loss mitigation modifications of troubled, nonperforming loans and does not require that they be repurchased from the Trusts because such modifications benefit the Trusts. A separate section permits modifications of performing loans and requires that they be repurchased from the Trusts, because such modifications benefit the Servicer and Seller—not the Trusts. The contracts thus establish that the Trustee was not merely reasonable, but right, when it concluded the loan modification argument was "legally wrong."

b. Loss Mitigation Modifications

Loss mitigation modifications, as part of prudent mortgaging servicing, are authorized and controlled by Section 3.01 of the PSAs. This section provides that the Master Servicer shall service the mortgages in the trusts in accordance with "customary and usual standards of practice of prudent mortgage loan lenders." *See, e.g.*, R.6468 (PTX 71.65, §3.01). There was no dispute below that loss mitigation modifications are a customary and prudent practice, implemented routinely by servicers. R.5426:12-16.[33] Federal law confirms that qualified loss mitigation plans that include principal or interest modifications are prudent servicing. 15 U.S.C. § 1639a(c) (providing that qualified loss mitigation plans, including loan modifications, "shall constitute standard industry practice for purposes of all Federal and State laws").

Loss mitigation modifications are undertaken as an alternative to foreclosure on a nonperforming mortgage loan in an effort to mitigate trust losses that would otherwise be incurred in foreclosure. In substance, a loss mitigation modification reduces the principal and/or interest owed to a level that the troubled borrower can

[33] "Q: And so what you are expressing there, loss mitigation modifications are part of what a prudent servicers should be doing as part of its RMBS servicing, correct? A: That is what part of prudent service should do, yes; part of prudent servicing" (Testimony of Adam Levitin). *See also* R.1189:6-11 ("It is very standard practice to, when a borrower goes delinquent to work with them to see if a modification is appropriate . . . [t]hey have been in the business as long as I have been in the business.") (Testimony of Tom Scrivener); *id*. at 1189:26-1190:2 ("modifications have always been involved in the servicing business"). *See also* ADAM J. LEVITIN & TARA TWOMEY, MORTGAGE SERVICING, 28 YALE J. ON REG. 1, WINTER 2011 at 11, 34 ("Servicers are responsible for . . . attempting to mitigate investor losses . . . [w]hen a loan defaults, a servicer has two options. It can proceed to foreclose or it can attempt to modify the loan.").

pay, but that is yet large enough that the expected payment stream has a net present value greater than the expected proceeds of foreclosure. R.5425:16-24.[34] Loss mitigation modifications thus are expected to increase trust collections for the benefit of trust certificateholders.

Nothing in Section 3.01 requires the purchase of loans from the Trusts that are modified to mitigate losses. This makes sense and is consistent with the economics of RMBS securitization transactions. When they purchase certificates, RMBS trust investors accept the risk that they will incur losses on loans that—although they conform to the Seller's representations and warranties—nonetheless fall into default. Prudent loss mitigation modifications are mandated to minimize losses on failing loans, and implementing them does not shift the risk of these losses away from investors and onto sellers or servicers. Construing the contracts to require a servicer or seller to repurchase a loan at par when the servicer prudently modifies a loan to mitigate losses would alter and undermine the fundamental risk allocation in the contract. It shifts to the servicer or seller a risk

[34] "Q: One of the ways in which RMBS servicers are supposed to attempt to mitigate losses, that you talk about in the article, are entering into modifications that are NPV positive, net present value positive? A: Correct. Q: And that means modifying loan so that the expected revenue stream over time would be greater that the foreclosure value, correct? A: Yes." (Testimony of Adam Levitin, objectors' expert witness on RMBS mortgage servicing). *See also* R.418:4-15 (Loss mitigation modifications "are typically performed when a borrower is delinquent on their payments, unable to make the contractual payment, but has the willingness and ability to make a reduced payment that the trust is benefitted for them to make as a result of the net proceeds, the net expected proceeds from that borrower making the modified payment, exceeding the net proceeds the trust could expect from that borrower's default and liquidation." (Testimony of Kent Smith)

of loss that the RMBS investor assumed when it bought certificates, not because the servicer or seller is responsible for the loss, or because the contract requires them to assume the risk of loss, but instead simply because the servicer prudently attempted to mitigate the loss as it was required to do under the contract.

If Triaxx's bizarre and arbitrary risk-shifting theory was intended to apply to loans that were modified to mitigate losses, one would expect that to be spelled out in unmistakable terms in the governing documents for the Trusts. As explained below, no such intention is expressed in these agreements. To the contrary, the governing documents are clear that the obligation to purchase modified loans applies only to loans modified for an entirely different purpose: modifications in lieu of refinancing, where the Servicer unmistakably stands to benefit at the expense of the Trust.

c. Modifications in Lieu of Refinance

Unlike loss mitigation modifications, modifications in lieu of refinancing are not a part of prudent servicing. They have nothing to do with nonperforming loans and are not undertaken to mitigate losses or otherwise benefit trust certificateholders. Instead, they are undertaken on performing loans for the sole purpose of preserving the Servicer's income stream and/or the Seller's customer

relationship. They are therefore governed by a different set of rules set out in a different section of the PSAs. R.10215 (PTX 620).[35]

A modification in lieu of refinancing occurs when a performing borrower requests a reduction in the interest rate on a mortgage as an alternative to refinancing the loan with another lender. R.10219 (PTX 620.5).[36] If the refinancing were to occur, the Servicer would lose the servicing income associated with the loan (and the Seller would lose the customer to another lender). Section 3.11 (and in some cases Section 3.12) of the PSAs permit the Servicer to preserve this income stream by undertaking a modification in lieu of refinancing, provided that the mortgage is purchased from the trust following the modification. R.10215 (PTX-620).[37]

A requirement that mortgage loans modified in lieu of refinancing be purchased from the Trusts makes sense in light of the economics of RMBS

[35] PTX 620 is a stipulated summary document setting forth (i) the variations in language among the Trusts' PSAs relating to modifications in lieu of refinancing and (ii) for each such variation, the language of the prospectus supplement corresponding to such PSA describing the operation and effect of the provision.

[36] "Countrywide Home Loans will be permitted under the Pooling and Servicing Agreement 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 Countrywide Home Loans purchases the Mortgage Loan from the issuing entity immediately following the modification." (Prospectus Supplement language describing in lieu of modification requirements).

[37] There is no evidence that any loan in the Trusts was modified as an alternative to refinancing. R.1201:14-17 ("I don't believe it's a practice or process of Countrywide of Bank of America to do in lieu of modified or in lieu of refinance modifications. I have never heard of it and I have been around for several years.") (Testimony of Tom Scrivener)

transactions. A modification in lieu of refinancing is not performed to benefit the trust holding the mortgage: it reduces the trust's cash flow on a loan where the borrower would otherwise pay the loan in full (if the borrower refinanced) or would pay interest in full for the life of the loan (if the loan were not refinanced). Such a modification does, however, benefit the Servicer and Seller: it maintains a relationship with a performing borrower that would otherwise be lost if the mortgage were refinanced with another lender. R.416:4-23.[38] For this reason, it is logical that such modifications would be conditioned on the Servicer or Seller making the trust whole by purchasing the mortgage out of the trust.

d. The Contracts Only Require Repurchase of Loans Modified in Lieu of Refinancing

Triaxx's loan modification argument ignores these differences, but the contracts do not.

Governing documents for 441 of the Trusts contain language addressing the repurchase of modified mortgage loans.[39] In each instance, the relevant provision of the PSAs that requires the purchase of modified loans is restricted to

[38] Explaining that a modification in lieu of refinancing is "in the servicer's interest because they are trying to retain a customer that may otherwise have refinanced away to another lender, therefore another servicer. But it's not in the trust's best interests because those borrowers pay a higher note rate. Typically that why they are seeking a rate term refinance. The lower rates in the market will provide them a lower payment, and therefore, the trusts' net income will reduce." (Testimony of Kent Smith)

[39] Triaxx asserted that the obligation to purchase loans modified for loss mitigation purposes applies to 441 of the 530 Trusts. Specifically, those with PSA and prospectus supplement language identified as Variants 1, 3, 4 and 5 in PTX-620 (R.10215). *See* R.16785 at 2 (Triaxx brief identifying Variants 1, 3, 4 and 5 as those at issue).

modifications performed in lieu of refinancing and makes no mention of loss mitigation modifications. In 392 of the 441 Trusts, the relevant PSA sections state expressly that the purchase obligation applies only where "the modification is in lieu of refinancing." R.10217, R.10219 (PTX-620 at 3, 5). For the remaining 49 Trusts, different words are used to reach the same result: the purchase of modified mortgage loans is required only where "borrowers request modification as an alternative to refinancing." *See* R.10215 (PTX-620 at 1). For these Trusts, this explanation appears in the prospectus supplement provided to investors in connection with the creation of these Trusts, *id*., the contents of which were the subject of a stipulation agreed to by all parties, *id.* (PTX-620). Reference to the terms of the prospectus supplement is critical when interpreting the language of an RMBS PSA because both are writings that form a single transaction. *Wells Fargo Bank, N.A. v. Fin. Sec. Assurance, Inc.*, 504 F. App'x 38, 2012 WL 6028908, at *1 (2d Cir. 2012).[40] The PSAs, in fact, mandate the primacy of the prospectus supplements when interpreting the PSAs: they provide that the terms of the prospectus supplements are intended to control the operations of the Trusts, even if

[40] "[W]e reject Assured's argument that the district court erred in considering, in interpreting the PSA, the Prospectus Supplement and other transaction documents related to the PSA. Under New York law, which governs the PSA, the district court properly considered all writings forming a part of a single transaction." *Wells Fargo Bank, N.A.*, 2012 WL 6028908, at *1.

they are inconsistent with the terms of the PSAs. *See, e.g.*, R.6534 (PSA §10.1) (PTX 71.131).[41]

It bears repeating: There were *no* modifications in lieu of refinancing in any of the Trusts. R.1201:14-17. The contracts established that those were the *only* type of modified loan required to be purchased in *any* Trust. It was therefore error for the trial court to conclude the Trustee acted unreasonably in releasing the loan modification claims as part of the global settlement of all of its trust-based claims. The Trusts had no loan modification claim: it was, as the Trustee concluded, a claim that was "legally wrong." As a matter of law, the Trustee could not have acted unreasonably in releasing a claim that did not exist.

2. The Trustee's Evaluation of the Loan Modification Argument Was Not an Abuse of Discretion

As explained above, the Trustee's conclusion that the loan modification argument lacked merit was both reasonable and right in substance. The remaining question, then, is whether the process engaged in by the Trustee to reach that conclusion was itself a reasonable exercise of the Trustee's discretion. Stated differently, the question is whether the Trustee's judgment that it had performed an

[41] "This Agreement may be amended from time to time by the Depositor, the Master Servicer and the Trustee without the consent of any Certificateholders . . . *to conform this Agreement to the Prospectus and Prospectus Supplement provided to investors in connection with the initial offering of the Certificates*." R.6534 (PSA §10.1) (PTX 71.131) (emphasis added).

adequate evaluation of the loan modification argument was one that a reasonable trustee could have reached.

In answering this question, the Court is guided by two key principles. The first is that, in reviewing a trustee's exercise of discretionary judgment, "the Court's role is limited to preventing an abuse of discretion . . . [and] [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 power of the trustee." R.90a (Judgment at 23 *citing* RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959)). In other words, the Trustee's judgment as to what constituted an adequate evaluation of the loan modification argument is entitled to deference, unless it is so plainly outside the realm of reason that it amounts to an abuse of discretion.[42] The second key principle is that "[w]hat is a reasonable exercise of discretion and judgment must always depend upon the surroundings, the facts and the circumstances." *In re Town of Ballston, Saratoga County*, 281 N.Y. 322, 328 (1939). When these principles are applied to the evidence presented at trial, it is clear that the Trustee conducted a competent and rational evaluation of the loan modification argument and did not abuse its discretion.

[42] *Cf. Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985) ("[S]election of one among several reasonable courses of action does not constitute malpractice"); *Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968) ("It is for the trustees, not judges, to choose between various reasonable alternatives").

Here, the evidence shows that the Trustee began its process by engaging highly competent and experienced counsel to advise it with respect to the loan modification argument and other legal issues. *See supra* Part III(F)(1). The Trustee, through its counsel, evaluated the loan modification argument by reviewing the relevant provisions of the Trusts' governing agreements. *See supra* Part III(F)(2). As a result of this evaluation, the Trustee, with the assistance of its counsel, formed an opinion regarding the merits of the argument, i.e., that it lacked merit. *See supra* Part III(F)(3). The evidence also shows that the Trustee considered, with its counsel, whether attempting to further develop and advance such a weak claim, in the middle of negotiating a global settlement in which the Trustee had strong claims with substantial value, would advance the cause of maximizing returns for the Trusts and concluded that it would not. *See supra* Part III(F)(4).

These are the actions of a prudent trustee, undertaking a reasonable process and exercising reasonable judgment. *See* RESTATEMENT (THIRD) OF TRUSTS § 77, cmt. b(2) (2007) ("The work of trusteeship, from interpreting the terms of the trust to decision making in various aspects of administration, can raise question of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee."). The Trustee's judgment that this careful and considered process was adequate to allow it to decide what, if any, use to make of

the loan modification argument in the context of the broader negotiations with Bank of Americaparties is entitled to deference. It was also well within the range of reasonable approaches that a reasonable trustee could have been taken to address this issue.[43]

Indeed, it is well settled that weak claims may be fairly and appropriately released in comprehensive settlements that derive value from comparatively stronger claims. *See In re Triac Cos., Inc.*, 791 A.2d 872, 876, 878 (Del. Ch. 2001) ("If it appears that those claims are weak or of little or no probable value or would not likely result in any recovery of damages by individual stockholders, it is fair to bar those claims as part of the overall settlement."); *Manacher v. Reynolds*, 165 A.2d 741, 747 (Del. Ch. 1960) (finding that a weak claim released as part of larger settlement could "properly be assimilated with and disposed of as a part of the compromise"). Releasing weak claims is critical to achieving global settlements that deliver substantial value to beneficiaries, defendants, and courts alike. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 310-11 (3d Cir. 2011) (noting, in the context of large settlements, that "defendants seek and pay for global peace—i.e., the resolution of as many claims as possible" and explaining the

[43] Triaxx claimed during trial that the loan modification theory, if successful, would be worth $32 billion to the Trusts R.5838 (Triaxx Counsel's Summation). As explained in the Trustee's brief, this number is wildly exaggerated, even if the PSAs required the repurchase of loans modified to mitigate losses, which they do not.

desirability of settlements that "achieve 'global peace' by obtaining releases from all those who might wish to assert claims, meritorious or not").

In the Judgment, the trial court suggested other actions the Trustee could have taken, but did not take, to evaluate the loan modification argument. The role of the court in an Article 77 proceeding, however, is not to design the trustee's process; instead, it is to assess whether the process the trustee employed was one a reasonable trustee could have employed. There is always "more" that can be done to evaluate any issue: that the Trustee chose not to take the (or other) additional steps the trial court suggested does not mean that it abused its discretion. Rather, it means only that the Trustee exercised its reasonable judgment and selected "one among several reasonable courses of action," *Rosner*, 65 N.Y.2d at 738, available to it in considering the loan modification argument.

For example, the trial court noted that the Trustee could have hired an outside expert to evaluate the loan modification argument, as it did with certain other legal issues raised in the settlement negotiations. R.119a (Judgment at 52). However, as Jason Kravitt, the Trustees' counsel, explained at trial, "[w]e don't have to get an expert on every single legal issue that arises, that's why [the Trustee] hired Mayer Brown." R.1908:23-25. It is difficult to imagine that the Trustee could have located a third-party expert more qualified than Mr. Kravitt and his team at Mayer Brown to advise it with respect to this RMBS securitization

issues. *See supra* Part III(F)(1) (discussing Mr. Kravitt's RMBS securitization experience and qualifications). In any event, the Trustee's judgment in this regard is entitled to deference and cannot fairly be said to be so outside the scope of reasonable judgment that it amounts to an abuse of discretion.

The same is true with respect to the Trustee's decision, noted in the Judgment, that it was not necessary to attempt to determine precisely the amount of damages a claim for purchase of loans modified for loss mitigation purposes could yield if it was successful and then include this amount in liability estimates used in connection with the settlement negotiations. R.115a (Judgment at 48-50). Like all trustee judgments, this one is entitled to deference, and it must be considered, in light of "the surroundings, the facts and the circumstances." *In re Town of Ballston*, 281 N.Y. at 328. Those surrounding facts and circumstances were that (i) the Trustee's counsel had analyzed the argument and considered it to be meritless, *see supra* Part III(F)(2); (ii) the Institutional Investors had analyzed the argument, had not included it in their notice of nonperformance that set the settlement negotiations in motion, and did not include it in their calculations of potential liability, *see* R.972:2-8[44]; R.6709 (PTX 108); (iii) the Trustee had strong arguments

[44] "Q: Now at any point during the settlement negotiation process, did you determine the amount that the seller or the master servicer would have to pay to repurchase modified loans if either one of those entities had that obligation? A: The issue of repurchasing modified loans was discussed within the group. We did not include that in our final analysis after a group discussion." (Testimony of Scott Waterstredt).

to advance in the negotiations (such as claims for breaches of representations and warranties and poor servicing), the potential damages for which already encompassed *all* losses the Trusts were expected to incur, R.971:2-26[45]; and (iv) the Trustee, together with its counsel, made the judgment that attempting to press a meritless loan modification argument would not enhance the overall value of the Trusts' claims and would likely impede, rather than advance, the settlement negotiations. R.2139:10-2130:13.[46] In light of these surrounding facts and circumstances, the Trustee's judgment that it was unnecessary to calculate the precise amount of damages that could be attributed to a meritless loan modification argument was "one among several reasonable courses of action" the Trustee could have taken. *Rosner*, 65 N.Y.2d at 738. It was not, therefore, unreasonable.

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[45] "Q: And the question I am asking is a simple one. Without having you characterize what those numbers represented, in terms of claims that were being evaluated, they were rep and warranty claims that were being evaluated; is that correct? A: They were generally rep and warranty claims. I would add to that, that *they accounted for all losses that we expected the trusts to take*." (Testimony of Scott Waterstredt, participant in Institutional Investor steering group) (emphasis added).

[46] "[W]e took in consideration that loan modification, on account of credit loss mitigation was really becoming the central policy strategy of many different levels of the United States government. State AG's, different Federal agencies, we knew that BofA was negotiating with regulators at that time with regard to that subject matter. You could argue that central to the government's, the U.S. government agency, state strategy and BofA's own strategy to comply with those strategies were loan modification on account of loss mitigation. . . . So, we thought the argument was a losing argument, legally. We thought it was contrary to national policy, although that certainly didn't make up our mind, but because it was so central to national policy, we thought BofA would have a difficult time agreeing to it, we felt that it would detract from what we were focusing on, which are strong arguments, which is breach of warranty and breach of servicing obligations, and we didn't feel that the total amount of money that we would get in the end would be any less because we didn't push that argument."

The question of when "enough is enough" in analyzing a legal argument is necessarily a matter of judgment. The appropriate role of a court in an Article 77 proceeding is not to substitute its judgment for that of the trustee. Nor are the trustee's judgments to be evaluated in a vacuum: they are to be reviewed in the context of the circumstances in which the trustee made its decision. Here, the Trustee made the reasonable judgment that it had performed a sufficient analysis of the loan modification argument. It did so after taking note of the argument, hiring highly competent counsel to advise it on the issue, and concluding that the argument lacked merit. Based on this reasonable judgment the Trustee concluded pressing this meritless argument would be counterproductive to the negotiations. The record establishes that the Trustee's judgment was reasonable under the circumstances presented.

The record also does not support the trial court's conclusion that the Trustee acted unreasonably and beyond the bounds of reasonable judgment when it included the loan modification claim within the global trust-based settlement. The Trustee understandably bargained for, and obtained, a global settlement; no other or piecemeal settlement was possible. The trial court's ruling on the loan modification issue disregards the deference that is due to a trustee's exercise of discretionary judgment. If affirmed by this Court, this aspect of the Judgment would impose a standard that micromanages and second guesses trustee decisions,

contrary to established New York law. That standard, if ratified by this Court, would impede and interfere with the ability of trustees to resolve RMBS securitization claims through settlement. It would afford trustees no certainty that their discretionary judgments will receive the deference they are due under the law. If not reversed, there is a palpable risk that this erroneous finding will doom trustees and investors to exhaustive, expensive litigation on a massive scale.

C. This Court Should Enter a Judgment Finding That the Trustee Acted Within the Scope of Its Discretion in Connection with the Loan Modification Argument

In this proceeding, where the Judgment was rendered after a non-jury trial, this Court "has virtual plenary power to render the judgment it finds warranted by the facts." *Baba-Ali*, 19 N.Y.3d at 640. Here, the trial court's finding that there was "no evidence" the Trustee evaluated the loan modification argument is contradicted by the record evidence that it did so. *See supra* Part V(A). Accordingly, this finding must be reversed.

The Court must then render the judgment it finds warranted by the record (giving due deference to the Trustee's exercise of judgment in the surrounding facts and circumstances). As explained in Part V(B) *supra*, the Trustee's process—which involved retention of highly qualified counsel, evaluation of the relevant documents, and consideration of the practical realities raised by the

argument—was "one among several reasonable courses of action" the Trustee could have taken. *Rosner*, 65 N.Y.2d at 738.

This process was also consistent with the custom and practice for trustees, as explained by Robert Landau, an expert witness with 50 years of experience in the corporate and RMBS trustee industry and author of the authoritative treatise, *Corporate Trust: Administration and Management*:[47]

> "Q: Let me say it this way, sir. What would you consider a reasonable investigation for a claim worth billions of dollars?
>
> A: I think that the Trustee would have to employ, utilize people experienced in the subject matter to advise it as to the elements of the dispute and what are the possible solutions to both determining the facts, evaluating the facts and reaching conclusions as to those facts. Number two, when you have institutional investors that are leading the charge, as is usually the case, responsible trustees will tend to rely upon the facts presented by the institutional investors. And, again, what's reasonable depends under the circumstances. It can take years and years to do a reasonable investigation. Conversely, I've seen investigations done in the space of three hours. It depends on the facts and circumstances, the parties you're dealing with."

R.2680:11-2681:4.

VI. CONCLUSION

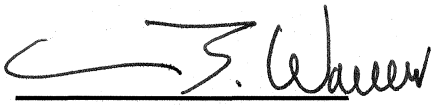
Though the Judgment below otherwise applied a correct standard of review to the facts, the court below erred when it found the Trustee acted unreasonably in evaluating and settling the loan modification claim. For the foregoing reasons, the Judgment should be modified to delete the finding that the Trustee "acted

[47] R.2500:20-2501:12; R.2503:21-2504:14.

unreasonably or beyond the bounds of reasonable judgment in exercising its power to settle the loan modification claims without investigating their potential strength." In all other respects, the Judgment should be affirmed.

Dated: New York, New York
May 28, 2014

WARNER PARTNERS, P.C.

By: 

Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS LLP
Kathy D. Patrick (*pro hac vice**)
Robert J. Madden (*pro hac vice**)
David Sheeren (*pro hac vice**)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for the Petitioners-Appellants, the Institutional Investors

* All *pro hac vice* counsel are members of the bar of the State of Texas in good standing and are appearing on this appeal by permission of the Court.

Printing Specification Statement

Pursuant to Rule 600.10(d)(l)(v), Petitioners-Appellants specify that this Brief was prepared using Microsoft Windows and Microsoft Word. Petitioners-Appellants used Times New Roman, 14-point font for text in the body of the Brief, and 12-point font for footnotes. The total number of words in the brief, inclusive of point headings and footnotes, and exclusive of tables of contents and authorities, proof of service, certificate of compliance, and any authorized addendum, is 11,781 as calculated by Microsoft Word.

SUPREME COURT OF THE STATE OF NEW YORK
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.	NY County Clerk's Index No. 651786/2011 **PRE-ARGUMENT STATEMENT**

PLEASE TAKE NOTICE that, Intervenor-Petitioners 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, and Western Reserve Life Assurance Co. of Ohio, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company (collectively the "Institutional Investors"), by their

counsel, Warner Partners, P.C. and Gibbs & Bruns, LLP, hereby submit this Pre-Argument Statement pursuant to 22 NYCRR § 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 CPLR § 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, addresses and telephone numbers of counsel for Petitioners-Intervenors, the Institutional Investors, are:

GIBBS & BRUNS LLP
Kathy Patrick (pro hac vice)
Robert J. Madden (pro hac vice)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

WARNER PARTNERS, P.C.
Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

Attorneys for Intervenor-Petitioners, the Institutional Investors

The names, addresses and telephone numbers of counsel for Petitioner The Bank of New York Mellon ("BNYM") (which has filed a separate Notice of Appeal and Pre-Argument Statement) are:

DECHERT LLP
Hector Gonzalez
James M. McGuire

Mauricio A. España
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Matthew D. Ingber
Christopher Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

4. The names, addresses and telephone numbers of counsel for Respondents are:

Daniel Reilly
Michael Rollin
REILLY POZNER LLP
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
(303) 893-6100

Mark C. Zauderer
FLEMING ZULACK WILLIAMSON ZAUDERER LLP
One Liberty Plaza
New York, New York 10006
(212) 412-9500

Attorneys for AIG Entities

John G. Moon
MILLER & WRUBEL P.C.
570 Lexington Avenue
New York, New York 10022
(212) 336-3500

Attorneys for the Triaxx Entities

Beth A. Kaswan
William C. Fredericks
Max R. Schwartz
SCOTT+SCOTT, Attorneys at Law, LLP
The Chrysler Building
405 Lexington Avenue, 40th Floor
New York, New York 10174
(212) 223-6444

Counsel for the Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago and other members of the Public Pension Fund Committee

Peter N. Tsapatsaris
PETER N. TSAPATSARIS, LLC
200 East 33rd Street
27th Floor, Suite D
New York, New York 10016
(646) 490-7795

Talcott J. Franklin
TALCOTT FRANKLIN P.C.
208 North Market street
Suite 200
Dallas, Texas 75202
(214) 736-8730

Counsel for Respondent-Intervenors the Knights of Columbus

Donna H. Lieberman
Scott A. Ziluck
HALPERIN BATTAGLIA RAICHT, LLP
40 Wall Street, 37th Floor
New York, New York 10005
(212) 765-9100

Attorneys for United States Debt Recovery, LLC VIII, L.P., and United States Debt Recovery X, L.P.

Sarah E. Lieber
CIFG Assurance North America, Inc.
850 Third Avenue, 10th Floor
New York, New York 10022
(212) 909-0425

Jason H. Alperstein
KOPELOWITZ OSTROW P.A.
200 S.W. 1st Avenue, 12th Floor
Fort Lauderdale, Florida 33301
(954) 525-4100

Attorneys for Sterling Federal Bank, F.S.B., Bankers Insurance Company, Bankers Life Insurance Company, First Community Insurance Company, and Bankers Specialty Insurance Company

Thomas B. Hatch
Bruce D. Manning
ROBINS, KAPLAN, MILLER & CIRESI L.L.P
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500

Counsel of Federal Home Loan Bank of Pittsburgh

William B. Federman
FEDERMAN & SHERWOOD
10205 North Pennsylvania Ave.
Oklahoma City, Oklahoma 73120
(405) 235-1560

Attorneys for American Fidelity Assurance Company

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

6. 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 would 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.

On July 8, 2011, the Institutional Investors' motion for leave to intervene in support of the settlement, and in support of BNYM's request for relief, was granted.

7. 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.

8. Intervenor-Petitioners, the Institutional Investors, appeal from the Judgment with respect to Supreme Court's erroneous ruling regarding loan modification claims in the settlement.

9. There is not a related action or proceeding pending in any court of this or any jurisdiction, except for a pending appeal by BNYM from the above Decision/Order/Judgment (copies of BNYM's Notice of Appeal and Pre-Argument Statement are attached as Exhibit B). Also, on May 28, 2013, certain Respondents filed an interlocutory appeal in this action from Supreme Court's order striking their jury demand. Doc. No. 826. However, now that the final Judgment of Justice Kapnick has been entered below, the foregoing interlocutory appeal is being withdrawn.

Dated: March 6, 2014
New York, NY

WARNER PARTNERS, P.C.

By: _____
Kenneth E. Warner

950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

Kathy D. Patrick (*pro hac vice)*
Robert J. Madden (*pro hac vice)*
David Sheeren (*pro hac vice)*
GIBBS & BRUNS, LLP
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Attorneys for Intervenor-Petitioners, the Institutional Investors