SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

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

Petitioner,

-against-

WALNUT PLACE LLC, et al.,

Intervenor-Respondents.

Index No. 651786/2011

Assigned to: Kapnick, J.

REPLY MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT CONVERT THIS SPECIAL PROCEEDING TO A PLENARY ACTION

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TABLE OF CONTENTS

ARGUMENT 3

I. THE PLAIN MEANING OF ARTICLE 77 EXCLUDES THIS ACTION AS A "TRUST FOR THE BENEFIT OF CREDITORS." 3

II. THIS PROCEEDING, AS DEFINED BY BNYM'S PETITION AND PROPOSED ORDER, FAR EXCEEDS THE SCOPE OF ARTICLE 77. 7

A. BNYM Intends to Use Article 77 to Deprive Respondents of Substantive Rights. 7

B. BNYM Continues Willfully to Disregard the Demands for Relief in Its Own Proposed Order. 8

C. Article 77 Has Never Before Been Used to Approve the Potentially Conflicting Rights of Hundreds of Trusts in the Same Proceeding. 10

III. THE "NO-ACTION CLAUSE" DOES NOT DICTATE WHAT KIND OF PROCEEDING THIS COURT SHOULD CONDUCT UNDER THE CPLR. 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Carona v. Cannito,
286 N.Y.S.2d 44 (Co. Ct. Onondaga County 1967) 6

Chatham Green, Inc. v. Bloomberg,
765 N.Y.S2d 446 (N.Y. Sup. Ct. N.Y. County 2003).....6

Fizzinoglia v.Capozzoli,
938 N.Y.S2d 226 (New Rochelle City Ct. Oct. 12, 2011).....6

In re Fales,
431 N.Y.S.2d 763 (N.Y. Sur. Ct. N.Y. County 1980) 11

In re IBJ Schroder Bank,
No. 101530/1998 (N.Y. Sup. Ct. N.Y. County Aug. 16, 2000) 3

In re New York Constr. Materials Ass'n, Inc. v. New York State Dep't of Envtl. Conservation,,
83 A.D.3d 1323 (3d Dep't 2011) 4

Kassover v. PVP-GCC Holdingco II, LLC,
73 A.D. 3d 626 (1st Dep't 2010).....6

Mount Vernon City School Dist. v. Nova Casualty Co.,
927 N.Y.S.2d 817 (N.Y. Sup. Ct. Westchester County Aug. 4, 2008).....6

New York & Boston Despatch Express Co. v. Carroll,
156 N.Y.S. 14 (1st Dep't 1915).....6

People ex rel. Lefkowitz v. Carlson,
12 A.D.2d 873 (4th Dep't 1961).....5

People ex rel. Tsukuda v. Superintendent, Clinton Correctional Facility,
519 N.Y.S.2d 99 (N.Y. Sup. Ct. N.Y. County 1987).....5

People v. Reed,
265 A.D.2d 56 (2d Dep't 2000).....4

Perkins v. Smith,
116 N.Y. 441 (1889).....4

Skeels v. Paul Smith's Hotel Co.,
185 N.Y.S. 665 (3d Dep't 1921).....4

Washington Mutual Bank v. LKH Assets LLC,
No. 204209/07, 2009 WL 2134026 (N.Y. Sup. Ct. N.Y. County June, 25, 2009).....6

TABLE OF AUTHORITIES

STATUTES

CPLR § 103(c) 2

CPLR § 7701 ..... *passim*

This Court has already observed that Article 77 is an infrequently used procedure in the CPLR. It has been employed almost exclusively to seek judicial instructions regarding matters of internal trust administration that do not lend themselves to the adversarial process. Article 77 is used infrequently because its scope is limited. This proceeding must be converted to a plenary action because (1) it is undisputed that the securitization trusts that are part of the proposed settlement fit the plain meaning of "trusts for the benefit of creditors" and are expressly excluded from Article 77 (*see* Part I), or (2) the relief that BNYM seeks and BNYM's decision to lump together the interests of 530 separate trusts in one proceeding far exceed the permissible scope of Article 77 (*see* Part II). Neither BNYM nor the Institutional Investors have offered any convincing reason why this case may properly proceed under Article 77. Moreover, the Institutional Investors' argument that this *motion* is barred by a no-action clause has no basis in the language of the PSAs and is belied by basic common sense. (*See* Part III.)[1]

*

BNYM and the Institutional Investors agree on almost everything. Curiously, however, they are in vehement disagreement about the consequences of this motion. BNYM argues that "objectors fail to show why the conversion motion should matter," and that "objectors' motion is, literally, much ado about nothing." (BNYM Br. 23-24.) The Institutional Investors, on the

[1] The Steering Committee submits this memorandum in reply on behalf of all Respondents except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; 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; Ambac Assurance Corporation; and The Segregated Account of Ambac Assurance Corporation. In addition, the Knights of Columbus and the other clients represented by Talcott Franklin P.C., do not join in or oppose the order to show cause/motion at this time.

other hand, point to the "devastating consequences" that would ensue if "Objectors succeed in their effort to thwart the Trustee's use of Article 77," and they argue that "disregard of the trustee's right to seek an Article 77 Instruction will have profound consequences for certificateholders and trustees." (Institutional Investors Br. 18-19.)

Both are wrong. BNYM's argument that this motion is about "nothing" is belied by the very fact that they have opposed it. (*See* Part II.A.) And the Institutional Investors' parade of horribles is a scare tactic that this Court must disregard. It is nonsense to suggest that the mere decision to convert this proceeding to a plenary action would cause the settlement to "collapse entirely." (Institutional Investors Br. 19.) A plenary action simply would ensure that BNYM and the Institutional Investors will be subject to full discovery and a full and fair hearing. And if it turns out that the proposed settlement cannot withstand that scrutiny, then certainly no trust "will be left with no remedy at all." (Institutional Investors Br. 19.) Although it may be true that certificateholders that do not have 25% of the voting rights of a trust cannot themselves sue (Institutional Investors Br. 19), it is also irrelevant. Having failed to obtain approval of this settlement, BNYM (which is not subject to any no-action clause) would be duty-bound to find another, likely more profitable, course of action to recover on behalf of certificateholders – even those that do not hold 25% of the voting rights of any trust.

This motion is neither about "nothing" nor does the fate of the proposed settlement turn on it. It is simply about the proper procedure under the CPLR for resolving a dispute of this magnitude and complexity. Respondents respectfully submit that the CPLR requires the Court to convert this proceeding into a plenary action and ask the Court to enter an order accordingly pursuant to CPLR § 103(c).

ARGUMENT

I. THE PLAIN MEANING OF ARTICLE 77 EXCLUDES THIS ACTION AS A "TRUST FOR THE BENEFIT OF CREDITORS."

There is no dispute that a "trust for the benefit of creditors" is expressly excluded from Article 77. And there is no meaningful dispute that the 530 trusts that are part of the proposed settlement are "trusts" that issued debt securities, and that the certificateholders are therefore "creditors."[2] Thus, under the plain meaning of the statute, this proceeding cannot be maintained under Article 77.[3]

BNYM argues that the Court should simply ignore the plain meaning of Article 77. Indeed, BNYM *criticizes* respondents for "assum[ing], without citing to *any* authority whatsoever, that any trust that has creditors is a 'trust for the benefit of creditors.'" (BNYM Br. 4 (emphasis in original).) But it is not necessary to rely on authority to establish that the words of a statute mean what they say. Indeed, BNYM itself repeatedly argues elsewhere in its own brief that "it is fundamental that, when the language of a statute is clear and unambiguous, courts are obligated to construe the statute so as to give effect to the plain meaning of the words." (BNYM Br. 3-4 (internal punctuation and citations omitted).)

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[2] BNYM and the Institutional Investors each devote a single footnote to the argument that the certificates are something other than debt. The Institutional Investors cite to a single law review article and BNYM relies solely on unspecified SEC rulings and treatises that were expressly rejected by a federal district court. The authority from actual courts has plainly treated certificates like those at issue here as debt. (Opening Br. 4-5.) Even BNYM expressly concedes that some of the 530 trusts issued debt securities. (BNYM Br. 4 n.3) (stating its position that only the "vast majority of the [t]rusts here did not issue debt."). Thus, even if the Court were to hold that many or most of the trusts did not issue debt securities, still it would be necessary to exclude the trusts that BNYM concedes issued debt from this proceeding in order to comply with the exception to Article 77 for "trust[s] for the benefit of creditors."

[3] Nor does *In re IBJ Schroder Bank*, No. 101/530/1998 (N.Y. Sup. Ct. N.Y. County Aug. 16, 2000), provide an example of an Article 77 proceeding whose beneficiaries were creditors. That case does not involve a security, with a fixed maturity date, entitling beneficiaries to regular payments of principal and interest.

BNYM's sole argument why this Court should ignore the plain meaning of the exception is that "a wealth of precedent mak[es] clear that 'trust for the benefit of creditors' is a term of art that has a precise and well understood meaning: it refers to a 'state law counter-part to Chapter 7 liquidation in bankruptcy.'" (BNYM Br. 4 (internal citations omitted).) None of that authority has anything to do with Article 77, however, and certainly none of it provides that the words "trust for the benefit of creditors" must always refer to liquidation in bankruptcy. The authority that BNYM relies on simply states that there exists a procedure in New York that permits a debtor in bankruptcy to transfer assets to a trust for the benefit of a creditor. BNYM does not point to anything in the text of Article 77 (or anything else in the CPLR) that instructs the Court to construe the exception to Article 77 as limited to that particular procedure.

There are at least four reasons why the Court should give the words of the exception their usual and commonly understood meaning, rather than the technical and arcane meaning that BNYM ascribes to them.

First, virtually all of the authorities that BNYM relies on state simply that if a term appears frequently in the *same legal context* and is interpreted as a term of art, then another reference to that term in the *same legal context* should be interpreted in a similar manner.[4]

[4] *See Perkins v. Smith*, 116 N.Y. 441, 448 (1889) (interpreting the terms "individual banker" and "private banker" distinctly, consistent with their frequent usage in the banking statutes, despite the fact that one banking statute had used them synonymously); *People v. Reed*, 265 A.D.2d 56, 66 (2d Dep't 2000) (interpreting the words "criminal transaction" in a criminal statute consistent with the definition of that phrase in a different criminal statute); *Skeels v. Paul Smith's Hotel Co.*, 185 N.Y.S. 665, 667-68 (3d Dep't 1921) (interpreting the meaning of "employee" in the worker's compensation statute consistent with its prior use under state employment law); *In re New York Constr. Materials Ass'n, Inc. v. New York State Dep't of Envtl. Conservation*, 83 A.D.3d 1323, 1326-27 (3d Dep't 2011) (defining "on behalf of" in an environmental statute according to both legislative history and the settled legal meaning of the term as indicated by more than 2,900 prior uses of the term in New York legislation, including a statute "pertaining to action(s) brought by the commissioner of environmental conservation").

Article 77 governs express trusts. The "term of art" that BNYM refers to arises in a completely different legal context – debtor-creditor law – and thus the authorities that BNYM relies on do not apply.

There is no authority – let alone a "wealth of precedent" – that requires a Court to ignore the plain meaning of a statute because of a "term of art" that is recognized in an entirely different area of law. To the contrary, courts in New York routinely have done precisely the opposite and held that words that are a term of art in one area of law may be construed to mean something different in another area of law. *See, e.g.*, *People ex rel. Tsukuda v. Superintendent, Clinton Correctional Facility*, 519 N.Y.S.2d 99, 101-02 (N.Y. Sup. Ct. N.Y. County 1987) (noting that "[p]hysical injury may mean different things in different contexts" such as under "Penal Law," or in "worker's compensation proceedings," but settling on "its ordinary meaning" for purposes of whether a parolee facing revocation caused a "physical injury"); *People ex rel. Lefkowitz v. Carlson*, 12 A.D.2d 873 (4th Dep't 1961) ("In the absence of an internal [Public Health Law] statutory definition, the Referee should not have sought out an irrelevant definition of the term 'subdivision' in a different context [of Real Property Law] but should have applied the ordinary or common definition of the term.").

Second, had the legislature indeed intended that this exception be limited to trusts created for creditors in a bankruptcy, then surely it could have said so. The Legislature could have easily used a more specific phrase such as "a trust created by a debtor for the benefit of its creditors" or "a trust arising from a debtor's assignment of property for the benefit of creditors." Indeed, that is exactly what the legislature did for other exceptions to Article 77. For example, one of the other express exceptions to Article 77 provides a very detailed description of the narrow exception: "a trust to carry out any plan of reorganization of real property acquired on

foreclosure or otherwise of a mortgage or mortgages against which participation certificates have been issued . . . ." And two other exceptions specifically refer to other statutory provisions to make clear that the exceptions are to be interpreted as they are understood in those other statutes: "a trust to carry out any plan of reorganization pursuant to sections one hundred nineteen through one hundred twenty-three of the real property law or pursuant to section seventy-seven B of the national bankruptcy act," and "trusts for cemetery purposes, as provided for by sections 8-1.5 and 8-1.6 of the estates, powers and trusts law."

The exception for "trusts for the benefit of creditors" is neither specific nor cross-referenced to another statute. It is generic and broad, and thus must be interpreted in accordance with its plain meaning.

Third, the words of the exception are simple and commonly understood. Nothing about "trust" or "creditors" suggests that the words are arcane or in need of a specialized interpretation. Indeed, trusts routinely are referred to as a "trust for the benefit of X," where X is the beneficiary or group of beneficiaries for whom the trust was established.[5]

Finally, there is a very good reason why the legislature would have chosen to exclude *all* trusts that involve creditors (not just liquidation trusts) from the scope of Article 77. Holders of

[5] *See, e.g.*, *Kassover v. PVP-GCC Holdingco II, LLC*, 73 A.D. 3d 626, 628 (1st Dep't 2010) (referring to a "trust for the benefit of . . . [s]hareholders."); *New York & Boston Despatch Express Co. v. Carroll*, 156 N.Y.S. 14, 15 (1st Dep't 1915) (referring to a "trust for the benefit of the owners."); *Fizzinoglia v.Capozzoli*, 938 N.Y.S 2d 226, (New Rochelle City Ct. Aug. 12, 2011) (referring to a "trust for the benefit of the respondents"); *Washington Mutual Bank v. LKH Assets LLC*, No. 204209/07, 2009 WL 2134026 (N.Y. Sup. Ct. N.Y. County June, 25, 2009) (referring to a "trust for the benefit of Tenants."); *Mount Vernon City School Dist. v. Nova Casualty Co.*, 927 N.Y.S.2d 817, at *9 (N.Y. Sup. Ct. Westchester County Aug.4, 2008) (referring to a "trust for the benefit of workers"); *Chatham Green, Inc. v. Bloomberg*, 765 N.Y.S2d 446, 453 (N.Y. Sup. Ct. N.Y. County 2003) (referring to a "trust for the benefit of people of the State."); *Carona v. Cannito*, 286 N.Y.S.2d 44, 45 (Co. Ct. Onondaga County 1967) (referring to a "trust for the benefit of employees.").

debt are entitled to regular payments of principal and interest on fixed dates and a debtor does not have discretion over whether to make those payments. Those rights to guaranteed payments create legal rights for the creditors that the creditors are entitled to enforce. Thus, trusts that have debt holders as beneficiaries are much more likely to be the subject of external and adversarial conflicts (that is, conflicts that are not merely matters of trust administration) and litigation that Article 77 was designed to avoid. It is unsurprising then, that the legislature would expressly exclude all such trusts from the scope of Article 77.

II. THIS PROCEEDING, AS DEFINED BY BNYM'S PETITION AND PROPOSED ORDER, FAR EXCEEDS THE SCOPE OF ARTICLE 77.

Even if this proceeding is not expressly excluded from Article 77, the Court should exercise its discretion to convert it into a plenary proceeding. BNYM argues that this proceeding was properly brought under Article 77. It is wrong for at least three reasons. First, this is not "much ado about nothing;" BNYM is trying to use Article 77 to deprive respondents of their rights. Second, BNYM continues to simply ignore the relief that it has requested in its own proposed order, much of which is plainly outside the scope of Article 77. Finally, Article 77 applies to matters of intra-trust administration. It cannot be used to adjudicate simultaneously the claims of 530 separate trusts.

A. BNYM Intends to Use Article 77 to Deprive Respondents of Substantive Rights.

First, BNYM argues that converting this action to a plenary proceeding would have no practical impact on the litigation – and that this motion is "literally, much ado about nothing." (BNYM Br. 24.) But BNYM has always been free to stipulate to the conversion of this action to a plenary proceeding. And if this really were "much ado about nothing," then certainly BNYM was not obligated to file a 24-page brief in opposition to it, nor were the Institutional Investors obligated to file a 26-page brief in opposition.

The fact, however, is that BNYM has argued repeatedly that Article 77 itself requires that this proceeding be conducted in a rush, with limited discovery and without affording respondents their full rights to develop a record and put that record before the Court. On September 1, 2011, counsel for BNYM argued to the federal district court that the reason it decided to file an Article 77 proceeding was because "it's an expedited proceeding because of its simplicity." (Sept. 1, 2011 Tr., 23:4.) More recently, in its March 12, 2012 letter to this Court, BNYM argued that "[a]voidance of further delay is a critical concern here. Article 77 proceedings are intended to be resolved with 'expedition and efficiency.'" (BNYM Mar. 12, 2012 Letter at 1.) In that same letter, BNYM also suggested that the scope of discovery in Article 77 proceedings is limited; a position it now directly contradicts. *Compare* (BNYM Mar. 12, 2012 Letter at 6) (stating that objectors' efforts to seek documents, including loan files, "would improperly transform this case from an Article 77 proceeding . . . into a plenary litigation of the settled claims") *with* (BNYM Br. 24) ("Nor does anyone argue that the *scope of disclosure* depends on whether (or not) this case proceeds under Article 77.") (emphasis in original).

In short, BNYM repeatedly has attempted to use the guise of Article 77 to deprive respondents of the rights that they would have in a plenary action, and there is every indication that BNYM intends to continue to do so. BNYM may believe that is "much ado about nothing," but respondents respectfully disagree.

B. BNYM Continues Willfully to Disregard the Demands for Relief in Its Own Proposed Order.

BNYM began this action by filing a petition under Article 77 and a Proposed Order and Final Judgment. The Proposed Order and Final Judgment demands several forms of relief, many of which go well beyond the scope of Article 77. (Opening Br. 7-9.) Throughout the course of

this action, in federal court and now before this Court, BNYM has preferred to pretend as if its Proposed Order and Final Judgment simply did not exist.

Thus, BNYM argues here that the purpose of this proceeding is merely to seek approval for its having engaging in "matters of oversight and management of trust assets," (BNYM Br. 8), and that all of the relief that it seeks "relate[s] to the ultimate approval or disapproval of the Trustee's *discretionary* acceptance of the Settlement Agreement, a matter that falls well within courts' understanding both of the scope of Article 77 and of 'trust administration.'" (BNYM Br. 10) (emphasis added). These arguments are flatly contradicted by BNYM's own proposed order.

For example, BNYM may be right that Article 77 may, under certain circumstances, be used to affirm that a trustee acted within its discretion by settling a claim on behalf of a trust. It cannot, however, be used to ask the Court to reach its own independent view of the purported substantive fairness of the settlement and to ratify the legal propriety of the trustee's actions. But that is precisely the relief that BNYM seeks here. Paragraph (i) in BNYM's proposed order seeks a ruling that "[t]he Trustee appropriately evaluated . . . the strengths and weaknesses of the claims being settled." That is not a finding that the trustee acted within its discretion; that is instead a finding that the Court agrees with the trustee's conclusion. Similarly, paragraph (j) of the proposed order would have the Court conclude that the negotiations that led to the settlement were arm's-length and fair. Again, that has nothing to do with whether the trustee acted within the scope of its discretion. That is instead asking this Court to opine on its own views of the settlement negotiations and the fairness of the settlement itself. These are questions of substantive law and fact that do not arise from the trust agreements and are, therefore, not matters of trust administration.

Moreover, paragraph (p) of BNYM's proposed order even seeks an order barring all certificateholders from ever seeking relief against *BNYM* for claims arising out of its negotiation of the settlement agreement. That too is unrelated to trust administration or the discretion of the trustee to settle claims. That is simply an attempt by the Trustee to use Article 77 and this proceeding to protect its own interests. [6]

BNYM is bound by the terms of its own Proposed Order and Final Judgment. Thus, BNYM's contention that "at bottom, this proceeding has been brought to settle one proposition: that the Trustee reasonably exercised its discretion to settle claims," (BNYM Br. at 11), is simply not correct. The scope of the relief that BNYM is actually seeking here is far broader than BNYM has represented to the Court, and also far greater than the scope of Article 77 would permit.

C. Article 77 Has Never Before Been Used to Approve the Potentially Conflicting Rights of Hundreds of Trusts in the Same Proceeding.

In addition to the scope of relief in BNYM's Proposed Order and Final Judgment, BNYM's attempt to seek this Court's approval of the settlement of the claims of 530 separate trusts in a single proceeding far exceeds the scope of Article 77. BNYM argues that "[i]f the Trustee has contractual authority to negotiate and enter into 530 separate settlement agreements, there is no reason why it needs additional authority to resolve the claims of all 530 Trusts in one agreement." (BNYM Br. 13.) But the question whether BNYM has the authority to settle the claims of all 530 trusts in one settlement, and the fairness of that proposed settlement, is not a matter of "trust administration." It is instead a matter relating to the rights and potential conflicts

[6] Accordingly, although the relief sought in the cases cited on pages 8 and 9 of BNYM's opposition brief may have involved mere "matters of oversight and management of trust assets," the relief sought here does not.

of many separate trusts. Indeed, BNYM has not pointed to anything in any trust agreement that permits the trustee to combine the claims of more than one trust in a single settlement or proceeding. The actions of the trustee, whether the Court approves of them or not, went beyond the scope of any single trust that it was administering – and therefore beyond the scope of Article 77.[7]

III. THE "NO-ACTION CLAUSE" DOES NOT DICTATE WHAT KIND OF PROCEEDING THIS COURT SHOULD CONDUCT UNDER THE CPLR.

The Institutional Investors argue that the "no action clause" in the PSAs "bar[s] the objectors" from making this motion to convert this proceeding to a plenary action. (Institutional Investors Br. 20.) This argument is so implausible that even BNYM does not attempt to make it. The Institutional Investors accurately quote the text of the no-action clause. It provides that "[n]o Certificateholder shall have the right . . . to *institute* any suit, action or proceeding in equity or in law upon or under or with respect to this Agreement, unless such holder [complies with the no-action clause]." (Institutional Investors Br. 21 (emphasis added).)

This action was *instituted* by BNYM – not by any certificateholder. BNYM also proposed, and this Court so ordered, an elaborate notice program to inform certificateholders of this proceeding and *invite* them to object and be heard.[8] Indeed, respondents' petitions to

[7] BNYM relies on *In re Fales*, 431 N.Y.S.2d 763 (Sur. Ct. N.Y. County 1980), to argue that it is appropriate for a trustee to seek court assistance and approval with matters involving inter-trust coordination and management. But there is no indication anywhere in that case that it involved an Article 77 proceeding. Rather, it is a proceeding of the Surrogate Court, involving the dissolution of a corporation whose shares were owned in part by a group of trusts.

[8] Moreover, the Institutional Investors essentially are arguing that the no-action clause somehow prevents this Court from considering whether the CPLR prohibits this action from proceeding under Article 77. But certainly it cannot be the case that if this Court agrees that this proceeding was improperly filed under Article 77, then the Court is bound by section 10.08 of the PSAs nevertheless to permit this proceeding to continue.

intervene in this proceeding were *unopposed* by BNYM and the Institutional Investors – and granted by the Court.[9]

No court has ever held – and, so far as respondents know, no party has ever before had the audacity to ask a court to hold – that a no-action clause prohibits a certificateholder that was *invited* to participate in a proceeding from making a *motion* to a court. The Institutional Investors state that "[n]umerous courts have held that similar provisions bar Certificateholders from dictating to the Trustee *how* it will litigate or settle Trust claims." (Institutional Investors Br. 21.) But the Institutional Investors do not cite even a single one of these "numerous" cases. Indeed, the "Institutional Investors" themselves are merely certificateholders. They are part of this proceeding only because they did precisely what respondents did – they filed a petition to intervene with this Court. It is the height of hypocrisy to argue that certificateholders who agree with the trustee are free to participate in this action as parties because they agree with the trustee, but certificateholders like respondents are not because they disagree with the trustee.

More important, BNYM and the Institutional Investors have represented repeatedly both orally and in writing that the very *purpose* of this proceeding was to allow certificateholders that disagreed with BNYM to be heard by this Court. These are just a few examples (all emphasis added):

[9] Nor is the motion an attempt by the objectors to "avail[ ] [themselves] . . . of any provisions of this agreement to affect, disturb or prejudice the rights of the Holders of any other Certificates." (Institutional Investors Br. 21 (quoting PSA § 10.08.)) The Institutional Investors do not have a "right" to an Article 77 proceeding, the appropriateness of which is solely for the Court to decide, based on the scope of the relief sought and the law. Nor can the Institutional Investors identify any "provision" of the agreement that objectors are attempting to avail themselves of, given that, as explained herein, they were *invited* by BNYM to object and be heard.

- "We filed this Article 77 proceeding in part because *we wanted to give notice to the trust beneficiaries and to give them an opportunity to weigh in either in support of the settlement or in opposition to the settlement*." Matthew Ingber, counsel for BNYM, Transcript of Proceedings before Pauley, J., Sept. 1, 2011 at 21:6-9.

- "BNYM filed a proceeding pursuant to Article 77 of the New York C.P.L.R., which provides a mechanism to hear such a request, *to give all trust beneficiaries the opportunity to be heard, and to resolve these questions conclusively*." BNYM Consolidated Response to Objections, October 31, 2011 at 6-7.

- "The issue is that this settlement is here on an Article 77 proceeding. *If people care about their investment, and they don't like this settlement, it is not too much for the Court to say you have had 60 days-notice, show up and tell me you don't like it, object*." – Kathy Patrick, counsel for the Institutional Investors, Transcript of Proceedings before Kapnick, J. Aug. 5, 2011, at 53:6-10.

- "The Trustee has commenced a proceeding under Article 77 of the CPLR because, among other reasons, *not every Trust beneficiary may agree with the Trustee's judgment*." BNYM Memorandum of Law in Support of Its Verified Petition Seeking Judicial Instructions and Approval of a Proposed Settlement, June 29, 2011 at 1.

- "The trustee entered into a settlement. As we stated in the verified petition that we filed in State court. There was some concern that there would be conflicts among certificateholders about what the right way forward was, whether the settlement should be entered into, whether certificateholders would prefer to proceed with their own litigation, in some that had been filed, and some maybe that would be anticipated to be filed in a different fashion. And so we went to court, we entered into the settlement agreement, we went to court, we gave notice to the certificateholders, and here we are." Matthew Ingber, counsel for BNYM, Transcript of Proceedings before Pauley, J., Nov. 3, 2011 at 5:17-6:2.

Indeed the Institutional Investors argue in their own brief in opposition to this motion that "Article 77 ensures that the views of all certificateholders, not just those with the requisite 25% stake, can appear before the court to be heard on the issues presented." (Institutional Investors Br. 22.) Apparently the Institutional Investors believe that the no-action clause somehow permits certificateholders to object to the *entire settlement* – and to be heard in court to state that objection and challenge the trustee's judgment – but it does not allow the same certificateholders to file a motion to argue that the CPLR does not permit the form of proceeding that the trustee

chose. In other words, the Institutional Investors are arguing that certificateholders are free to – indeed, *invited* to – attempt to displace the trustee's judgment about the settlement. But they are prohibited from seeking to displace the trustee's judgment about the form of proceeding that should take place in this Court. Respondents respectfully submit that this is a distinction that appears nowhere in the PSAs, defies all reason, and should be rejected by this Court.

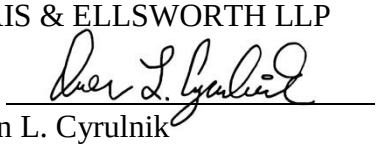
CONCLUSION

For all of the reasons argued above and in respondents' opening brief, the Court should convert this action from an Article 77 proceeding into a plenary action.

Dated: New York, New York
April 19, 2012

Respectfully submitted,

GRAIS & ELLSWORTH LLP

By: 
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