*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.

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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)*

# REPLY BRIEF IN SUPPORT OF APPEAL AND RESPONSE IN OPPOSITION TO CROSS-APPEAL OF INTERVENORS-PETITIONERS-APPELLANTS-CROSS-RESPONDENTS THE INSTITUTIONAL INVESTORS


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– 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 and Cross-Appellants the Institutional Investors submit this brief: (1) in support of their appeal from a Decision/Order/Judgment dated January 31, 2014 (the "Judgment"), R.67a,[1] issued by the court below; and (2) in opposition to the cross appeal of Cross-Appellants The Retirement Board of the Objectors Annuity & Benefit Fund of the City of Chicago, et al. (the "Objectors").[2] For the reasons stated below, the Judgment should be modified to approve the entirety of the Trustee's conduct in entering into the settlement.

## I. PRELIMINARY STATEMENT

This appeal presents a question of fundamental importance: will courts uphold the reasonable, discretionary judgments of securitization trustees to settle valuable claims entrusted to them, without holding those decisions hostage to interference by a tiny and ever-diminishing minority of dissident certificateholders, and without undue micro-management by the courts?

In this appeal, BNYMellon, as Trustee for 530 securitization trusts, sought an Article 77 judicial declaration concerning a settlement it had obtained for repurchase and servicing claims it owned in trust. This settlement is *the largest*

[1] References to "R.___" indicate citations to the Record.

[2] In addition to The Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, et al., (the "Retirement Board") the only other objectors to the Settlement are United States Debt Recovery ("U.S. Debt") and American Fidelity Assurance Company ("American Fidelity'), They have limited their arguments to incorporating by reference those made by the Retirement Board.

*private settlement in history*: its $11 billion value includes a cash payment of $8.5 billion plus $3 billion in servicing improvements that could not have been obtained through litigation. The record developed in the trial court below demonstrates conscientious work by a careful trustee (assisted by able counsel and third party subject matter experts), working closely with sophisticated investors with substantial holdings, to carefully evaluate, vigorously negotiate, and ultimately settle trust claims, all to the enormous benefit of trust certificateholders. The Trustee's settlement decision is supported by the overwhelming majority of affected certificateholders. As of the filing of this brief, holders of *99.9%* of securities in the Trusts either actively support, or have no objection to, the settlement; and holder of *only 0.1%* of Trust securities stand in opposition and urge that the settlement be jettisoned.[3]

This settlement is fully consistent with this State's clear policy favoring settlement: it affords certainty to thousands of certificateholders and relieves the courts of the unnecessary burden of litigating hundreds of complex suits involving millions of individual loans alleged to have been originated in breach of representations and warranties.

[3] The Objectors are the only certificateholders in the Trusts that continue to object to the settlement, and oppose the relief requested by the Trustee in this appeal. Their holdings total 0.1% of certificates (as measured by unpaid principal balance). In other words, the settlement is now opposed by holders of only *one one-thousandth* of certificates in the Trusts, an amount that can fairly be rounded to zero.

If, on this record, the Trustee[4] cannot obtain a judgment that its decision to enter into the Settlement was not an abuse of the discretion conferred on it by contracts to which all certificateholders agreed to be bound, it is not clear how any securitization trustee could ever settle its claims. Rejecting this Trustee's reasonable and careful process, and its extraordinarily beneficial $11 billion settlement, would set an unfortunate precedent that could paralyze trustees. It would also severely injure Trust certificateholders by subjecting them to the idiosyncratic will of a minority (here a very tiny minority) when all certificateholders – including the minority – agreed that it was the Trustee's reasonable judgment that would govern all of them.

As we explain below, a decision upholding the Trustee's settlement judgment in all respects is fully supported by the abundant record evidence and the law. Vacating the one aspect of the Judgment that determined that the Trustee abused its discretion as to a loan modification theory asserted by one, now absent, objector, and replacing it with a finding that the Trustee acted within the scope of its discretion as to this issue, is also fully supported by the record evidence, because the trial court erroneously concluded there was "no evidence" the Trustee evaluated this claim. Upholding the Trustee's settlement judgment and discretion

[4] Capitalized terms have the meaning assigned to them in the Institutional Investors' opening brief, unless otherwise stated.

in all respects will *enforce* the securitization contracts as they are written and vindicate trustee authority. It will also be fully consistent with settled New York law. The contrary result advocated by the Objectors is one that can be reached only by *ignoring* the record and the contract terms, *redefining* trustee authority, and *rewriting* New York law. Such a result would reverberate far beyond this proceeding.[5]

On this record, as explained below, and in the Institutional Investors' opening brief, there is no basis for a finding that the Trustee abused its discretion. The arguments offered to the contrary by the Objectors in support of their appeal are meritless. They ignore the appropriate standard of review, devote pages of argument to irrelevant distinctions and misstatements of the law, and in the end offer nothing more than the type of second guessing of trustee decision-making that proceedings of this kind are meant to prevent. In response to the Institutional Investors' appeal of the trial court's loan modification theory decision, the

[5] The efforts of responsible securitization trustees to resolve repurchase and servicing claims by settlement, rather than litigation, with the support of substantial majorities of certificateholders, are not limited to this case. On August 3, 2014, seven trustees for 330 JPMorgan mortgage backed securitization trusts filed a proceeding below seeking judicial confirmation that their decision enter into a settlement of trust claims, similar to that at issue here, was not an abuse of their discretion. *See In the Matter of the Application of U.S. Bank N.A., et al.*, No. 652382/2014 (Sup. Ct. N.Y. Cnty) (Doc. 1 – Petition). In addition, four trustees for 68 Citigroup mortgage backed securitization trusts have announced that they are in the process of evaluating a proposal to settle similar trust claims, which settlement would involve the filing of a court proceedings confirming that the trustees had not abused their discretion in entering into the settlement. *See* Citigroup Trustees Notice, available at http://citigroupprmbssettlement.com/ . The decision of the Court in this case will greatly affect the question of whether the claims of these trusts can be resolved short of litigation on a massive scale.

Objectors make no effort to dispute (indeed they completely ignore) the evidence cited by the Institutional Investors that the Trustee specifically considered the merits of this theory with the assistance of highly qualified counsel. Nor do they dispute that this theory is premised on a misreading of the governing agreements, as the Trustee and its counsel concluded. Instead, the Objectors offer only new arguments, never presented to the trial court, and more second-guessing.

For these reasons, and those set forth below and in the Institutional Investors' opening brief, this Court should modify the Judgment to approve the entirety of the Trustee's conduct in entering into the settlement.

## II. RESPONSE IN OPPOSITION TO THE CROSS-APPEAL

The Objectors ask this Court to overturn the bulk of the trial court's judgment holding that the Trustee acted in good faith and within the scope of its reasonable discretion when it obtained a settlement of Trust claims that is worth over $11 billon, and is supported by the overwhelming majority of certificateholders in the Trusts, in exchange for a global release of repurchase and servicing claims. The authorities are uniform that a court's role in reviewing such an exercise of discretionary judgment by a trustee is limited to determining whether the trustee's decision-making was so outside the bounds of reasonable

judgment that it amounts to an abuse of discretion.[6] The Objectors' brief ignores this standard and makes no effort to show how the Trustee's decision to settle could be overturned in light of it. That, by itself, should dispose of the cross-appeal.

Instead, the Objectors spend the majority of their brief arguing about such *wholly irrelevant issues* as whether the Trustee owed fiduciary duties, whether the Trustee wrongly denied it had such duties, and whether the Trustee attempted to avoid being subject to such duties. These issues are irrelevant because the standard by which a trustee's decision-making must be judged *is exactly the same* regardless of whether the trustee was or was not a fiduciary;[7] namely, did the Trustee abuse its discretion? It simply does not matter in this appeal whether the Trustee was (or was not) a fiduciary. The *only* relevant issue is whether the Trustee's conduct was an abuse of discretion.

On this issue, the Objectors' brief is devoid of any evidence demonstrating the trial court erred when it found that the Trustee did not abuse its discretion as to

[6] *See, e.g., Haynes v. Haynes*, 72 A.D.2d 535, 536 (1st Dep't 2010) ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith.").

[7] *See e.g., Restatement (Third) of Trusts* §87 (2007) ("When a trustee has discretion with respect to the exercise of power, its exercise is subject to supervision by a court only to prevent an abuse of discretion.").

the vast bulk of its settlement conduct.[8] The trial court had before it a "voluminous record," R.119a (Judgment at 52), detailing the Trustee's seven-month long effort to respond to the Institutional Investors' concerns, a record that reflected the Trustee's persistent effort to obtain a fair and reasonable recovery for the repurchase and servicing claims it held for the benefit of Certificateholders. As the Trustee has set out in its brief,[9] the totality of this voluminous record reflects that in this case the Trustee was responsive, active, careful, and vigorous in advocating for the largest recovery it could obtain for the repurchase and servicing claims it held for the benefit of Certificateholders—and was extraordinarily successful in doing so. The Trustee *acted*, and it acted *reasonably* and *within* its discretion. That ends the issue and disposes of the Cross-Appeal.

Against this record, the Objectors offer only second-guessing and speculation. They claim they (or someone else) might have approached things differently than the Trustee; they resort to speculation that the Trustee might have recovered more in litigation. These arguments fail. They in no way establish that the Trustee's approach was so inherently *unreasonable* that it amounted to an

[8] We have addressed in our opening brief, and will address in the Reply portion of this brief, the evidence and authorities establishing that the Trial court erred when it concluded the Trustee abused its discretion with respect to the loan modification theory.

[9] The Trustee's brief contains a comprehensive summary of the record evidence supporting the trial court's Judgment that the Trustee did not abuse its discretion. Rather than repeat that summary, we refer the court to the Trustee's responsive brief at pp 4-33.

abuse of discretion, nor do they undercut the trial court's conclusion that the Trustee's conduct was reasonable, in good faith and within its discretion.

The Objectors' suggestion that the Trustee "did not even attend" the negotiating sessions is manifestly false. The Record reflects that the Trustee advocated vigorously for the largest settlement it could obtain in multiple, in-person negotiating sessions and made clear to Bank of America that it *would* sue if a satisfactory settlement was not reached. *See* Section II(B)(2)(a) and (b), *infra*. Nothing in this record remotely supports a finding that the Trustee *abused* its discretion.

The Objectors' procedural objections – that the Trustee lacked authority to settle the claims, that the trial court lacked authority to bind absent certificateholders, that it misapplied the burden of proof, etc. – should be seen for what they are: diversionary efforts to change the subject, because the Objectors cannot demonstrate that the Trustee abused its discretion *in light of the record evidence, the relevant law, and the contract terms*. We address these erroneous points below and show that each rests on distorted logic and is contradicted by well-established authority. We begin with the standard of review because it is dispositive of the cross-appeal.[10]

[10] The Institutional Investors adopt the Trustee's statement of the cross-questions raised by the cross-appeal. As noted earlier, the Institutional Investors refer the Court to the counter-statement of the facts provided by the Trustee.

### A. Standard of Review

The standard of review applicable to a court's consideration of a trustee's exercise of discretion is whether the record evidences "any abuse of discretion which would warrant judicial interference with the Trustee's decision to enter into the Settlement." R.91a (Judgment at 24 *citing Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010).[11] This standard of review applies to the decision of all trustees, regardless of whether or not the trustee owed fiduciary duties to certificateholders. RESTATEMENT (THIRD) OF TRUSTS §87 ("When a trustee has discretion with respect to the exercise of power, its exercise is subject to supervision by a court only to prevent an abuse of discretion."). Thus, for the purpose of this appeal, the Court need not resolve whether BNYMellon was – or was not – a fiduciary, because it has no impact on the Court's analysis.

With respect to the trial court's determination that the Trustee abused its discretion regarding the loan modification issue, this Court has the power to render

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[11] *Accord 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."); *In re Heidenreich's Will*, 85 Misc.2d 135, 138 (N.Y. Sur. Ct. 1976) ("[B]ased on the testimony submitted to the court, the court cannot find that the trustees acted in bad faith but that they made a considered judgment . . . and they should not be second guessed."); RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e (1959) ("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 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.").

the judgment the Court finds warranted by the facts. *Baba-Ali v. State*, 19 N.Y.3d 627, 640 (2012).[12]

## B. Argument

### 1. The Trustee's Investigation of its Claims was Reasonable and Adequate

The Objectors attack the Trustee's factual investigation and its advocacy during the negotiation of the settlement. Objectors' Brief at 26-34. In this section, we respond to particular aspects of the Objectors' attack on the trial court's Judgment upholding the Trustee's exercise of its settlement discretion.[13]

#### a. Investor Support for the Settlement

The Objectors make much of the fact that the Institutional Investors prepared an evaluation of the potential size of the repurchase claim that was higher than the eventual settlement, and higher than the range calculated by the Trustee's expert, Brian Lin. Objectors' Brief at 31-32. This is not evidence that the Trustee abused its discretion. To the contrary, the Institutional Investors, many of whom are fiduciaries for others, were aware of their own analysis and *supported* the Settlement. In fact, the record includes abundant evidence that the Institutional

[12] "[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.").

[13] Our reply to the Objectors' arguments concerning the trial court's ruling that the Trustee abused its discretion in evaluating the loan modification theory is addressed in Section III, *infra*.

Investors (like the Trustee): (i) used GSE data in one of their valuation scenarios, R.1037 (PTX 604); R.837-41 (Waterstredt), (ii) were aware the Trustee was using GSE data to estimate the size of the potential repurchase claim, R.616-17 (Smith), (iii) knew the Trustee had not sampled other loan files, R.892 (Waterstredt), and, (iv) knew the Trustee retained experts to advise it on the reasonableness of key aspects of the settlement after it was negotiated, rather than employing external experts in the negotiation itself. R.856 (Waterstredt). The Institutional Investors nonetheless fully and completely supported (and continue to support) the Trustee's settlement conduct and its settlement decision. The fact that 22 of the world's largest and most sophisticated investors support the reasonableness of the Trustee's settlement conduct and its settlement decision is compelling evidence the Trustee acted reasonably in evaluating, negotiating, and advocating for the settlement in all respects. *Compare* R.3482-85 (Fischel).

In this *equitable* proceeding, the Court also cannot and should not ignore the voice of the 99.9% of investors who do *not* oppose the Settlement and who want to have its $11 billion in benefits immediately. This broad and deep support should be virtually dispositive of the cross-appeal. All certificateholders had access to information about the Trustee's settlement process, its negotiations, its expert reports, and its settlement decision for months before the Article 77 trial. They have had knowledge of the Judgment upholding virtually all of the Trustee's

settlement judgment for months, as well. Yet, as of the filing of this brief, the ranks of certificateholders urging that the Trustee's judgment be rejected, and the settlement destroyed, consists of holders of only *one tenth of one percent* of the Trusts' securities.

The governing agreements for the Trusts nowhere contemplate that the Trustee's exercise of its settlement discretion can be set aside or impeded by the idiosyncratic preference of a dissident minority. The law likewise mandates that this Court defer to the Trustee's reasonable exercise of its settlement discretion and refrain from substituting its own judgment for that of the Trustee. In this case, where virtually all certificateholders reject the Objectors' claim that the Trustee's conduct was so unreasonable as to constitute an abuse of discretion, there is no basis on which *any* aspect of the Judgment supporting the Trustee's exercise of its settlement discretion could or should be overturned.

**b. The Objectors Misstate the Standard of Review**

Most of the Objectors' attack on the Judgment rests on their assertion that the Trustee should have employed a different approach in evaluating, negotiating, and settling its claims. Objectors' Brief at 26-29. This second-guessing is not competent evidence, nor does it establish the Trustee's conduct was so inherently unreasonable as to be an abuse of discretion. The trial court appropriately rejected these arguments in its Judgment. R.119a-120a (Judgment at 52-53) ("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.").

The standard by which a court reviews a trustee's judgment *never* inquires whether the court might have acted differently if it had been the trustee.[14] Instead, the standard is one under which the court is required to defer to the judgment of the trustee: "When a trustee has discretion with respect to the exercise of power, its exercise is subject to supervision by a court only to prevent an abuse of discretion." *Restatement (Third) of Trusts* §87 (2007). The Objectors' second-guessing violates this principle repeatedly: their argument rests on pure speculation that some other course of conduct might have led to a different outcome. That speculation flouts the standard of review and is not evidence that in any way undermines the Judgment.

[14] *Haynes*, 72 A.D.2d at 536 ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith."); *In re Heidenreich's Will*, 85 Misc.2d at 138 ("[B]ased on the testimony submitted to the court, the court cannot find that the trustees acted in bad faith but that they made a considered judgment . . . and they should not be second guessed."); RESTATEMENT (SECOND) OF TRUSTS § 187, cmt. e ("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.").

### c. Certificateholders Do Not Own the Claims the Trustee Settled

Fundamental to the Objectors' appeal is their assertion that the Trustee "settled and released absent certificateholders' claims." Objectors' Brief at 8. This is false. The repurchase claims released in the settlement and at issue in the Article 77 case are vested in the Trustee, on behalf of the Trusts, not in Certificateholders. This is clear in the contracts. It is also clear in the law governing these trusts.

The trial court correctly found the Trustee owns all claims related to Trust assets, including claims for repurchase of ineligible mortgage loans. R.89a-90a (Judgment at 22-23). The Objectors do not challenge this finding; nor could they. This Court has thrice held that Certificateholders do not own and lack any standing to pursue Trust repurchase claims.[15] The Trustee alone has "exclusive standing under the PSA to sue on behalf of Certificateholders," *Asset Securitization,* 12 A.D.3d at 215, so its judgment as to when and how to resort to the courts is "controlling upon all of the bondholders." *Campbell v. Hudson & Manhattan R.R.Co.*, 277 A.D. 731, 734 (1st Dep't 1951) *aff'd* 302 N.Y. 902.

[15] *Ace Securities Corp. v. DB Structured Prods, Inc.*, 112 A.D.3d 522, 977 N.Y.S.2d 229 (1st Dep't. 2013); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 948 N.Y.S.2d 580 (1st Dep't. 2012); *Asset Securitization Corp. v. Orix Capital Mkts,* LLC, 12 A.D.3d 215, 215, 784 N.Y.S.2d 513 (1st Dep't. 2004).

### 2. The Trustee's Settlement Conduct Was Reasonable

The Objectors' description of the Settlement, the Trustee's role in obtaining and evaluating it, and its reasonableness also bears no resemblance to the record developed in the nine-weeks of evidence presented in the Article 77 trial. That record contains voluminous evidence establishing that the Trustee reasonably, appropriately, and in good faith evaluated *all* of the claims that were incorporated in the Settlement. Rather than repeat points made by the Trustee, we write below to correct certain manifestly incorrect statements that appear in the Objectors' Brief.

#### a. There Was No 25% Discount

The Objectors assert the Trustee allegedly relied on the 25% Voting Rights requirement and the no action clause "to 'justify' a substantial settlement discount at the negotiating table." Objectors' Brief at 4, 9 and 12. In fact, the argument for such a discount was made by *Bank of America*, but was *rejected* by both the Trustee and its expert, Brian Lin. PTX 36.5-6; R.1044 (Scrivener of Bank of America testifying: "The group didn't take well to [the presentation] haircut because they were in the room and therefore they believed that there was a hundred percent chance that claims would be filed if this conversation did not continue to a settlement."). R.1968, 2017, 2020.

### b. The Trustee was Not a Spectator in the Negotiations. Instead, it Threatened to Sue

The Objectors assert that the Trustee and its counsel "did not even attend" the settlement negotiations, Objectors' Brief at 10, deferred to Bank of America's negotiating positions, *id*. at 18, and "refused to give any assurance that it would sue if the Proposed Settlement blew up." *Id*. at 24. These claims are all false.

The record demonstrates that the Trustee attended and participated actively in the negotiations. Jason Kravitt described the initial sessions as marked by tension, hostility, and confrontation. R.1344-1345. These heated discussions led to "a bit of a standoff," R.695. In subsequent sessions, the Trustee participated actively in the discussions and often took the lead. R.318, R.809, R.1388-1390, R.1399-1400, R.1421. Far from deferring to Bank of America's positions, the negotiations were marked by "serious disagreements over many issues." R.403, R.706, R.826, R.1388, R.2203. The tenor of the conversations was often hostile, with the parties becoming "very loud or very agitated." R.826, R.1388. At one point, matters deteriorated so significantly that Bank of America's lead negotiator, Terry Laughlin, threw presentation materials back at the Institutional Investors. R.807, R.363, R.1429.

Though Bank of America repeatedly attempted to argue for discounts, R.1040-46 (Scrivener), or concessions, R.398-404 (Smith), its demands were rejected. Ultimately, Bank of America accepted an "$8.5 billion, take it or leave it,

fill or kill" demand. R.398. Its later efforts to negotiate the number down to $7 billion, R.399, R.715, and its request to pay the settlement amount in installments over time, R.399, R.402, R.715, were both rejected summarily. As Bank of America's lead negotiator testified, when it entered the negotiations with the Trustee and the Institutional Investors, Bank of America was "*never* thinking we would pay an amount that high…it was a really difficult decision to ultimately agree on that number." R.716. The record establishes that this extraordinary result did not happen in the Trustee's *absence*. It happened because the Trustee was *there*, advocating vigorously for the best settlement it could obtain.

Among the many misstatements in the Objectors' brief, few are more astonishing than its assertion that the Trustee "refused to give any assurance that it would sue if the Proposed Settlement blew up." Objectors' Brief at 24. The Trustee made absolutely clear that it would sue if an acceptable settlement was not reached. R.816. Bank of America understood suit was a *certainty* if it did not reach a settlement satisfactory to the Trustee. R.717, R.816, R.820. The Trustee's head of litigation, Kevin McCarthy, testified he had "no doubt" in his mind that Bank of America "understood that we were …in a position to commence

litigation." R.5023. The Trustee had also taken "substantial steps to retain litigation counsel [to] pursue…repurchase rights." R.5035.[16]

### 3. The Objectors' Due Process Argument Regarding Non-Party Certificateholders Is Meritless, and Not Properly Before the Court

The Objectors' argument that there are due process problems preventing certificateholders who (unlike the Objectors) did not appear as parties in this case from being bound by the Judgment is contrary to well-established law. This argument also is not properly before the Court.

The Objectors appeared as intervenor-objectors in the court below and are parties to this appeal as respondents and cross-appellants. They do not (and could not) raise this due process argument for themselves: they were present and litigating in the Article 77 proceeding. Instead, they ask the Court to render an advisory opinion on whether some other, *hypothetical* certificateholder in the Trusts who chose not to appear (despite having been given adequate notice and an opportunity to appear[17]), would be bound by the Judgment. Because the Objectors

[16] The Trustee has addressed the Objectors' specious claims that Mayer Brown suffered under a "disabling conflict" in the negotiations, so the Trustee was allegedly disabled from (and so did not) threaten to sue Bank of America. Trustee's Response and Reply Brief at Section I(B)(3). In fact, the Trustee did make clear that it would file suit if a satisfactory settlement was not reached. More important, though Mayer Brown is highly capable, the evidence established it was not the only firm available to The Trustee. Indeed, as Mr. McCarthy emphasized, the Trustee was fully prepared to litigate (with other counsel) if a satisfactory settlement could not be reached.

[17] The Objectors nowhere challenge the trial court's finding that notice was adequate.

(who actually appeared and litigated) would not be affected by a decision on this issue, they have no standing to raise this issue.[18] Their request for an advisory opinion also does not raise a justiciable issue on appeal, because this court may not issue advisory opinions.[19]

Even if the issue were before the Court, it is clear that a judgment entered in this proceeding will bind all certificateholders. In *Mullane v. Central Hanover Bank & Trust Co.*, the United States Supreme Court considered whether trust beneficiaries can be bound by a judgment adjudicating a trustee's actions, consistent with constitutional due process requirements. 339 U.S. 306 (1950). After observing that such a proceeding "may cut off [trust beneficiaries'] rights to have the trustee answer for negligent or illegal impairment of their interests," *id*. at 313, the *Mullane* court held that due process was satisfied by "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id*. at 313. The court explained that "[t]he notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable

[18] *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772 (1991) ("Under the common law, there is little doubt that a court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.")

[19] *Cheng v. Oxford Health Plans, Inc.*, 15 A.D.3d 207, 208 (1st Dep't 2005) ("We agree that the appeal should be dismissed, as it would result in an inappropriate advisory opinion.").

opportunity to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." *Id*. at 314-15 (citations omitted).

Here, the trial court described the breadth of the notice provided and found that "a full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon." R.89a (Judgment at 19, 22). The Objectors have not challenged this finding. They also do not challenge either the sufficiency of the notice, or the opportunity to appear and object, that was afforded to all certificateholders in this proceeding.[20] Thus, under *Mullane*, the Objectors' due process arguments are meritless because the notice given here was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Id*. at 313.

[20] Any objection to the notice and opportunity to be heard in this proceeding would fail. Notice of the proceedings in the trial court was provided to certificateholders "via nine different domestic and international methods or channels of communication," including by direct mail, by publication, through the Depository Trust Company, by targeted internet advertising, and by the Trustee's creation and maintenance of a website dedicated to advising certificateholders of the existence and progress of the proceedings. R.86a (Judgment at 19). In addition, pursuant to the trial court's orders, certificateholders who wished to appear and be heard (either to support, object to, or simply seek additional information about the settlement) were permitted to do so simply by filing a notice of intention to appear. *Id*. at 86a-87a (Judgment at 19-20).

The Objectors attempt to distinguish *Mullane* on the grounds that "the trustee in *Mullane* did not dispute that it owed traditional fiduciary duties to all trust beneficiaries it sought to bind." Objectors' Brief at 45. This is entirely irrelevant. The Objectors cite *no authority*, or any rational basis, to support their claim that *Mullane* is limited to cases where a trustee *stipulates* to owing "traditional fiduciary duties" to all trust beneficiaries. *Mullane* is not a product of the precise character of the duty that is owed by any particular trustee (which can vary dramatically depending on the trust instrument). Instead, it reflects the pragmatic need of the states that create trusts to resolve issues pertaining to them:

> the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond the right of its courts to determine the interests of all claimants, resident or non-resident, provided its procedure accords full opportunity to appear and be heard.

*Mullane*, 339 U.S. at 313.

The Objectors' argument is also premised on an obvious misapplication of the inapposite case of *Taylor v. Sturgell*, 553 U.S. 880 (2008). In *Taylor*, the court was concerned with a question not at issue here: under what circumstances may a person who "has *not* had a 'full and fair opportunity to litigate' the claims and issues settled," 553 U.S. at 892-93 (emphasis added), be bound by a judgment entered in such a suit under the doctrine of *res judicata*. Here, that question has *no relevance*, because the Objectors do not contest (and thus concede) that all Trust

certificateholders have been afforded a full opportunity, under the test set out in *Mullane*, to appear and be heard. Thus, even if the issue were properly before this Court (and it is not), the law is clear that Trust certificateholders who elected not to participate in this proceeding are nonetheless bound by the Judgment.

### 4. The Objectors' Argument that the Trustee Lacked Authority to Enter Into the Settlement Is Meritless

As explained in the Trustee's brief at Section I(A)(1), the Objectors misread the Court of Appeals' recent decision in *Quadrant Structured Prod. Co. Ltd. v. Vertin*, __ N.Y.3d __, 2014 WL 2573378 (2014) when they argue the Trustee had authority to prosecute and/or settle repurchase and servicing claims only if an event of default had occurred. The Institutional Investors add three additional points.

First, this argument was never raised by the Objectors or any other objector in the trial court,[21] so it is not properly before this Court on appeal.[22] Second, the Objectors' argument ignores *Quadrant's* fundamental teaching that the contract language is controlling. This Court, presciently, took the same approach in construing a virtually identical Countrywide PSA in *Walnut Place LLC v.*

[21] *See e.g.* R.16847-61 (The Retirement Fund's post-hearing brief in opposition to the settlement) (no argument that the Trustee's authority to settle turns on the presence of an event of default).

[22] *Commercial Credit Corp. v. Wells*, 228 A.D. 402, 406 (4th Dep't 1930) ("A judgment cannot be sustained on appeal upon some other theory which has never been urged, or even suggested."); *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dep't 1988) ("Nor, obviously, may a party argue on appeal a theory never presented to the trial court of original jurisdiction").

*Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012). In *Walnut Place*, this Court held that breaches of representations and warranties giving rise to the mortgage repurchase claims at issue in the settlement: (i) do *not* in and of themselves constitute events of default under the governing agreements for the Trusts, and (ii) as a result, can only be enforced by the Trustee. *Id.* The Countrywide governing agreements at issue here are identical to the Countrywide governing agreements in *Walnut* and expressly contemplate suit by the Trustee to "enforce" breaches of representations and warranties (by demanding repurchase of the offending loans), notwithstanding that such breaches are not events of default. *See, e.g.*, R.6464 (PSA section 2.03(c)) (providing for reimbursement to the Trustee, by the mortgage seller, "for any expenses reasonably incurred by the . . . Trustee in respect of enforcing remedies for such breach.").

Finally, the Objectors' argument thus makes no sense. In their view, the only party with authority to enforce or settle these claims – the Trustee – would *never* have authority to do so because the breaches giving rise to them do not in and of themselves constitute events of default. No term or condition of the governing agreements calls for this absurd result.

### 5. The Objectors' Assertions that the Trial Court Applied a Flawed Standard of Review, and Failed to Explain Its Reasoning, Are Meritless

#### a. The Trial Court Did Not Enter a Summary Judgment

There is no merit to the Objectors' assertions that the trial court "grant[ed] summary judgment for Petitioners," and "effectively dr[ew] all factual inferences against Objectors." Objectors' Brief at 56. In a special proceeding (as in a plenary proceeding), summary judgment is rendered solely on the basis of the "pleadings, papers, and admissions," where *no* triable issue of fact is raised. CPLR § 409(b). The trial court's reference to the "summary judgment standard," R.92a (Judgment at 25), meant only and simply this: As CPLR §409 states, the Trustee bore the burden of proof as petitioner to demonstrate there were no material issues of fact. If, after reviewing the pleadings and proof submitted, the trial court determined there were disputed fact issues, then CPLR §410 required that a bench trial be held to resolve them.

That is precisely what happened here. From June 3, 2013 to November 21, 2013, the trial court presided over an evidentiary hearing lasting 36 days, many of them consecutive. R.1-5820 (trial transcripts). These proceedings included opening and closing arguments, sworn testimony from 22 fact and expert witnesses, hundreds of documents admitted in evidence, and rulings on countless evidentiary objections. *Id*. It was only *after* this intensive fact-finding process that the trial court issued a judgment, making clear that the task before the court was "to *decide* whether the Trustee abused its discretion" in entering into the settlement agreement. R.93a (Judgment at 26).

The Judgment includes over fifty citations to testimony and exhibits, and concludes with express factual determinations ("the Court *finds* …"), arrived at "*[a]fter reviewing the voluminous record*." R.119a. The trial court's findings and rulings resolved disputed facts, and addressed the reasonableness of the Trustee's process and its good faith in entering into the Settlement Agreement. R.119a-120a (ruling that "the Trustee did not abuse its discretion in entering into the Settlement Agreement" and finding that it "did not act in bad faith or outside the bounds of reasonable judgment."). For the Objectors to suggest that the nine-week bench trial held by the trial court was simply a summary judgment hearing – one in which the court, inexplicably, heard *testimony* from 22 witnesses and received *in evidence* hundreds of exhibits – is the height of absurdity.

**b. The Trial Court Did Not Place the Burden of Proof on Objectors**

The Objectors' assertion that the trial court shifted the burden of proof to objectors by requiring them "to show there was no evidence that supported the Trustee's actions," Objectors' Brief at 56, is meritless. Nowhere in the Judgment does the trial court state that the objectors bear the burden of proof or that they failed to carry the burden of proof on any issue. Although the Objectors cite three instances in the Judgment in which they claim the trial court was "accepting as true [the] Trustee's argument" as to some contested issue, Objectors' Brief at 57, in *not*

*one* of these instances (or anywhere else in the Judgment) does the trial court actually state that it is accepting the Trustee's arguments as true.[23]

Instead, the only fair reading of the Judgment is that it reflects careful weighing of the evidence after a hearing in which all parties had an opportunity to appear, present evidence, make their arguments, and otherwise make themselves heard. The Judgment simply did not limit itself to whether there was *some* evidence to support its findings. Rather, the Judgment repeatedly makes clear that the trial court weighed *all* of the evidence, considered it carefully, evaluated the arguments of *both* sides, and then made the fact findings the court found warranted. Notably, the trial court also stated expressly that this was exactly what it had done: it issued the Judgment "[a]fter reviewing the voluminous record and carefully considering the arguments presented by *all* counsel," R.119a (Judgment. at 52), and then (as to everything except the loan modification claim) adopted

[23] The Objectors cite the trial court's decision at pages 13-20 (R.80a-87a), 27-28 (R.94a-95a), and 29-32 (R.96a-99a) for the proposition that the trial court "accept[ed] as true" the Trustee's arguments. This is belied by the cited pages. Pages 13-20 are simply a factual summary of the structure of the transactions and the procedural history of the case. Pages 27-28 and 29-32 contain the trial court's summary of the parties' respective positions on contested issues that are resolved by the court's decision, as is evident from the trial court's statements that "Respondents argue…," and "The Trustee asserts… ." *Id.* The trial court's ruling on these disputed issues is found in its "Conclusion," which states clearly that the court reached its decision, "After reviewing the voluminous record and carefully considering the arguments presented by all counsel…." R.119a (Judgm't. at 52). This section then goes on to contain the court's findings, based on all of the evidence it considered. *Id.* Nowhere does the court's decision recite (or support) Petitioner's claim that the trial court "accept[ed] as true," Petitioners' Brief at 57, any argument made by the Trustee. To the contrary, the record establishes that the trial court recognized there were disputed issues of fact and conducted a nine-week evidentiary hearing to resolve them.

finding (t) stating that "all objections to the Settlement have been considered and are overruled in all respects." R.80a, 120a (*Id.* at 13, 53).

### c. The Trial Court's Judgment Is Sufficiently Specific and Includes the Necessary Findings

The Objectors' claim that the Judgment omits sufficient analysis or explanation is also wrong. Nothing in New York law requires overworked courts to enumerate *ad nauseam* every argument of the losing side and every bit of evidence that informs the final judgment. A trial judge need only set forth in a judgment "the essential facts upon which it based its decision." *Kaywood Prop., Ltd. v. Glover*, 34 A.D.3d 645, 645-46 (2nd Dep't 2006).[24] The 53-page Judgment rendered by the trial court plainly meets this standard: it is replete with references to the essential facts upon which the decision is based.[25]

[24] *Accord* 8A Carmody-Wait 2d New York Practice § 60:17 (2014) ("A formal statement of a court's findings of fact is not required under the rule requiring a statement of the essential facts upon which a court relied to reach its decision. The trial court is required only to state the essential facts upon which it based its decision and is not required to state the evidentiary facts contained in the record or the basis for its credibility determinations. A memorandum decision of a trial court, although brief, may fully comply with the requirement that the court make findings of facts it deems essential to its decision if the decision sets forth all the ultimate determinative facts necessary for the relief sought. Also, the absence of express findings of fact does not invalidate a decision if the decision itself is the equivalent of express findings of fact on each and every material issue of fact.").

[25] Among the essential facts identified in the Judgment, which formed the basis of the trial court's decision, are: (i) the role of the Trustee and the other parties in the securitization transaction at issue, R.81a-82a; (ii) the relevant terms of the agreements underlying the claims subject to the settlement, R.82a-83a; (iii) the claims at issue in the settlement and the manner in which they were brought to the attention of the Trustee, R.83a-85a; (iv) the negotiations conducted between the Trustee, Bank of America, and the Institutional Investors that led to the settlement, *id.* at R.85a, R.104a n.17; (v) the details of the settlement agreement, R.85a, R.100a-101a; (vi) the Trustee's specific rationales for entering into the settlement agreement, R.93a-94a,

Even if the Objectors were correct that sufficient explanation is omitted (and it is not), remitting the case to the trial court would still be unwarranted. "Even if a trial court sitting without a jury has failed to satisfy its obligation to state findings of fact it deems essential to its decision, an appellate court will refrain from remitting a case to that trial court if the appellate court's examination of the record in the action permits effective review as is the case if the record is complete and the essential facts can be established by a review of the evidence." 8A Carmody-Wait 2d New York Practice § 60:23 (2014).[26] Here, the record is more than sufficient to support a finding that the Trustee acted reasonably, in good faith, and did not abuse its discretion in any aspect of its settlement conduct and settlement

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R.101a-102a, (vii) the circumstances surrounding the Trustee's retention of counsel and attention to conflict issues, R.94a-95a; (viii) the circumstances surrounding the Trustee's entry into the forbearance agreement, R.96a-97a; (ix) the Trustee's reasoning behind agreeing to include the further assurances clause in the settlement agreement, R.99a-100a; (x) the specifics of the Trustee's analysis of the mortgage repurchase and successor liability claims, including the work of the experts retained by the Trustee to assist in its analysis of these claims, R.100a-111a; (xi) the specifics of the Trustee's analysis of the document exception claims, R.111a-112a; (xii) the specifics of the Trustee's analysis of the servicing claims, R.113a-114a; and (xiii) the specifics of the Trustee's analysis of the loan modification claims, R.114a-119a. In addition, the Judgment also sets out the conclusions of law on which it rests, including: (i) the Trustee's ownership of the claims at issue in the settlement, and its authority to prosecute and settle them, R.89a-90a; and (ii) the proper scope of judicial review of a trustee's discretionary decision making in an Article 77 proceeding is limited to determining whether the trustee abused its discretionary authority by acting beyond the bounds of reasonable judgment, R. 90a-93a.

[26] *Accord Marks v. Macchiarola*, 250 A.D.2d 499 (1st Dep't 1998) ("Brief though the trial court's decision is, it set forth sufficient findings of fact and conclusions of law to satisfy the requirements of CPLR 4213(b), and, in any event, the record of the entire trial transcript with exhibits allows this Court to make the requisite findings."); *Bonner v. Nash*, 70 Misc.2d 752, 753 (N.Y. App. Term 1st Dept. 1972) ("Appellant argues that the judgment is improper because of the absence of findings of fact and the rendering of a decision which omits to state the facts essential to the court's determination. Where the record appears complete, as is the record herein, this court may make the requisite findings in the exercise of its discretion.")

decision. Accordingly, though the Judgment itself contains a sufficient explanation, this Court could (if it believed it necessary to do so) modify the judgment to include additional matters *without* condemning the Trustee and Certificateholders to further, prejudicial delay in the implementation of this $11 billion settlement. To state it plainly, the Objectors' demand for the perfect should not be permitted to become the enemy of the extraordinarily good settlement the Judgment largely affirms.

## III. REPLY IN SUPPORT OF APPEAL OF THE TRIAL COURT'S FINDING ON THE LOAN MODIFICATION THEORY

In their opening brief, the Institutional Investors: (i) cited direct and uncontradicted record evidence establishing that the Trustee, represented by highly qualified counsel, evaluated the loan modification theory; (ii) demonstrated why this evidence contradicts, and therefore requires reversal of, the trial court's finding that there is "no evidence" that the Trustee evaluated this theory (and therefore acted unreasonably in agreeing to release it as part of the global settlement); and (iii) showed the reasonableness of the Trustee's conclusion that the loan modification theory misreads the governing documents. The Objectors' response to this evidence and these arguments is to ignore them.

The Objectors do not discuss, attempt to distinguish, or even mention, the evidence cited by the Institutional Investors demonstrating that the Trustee evaluated the loan modification theory. Nor do the Objectors attempt to explain

how the trial court's "no evidence" finding can be affirmed in light of this evidence.

The Objectors also ignore the merits of the loan modification theory. They do not claim the theory has merit, or dispute the Institutional Investors' explanation as to why it does not. Nor do they dispute the reasonableness of the Trustee's considered judgment that the theory "was a losing argument, legally." R.2140:5-6.

Rather than join issue on the questions actually raised by this appeal, the Objectors instead offer: (i) an entirely new, and meritless, loan modification theory that was never presented at trial, and therefore is not properly before this Court; and (ii) inappropriate second guessing of the Trustee's process, that takes no account of what the Trustee actually did to evaluate the loan modification theory. As explained below, these arguments offer no basis on which to affirm the trial court's loan modification finding.

### A. The Objectors Do Not Dispute That the Trustee Evaluated the Loan Modification Theory With the Assistance of Counsel

In support of their appeal, the Institutional Investors cited record evidence showing that the Trustee: (i) considered the loan modification theory, *see* Institutional Investors' Brief at 15-17, (ii) retained highly qualified counsel, with deep experience and knowledge of RMBS securitizations, who conducted an analysis of the theory, *id*. at 15-19 (iii) came to the informed, and correct, opinion that it was a losing argument, *id*. at 17-20, (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 theory), *id*. at 20-22 and (v) made the judgment that releasing claims based on this weak theory as part of a global settlement was in the best interest of certificateholders. *Id*.

This evidence directly contradicts both: (i) the trial court's puzzling ruling that "there is no evidence to suggest that the Trustee evaluated" the loan modification theory, R.119a (Judgment at 52),[27] and (ii) the trial court's conclusion, based on that ruling, that "the Trustee acted unreasonably or beyond the bounds of reasonable judgment, in exercising its power to settle the loan modification claims without investigating their potential worth or strength." R.120a (Judgment at 53).

The Objectors offer *no response* to this evidence. They do not dispute that the Trustee evaluated the loan modification theory with the assistance of highly qualified counsel. *See* Institutional Investors' Brief at 15-19. They do not dispute that the Trustee formed an opinion on the merits of the theory, based on its counsel's evaluation. *Id*. at 19-20. They do not dispute that the Trustee acted on

[27] Under New York law, for there to be "no evidence" to support a finding that the Trustee evaluated the loan modification argument, "[i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possible lead rational men to th[at] conclusion . . . on the basis of the evidence presented at trial." *Cohen v. Hallmark Card, Inc.*, 45 N.Y.2d 493, 499 (1978).

this evaluation, and made a considered, strategic judgment whether to emphasize this argument in negotiations, and whether to release claims based on this theory as part of a global settlement. *Id*. at 20-22.

The Objectors' brief never acknowledges any of this evidence, nor does it offer any explanation or justification for how this evidence can be squared with the trial court's finding that there is "no evidence" that the Trustee evaluated the loan modification theory. Instead, the Objectors attack a straw man, wrongly claiming that "the Settlement Proponents argue that such [loan modification] claims were so devoid of merit that they did not warrant consideration." Objectors' Brief at 7. This is, of course, the *opposite* of the Institutional Investors' and the Trustee's argument (and the record), which is that the Trustee was aware of this theory, actually *did* consider it, reasonably concluded that it "was a losing argument, legally," R.2140:5-6, and made the reasonable judgment that releasing it in a global settlement of trust claims was in the best interest of certificateholders. R.2140:9-13.[28]

The Objectors not only fail to address this evidence, they also fail to address the legal authorities (discussed in the Institutional Investors' opening brief) recognizing that:

[28] The Trustee's counsel testified: "[W]e felt that it [the loan modification argument] 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." R.2140:9-13.

> "The work of trusteeship, from interpreting the terms of the trust to decision making in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters *evidences prudence on the part of the trustee*. . . . Thus, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, *the trustee's conduct is significantly probative of prudence*."

RESTATEMENT (THIRD) OF TRUSTS § 77, cmt. b(2) (2007) (emphasis added).

This common sense view, that a trustee's retention of counsel to advise it with respect to complex legal questions "evidences prudence on the part of the trustee," *id*., is squarely in line with New York jurisprudence. For example, in *In re Joost's Estate*, 50 Misc. 78 (N.Y. Sur. Ct. 1906), the court held that an executor, who decided not to assert a claim on a note payable to the estate based on the advice of counsel that the note was uncollectible, had acted reasonably and consistent with his duty of prudence. As the court explained, after observing that counsel's competence and integrity were not at issue:

> The executor is only required to bring to the discharge of his duties the intelligence which an ordinarily good business man would use in like matters; and *where, in the course of the administration of his trust, [the executor] is confronted with any question which requires the advice of a skilled specialist and in good faith seeks such advice, receives the same, and acts thereon, he is not held accountable for the consequences of following it. And this is particularly true of intricate propositions of law*.[29]

[29] *Id*. at 8 (emphasis added). *Accord In re Wanamaker's Trust*, 17 A.2d 380, 382 (Pa. 1941) ("[T]he trustee did the right, the sensible and the prudent thing, it consulted counsel, of recognized high standing at the Bar, who advised that, owing to the uncertainties of the legal problems involved and the precariousness of the business situation, suit should not be brought. The trustee was fully justified under the situation here existing in acting upon his advice not to bring suit.").

Here, the same is true. The Trustee was faced with the question of the appropriate use, if any, of a legal theory, whose value to certificateholders turned on an "intricate proposition of law,"[30] and a "question of legal complexity."[31] In response, the Trustee did *exactly* that which the authorities make clear "evidences prudence on the part of the trustee"[32] – it analyzed the issue through its counsel, who correctly concluded that the theory was weak and would not likely advance certificateholders interests if pressed. On this record, there is no basis for concluding, as the trial court erroneously did, that there was "no evidence" the Trustee evaluated the loan modification theory and therefore abused its discretion with respect to it.

### B. The Objectors Do Not Dispute that the Loan Modification Theory Is Meritless, or that the Trustee Acted Reasonably in So Concluding

In addition to ignoring evidence of the Trustee's evaluation of the loan modification theory, the Objectors do not dispute or challenge the reasonableness of the Trustee's conclusion that the theory "was a losing argument, legally." R.2140:5-6. As discussed in the Institutional Investors' opening brief, the loan

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[30] *In re Joost's Estate*, 50 Misc. at 78.

[31] RESTATEMENT (THIRD) OF TRUSTS § 77, cmt. b(2) (2007).

[32] *Id.*

modification theory before the trial court (made by Triaxx,[33] not by the Objectors) was that the Trustee had failed to assess whether the governing agreements for the majority of the Trusts required that *all* modified loans be purchased from the Trusts, regardless of whether the modification was carried out for loss mitigation purposes or in lieu of refinancing.[34]

In their opening brief, the Institutional Investors explained the reasonableness of the Trustee's conclusion that this theory "was a losing argument, legally." R.2140:5-6. The Institutional Investors demonstrated that the loan modification theory argued at trial by Triaxx is based on a selective misreading of the governing agreements, one that ignores the difference between modifications in lieu of refinance (which require repurchase, but which there is no evidence occurred in the Trusts) and loss mitigation modifications (which did occur in the Trusts, but do *not* require repurchase). *See* Institutional Investors' Brief at 25-33.

In their brief, the Objectors offer no response. They do not argue (as Triaxx did) that the governing agreements required the repurchase of all modified loans, regardless of the purpose of the modification. They do not respond to any of the

[33] Triaxx has since abandoned the argument and its objection to the Settlement.

[34] R.114a (Judgment at 47) (noting that the argument made by Triaxx was that the governing agreements for certain trusts "require immediate repurchase of modified mortgage loans without regard to whether the modifications were 'in lieu of refinance' or 'loss mitigation' modifications."); R.16797 (Triaxx Brief) (arguing that the governing agreements for certain trusts "expressly require repurchase of Modified Mortgage Loans"); R.10215 (PTX 620) (stipulated summary exhibit summarizing relevant language from governing agreements pertaining to loan modifications).

points raised in the Institutional Investors' brief demonstrating why this theory misreads and ignores key portions of the governing agreements. They also do not disagree with or call into question the reasonableness of the Trustee's conclusion that the loan modification theory "was a losing argument, legally." R.2140:5-6. Instead, as discussed below, the Objectors set "aside" and abandon the loan modification theory argued at trial by Triaxx, in favor of their own, entirely new, loan modification theory that is both meritless, and not properly before this Court because it was never argued below and relies on factual assertions not appearing in the record.[35]

### C. The Objectors' New Loan Modification Argument is Both Improper and Meritless

In their brief, the Objectors claim, *for the first time*, that the Trustee acted unreasonably by failing to evaluate a new theory that was not raised in the trial court below. As the Objectors would now have it, the issue before this Court is *not* (as it was in the trial court) whether the Trustee evaluated the theory that the governing agreements for the Trusts require the repurchase of *all* modified loans, regardless of the purpose of the modification. Rather, the Objectors now claim that the issue is whether the Trustee failed to evaluate an argument that some

[35] Acknowledging that their loan modification theory is wholly new, and separate and apart from the loan modification theory advanced by Triaxx at trial, the Objectors introduce it as being "aside from the additional arguments made by Triaxx as to why Countrywide was required to repurchase modified loans under PSA §3.11(b) or §3.12(a) . . . ." Objectors Brief at 36.

unspecified number of loan modifications "were not made in the ordinary course of business to mitigate losses on non-performing loans" but rather were made "to settle predatory lending claims of various States Attorneys Generals," Objectors' Brief at 38, and for this reason this unknown number of loans were required to be repurchased. Stated differently, the Objectors now argue, *for the first time*, that what the Trustee failed to evaluate was a theory that unauthorized loan modifications – not carried out for loss mitigation purposes – were performed on loans in the Trusts, and that those loans were therefore required to be repurchased.

The Objectors' eleventh hour change of course on the loan modification issue suffers from a number of fatal defects. The first is that the Objectors never made this argument (or any other loan modification related argument) at trial.[36] Nor did Triaxx (or any other objector) argue at trial, as the Objectors attempt to do now, that the Trustee failed to evaluate a theory that loans in the Trusts had been improperly modified, to settle predatory lending claims, and for this reason were somehow required to be repurchased.[37]

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[36] At trial, the Retirement Fund objectors raised no objection, *of any kind*, related to loan modifications. *See e.g.* R.16218-31 (Retirement Fund objectors' pre-hearing brief in opposition to the settlement) (no objection regarding loan modifications), R.16847-61 (Objectors post-hearing brief in opposition to the settlement) (no objection regarding loan modifications). Nor did it join Triaxx in making its loan modification argument. R.16780-97 (Triaxx post-trial briefing) (no joinder by the Retirement Fund objectors).

[37] There is no mention of settlements with the States Attorneys General, or modifications outside the ordinary course of business, in any of Triaxx's briefing. *See*, *e.g.* R.16780-97 (Triaxx post-

"A judgment cannot be sustained on appeal upon some other theory which has never been urged, or even suggested."[38] This precept is inviolate where, as here, the new argument is based on factual assertions with no support in the record.

The governing documents for the Trusts permit loss mitigation modifications of mortgage loans, as an alternative to foreclosure, where the modification is expected to be net present value positive (i.e., the anticipated net present value of the income stream from the modified loan exceeds expected foreclosure proceeds). *See* Institutional Investors' Brief at 26-29. The Objectors do not dispute this fact. They also point to *no evidence* in the trial record (because there is none) that there was ever any claim or allegation (much less proof) that Countrywide or Bank of America had carried out *any* modification of a mortgage in the Trusts that was not an authorized, net present value positive, loss mitigation modification.[39]

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trial briefing). Nor is there any mention in the Judgment of any such argument having been made.

[38] *Commercial Credit Corp. v. Wells*, 228 A.D. 402, 406 (4th Dep't 1930). *Accord Wright v. Wright*, 22 N.Y. 578 (1919) ("a respondent will not be permitted to sustain a ruling in its favor upon some reason not considered in the lower courts"); *Recovery Consultants, Inc. v. Shih-Hsieh*, 141 A.D.2d 272, 276 (1st Dep't 1988) ("Nor, obviously, may a party argue on appeal a theory never presented to the trial court of original jurisdiction"). *See also* 4 N.Y. Jur.2d Appellate Review § 606 ("The rule against a change of theory on appeal is applicable to both appellants since resort cannot be had to a theory not alleged in the pleadings or suggested at the trial for the purpose of either sustaining or reversing the determination made in the trial court").

[39] The *Greenwich* lawsuit, which the Objectors point to when discussing their new theory, *see* Objectors Brief at 35-36, did *not* assert (as the Objectors do here) that modified loans in the Trusts were required to be repurchased because they were unauthorized, outside the ordinary course, non-loss mitigation modifications. Rather, the argument made by the plaintiff in *Greenwich* was the *same one* put forth by Triaxx at trial (and evaluated by the Trustee before

"Factual assertions not properly contained in the record may not be considered by an appellate court." *Recovery Consultants*, 141 A.D.2d at 276. Thus, the Objectors' new theory cannot provide a basis for affirming the trial court's loan modification finding because there is *no evidence* in the record: (i) that any unauthorized, outside the ordinary course, non-loss mitigation modification occurred in the Trusts, (ii) that the Trustee knew or should have known that any such modification had occurred, or (iii) that the Trustee should have, but failed to, evaluate the existence or value of a claim based on this theory. The Objectors' improper reliance on a wholly new, fact-bound theory, and their abandonment of any attempt to support the Judgment based on the loan modification theory actually presented to and ruled on by the trial court, tacitly concedes the validity of the appeal of the trial court's loan modification determination.

Finally, to the extent that the Objectors' argument is simply that predatory loans violated representations and warranties, and for this reason were required to be repurchased, this argument has *nothing* to do with loan modifications. Loans

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entering into the settlement): "that Countrywide Servicing is required *under the terms of the PSAs to repurchase modified loans*," regardless of the reason for the modification. *Greenwich Fin. Serv. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 25 (2nd Cir. 2010) (emphasis added). *See also Greenwich Fin. Serv. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, No. 650474/08, (Sup. Ct. N.Y. Cnty) Doc. # 1 at ¶ 33 (Complaint) (asserting that "[u]nder the PSAs that govern the CWL securitizations, *any mortgage* that is modified must be purchased from the trust.") (emphasis added); *Id*. Doc. # 12 at 14-20 and Doc. # 17 at 15-23 (dismissal briefing, arguing the question of whether the obligation to repurchase modified loans applies only to modifications in lieu of refinancing, or extends to loss mitigation modifications).

that violate the predatory lending representation are required to be repurchased regardless of whether they are modified, so long as the defect in the loan "materially and adversely affects" the interests of Certificateholders. R.6464 (PSA 2.03(c)). This argument, therefore, offers no support to the trial court's ruling that there was "no evidence" that the Trustee evaluated the loan modification theory raised by Triaxx.

Moreover, the evidence presented at trial demonstrates that the issue of repurchase of mortgages that violated the predatory lending representation was raised, evaluated, and considered by the Trustee and the Institutional Investors. The record shows that one of the many representations and warranties that could give rise to a claim for repurchase, on which the Trustee and the Institutional Investors focused their attention, was that the mortgage loan was originated in a way that violated predatory lending laws. R.1804:10-1805:14,[40] R.415:11-19.[41] The evidence below was that both the Trustee and the Institutional Investors devoted significant time and attention to attempting to estimate the size of the claim that could be asserted by the Trusts for breaches of representations and

[40] Testimony of Jason Kravitt (counsel for the Trustee) discussing: (i) existence of predatory lending representation in PSAs, and (ii) discussions with counsel for Institutional Investors regarding repurchase claims based on the predatory lending representation.

[41] Testimony of Kent Smith (representative of Institutional Investor PIMCO) discussing predatory lending representation in PSAs as a basis for repurchase claim.

warranties, including the predatory lending representation. R.1346:24-1347:18, 1433:16-1434:13;[42] R.355:11-356:24, 359:24-360:7.[43]

Thus, even if the repurchase of predatory loans was somehow related to loan modifications, there was evidence that such a claim existed, and this issue was properly before this Court – *none of which is true* – the record shows that repurchase claims based on a violation of the predatory lending representation were evaluated by both the Trustee and the Institutional Investors. And far from being given away for no value, the Trustee obtained $8.5 billion for the Trusts in exchange for a release of all repurchase claims, including claims that the mortgage seller had falsely represented that the loans did not violate predatory lending laws. The trial court did *not* find – nor could it have found – that the Trustee failed to evaluate this *breach of a representation* claim. To the contrary, the trial court found that the Trustee acted reasonably in its evaluation of claims arising out of breaches of representations and warranties. Therefore, even if this issue could be raised on appeal for the first time (and it cannot), there is no basis for asserting that the issue of repurchase of predatory loans was overlooked.

[42] Testimony of Jason Kravitt (counsel for the Trustee) discussing Trustee's retention of an expert to evaluate the potential claim size arising out of breaches of representations and warranties.

[43] Testimony of Kent Smith (representative of Institutional Investor PIMCO) discussing the Institutional Investors' effort to evaluate the potential claim size arising out of breaches of representations and warranties.

### D. The Objectors' Assertion That the Trustee Released Claims Based on the Loan Modification Theory "For Nothing" Ignores the Global Nature of the Settlement Agreement

The Objectors' criticism that the Trustee released claims based on the loan modification theory "for nothing" is simply wrong. Objectors' Brief at 37. The Trustee did not abandon or ignore the loan modification theory. Instead, the evidence shows that the Trustee: (i) evaluated the claim with the assistance of counsel, (ii) correctly determined that it lacked merit, (iii) made the judgment that attempting to push this weak claim to the forefront of negotiations where the Trustee was attempting to reach a global settlement of a variety of potential claims (some strong, some weak) would be counterproductive, and would not maximize certificateholder value; and (iv) made the ultimate decision that including a release of claims based on this meritless theory as part of a global settlement, *in return for $8.5 billion in cash and servicing reforms worth another $3 billion*, was in the best interest of certificateholders. *See* Institutional Investors' Brief at 15-22.

These are not the actions of a trustee who overlooked or released a potential claim for "nothing." Rather, they are the actions of a prudent trustee, who considered the issue carefully – with the advice of one of the nation's foremost securitization lawyers – and then made a rational and informed judgment about the highest and best use of a legal theory it reasonably believed to be weak. Strategic

judgments like this are not to be second-guessed by courts, absent a clear abuse of discretion.[44]

### E. The Objectors' Assertion that the Trustee Made No Attempt to "Determine the Value" of the Loan Modification Theory Is Meritless

Relying entirely on testimony that the Trustee did not add up the principal balance of all modified loans when it evaluated the loan modification theory advanced by Triaxx at trial, the Objectors assert "[t]he Trustee did not undertake any effort to determine [its] value." Objectors' Brief at 37. The Objectors give no weight to the analysis and consideration the Trustee and its counsel actually devoted to this theory. Instead, their position is that the Trustee's decision not to add up the principal balance of all modified loans, *standing alone and regardless of any other consideration or analysis the Trustee devoted to this theory*, justifies a finding that there is "no evidence" the Trustee reasonably evaluated this theory, and so abused its discretion. The law governing judicial review of discretionary judgments is entirely to the contrary.

"What is a reasonable exercise of discretion and judgment must always depend upon the surroundings, the facts and the circumstances." *In re Town of*

[44] *See Haynes* 72 A.D.2d at 536 ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith."); *Glenn*, 201 A.D.2d at 909 ("[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.").

*Ballston, Saratoga County*, 281 N.Y. 322, 328 (1939). Here, the surrounding facts and circumstances were that the Trustee was attempting to negotiate a global settlement, involving a number of potential claims, some strong and others weak. In such a circumstance, the "value" of any particular claim is not measured by whatever number someone attaches to it, but rather by its potential to advance (or interfere with) the goal of increasing the pressure on one's adversary to pay more in return for a global release.

Here, the evidence is that the Trustee made the judgment, through its highly competent and qualified counsel, that: (i) the loan modification theory was a losing argument, and (ii) attempting to press it was more likely to hinder than help the Trustee's goal of maximizing overall value on all of its claims. *See* Institutional Investors' Brief at 15-22. Litigants often settle disputes on a global basis. Inherent in that process is the reality that each side makes strategic judgments about which arguments, theories, and counterarguments to press and which not to press. There is certainly no basis to suggest that the Trustee abused its discretion because it did not add up the principal balance of modified loans (an exercise that, in any event, would *not* have estimated recoverable damages, even if the theory had merit[45]) in

[45] As explained in the Trustee's opening brief, the principal balance of modified loans is in no way the measure of liability for a claim premised on the loan modification theory, even if it had merit. Trustee Opening Brief at 31-33.

support of a theory it reasonably concluded was weak because it was contradicted by the very contracts the Trustee was attempting to enforce.

In these circumstances, the Trustee's considered judgment that it had performed a sufficient analysis of the loan modification theory was certainly "one among several reasonable courses of action,"[46] the Trustee could take. The Trustee's judgment, in that respect, *was* reasonable, was *not* an abuse of discretion, and so *was* entitled to deference from the trial court.[47] That is precisely why the Judgment below was in error and should be modified to include a ruling that in this respect, as in all others, the Trustee acted reasonably, in good faith, and did not abuse its discretion.

[46] "[S]election of one among several reasonable courses of action does not constitute malpractice." *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985). *Accord 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").

[47] *In re Heidenreich's Will*, 85 Misc.2d 135, 138 (N.Y. Sur. Ct. 1976) ("[B]ased on the testimony submitted to the court, the court cannot find that the trustees acted in bad faith but that they made a considered judgment . . . and they should not be second guessed.").

## IV. CONCLUSION

For the foregoing reasons, this Court should modify the judgment to approve the entirety of the Trustee's conduct in entering into the Settlement.

Dated: New York, New York
September 2, 2014

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## Printing Specification Statement

Pursuant to Rule 600.10(d)(1)(v), Petitioners-Appellants and Cross-Appellants specify that this brief was prepared using Microsoft Windows and Microsoft Word. Petitioners-Appellants and Cross-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, certificates of compliance, and any authorized addendum, is 12,431 as calculated by Microsoft Word.