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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE BANK OF NEW YORK MELLON'S
<u>BRIEF IN SUPPORT OF THE SETTLEMENT</u>

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PRELIMINARY STATEMENT

Nearly two years ago, the Trustee filed this Article 77 proceeding to seek approval of the largest private litigation settlement ever. It said, at the time, that its decision to enter into the Settlement was well within the bounds of reasonableness. It argued then that the cash payment was more than adequate, in part because Countrywide cannot pay a judgment even approaching $8.5 billion. In its Petition, the Trustee noted the extreme difficulty of the alternative of separate litigations involving hundreds of separate trusts and separate groups of Certificateholders—almost none of whom (then or now) had even sought to instruct the Trustee to take any action against Countrywide. It described the unprecedented servicing improvements (since valued at more than $3 billion) that could be won only in a global settlement. It noted the support of the world's largest and most sophisticated investors, with trust holdings of tens of *billions* of dollars and the sole incentive of maximizing the settlement amount. It said, in short, that it would have been *un*reasonable to refuse to enter into this landmark Settlement.

Now, despite ever-changing and meritless attacks on the only trustee in the industry that has yet achieved any recovery for its certificateholders, the original rationale for entering into the Settlement is no less compelling. The process of reaching the Settlement was reasonable, fair, and easily satisfied the standards set by the governing agreements and industry practice. The Trustee then, and now, receives no benefit from the Settlement. And if the Court chooses to review the merits of the Settlement from scratch, the Settlement is at least as fair today as it was two years ago.

The objectors would like the Court to decide on its own whether the Settlement is "substantively fair," without regard to the Trustee's expert advisors and business judgment, the negotiations, or any of the facts that have consumed nearly two years of discovery. By transferring to the Court the burden of exercising the discretion vested in the Trustee, that standard ordinarily would be more difficult to apply. Here, however, "substantive fairness" is straightforward, not just because of the staggering size of the Settlement, but because the objectors have decided not to present any evidence to the contrary: *none* of their experts was willing to opine that the Settlement is too small. In any event, the Court need find only that the Trustee did not act in bad faith and that its decision was not so egregiously mistaken as to be an abuse of discretion.

Under either standard, the result is the same: the Settlement should be approved.

STATEMENT OF FACTS

The Governing Agreements

The 530 securitization trusts that are subject to the proposed Settlement were established between 2004 and 2008. Under the governing contracts,[1] a loan originator, or Seller (here, Countrywide Home Loans, Inc. ("Countrywide")), sold portfolios of loans secured by mortgages on residential properties ("Mortgage Loans") to another entity, the Depositor. The Depositor conveyed the Mortgage Loans to The Bank of New York Mellon, as Trustee ("BNYM" or "Trustee"). Investors bought securities backed by trust assets from the Depositor, or an affiliate, through an underwriter. The Master Servicer is charged with, among other things, collecting debt payments on the Mortgage Loans, taking necessary enforcement action against borrowers, and sending payments to the Trustee for distribution to the Certificateholders.

[1] All but seventeen of the Trusts are governed by Pooling and Servicing Agreements under which BNYM is the trustee. The rest are governed by Indentures and Sale and Servicing Agreements under which BNYM is the indenture trustee. The differences between the two forms of documentation are generally not important for purposes of this proceeding. The PSAs, indentures, and SSAs are collectively referred to herein as the "PSAs." Cites herein to "PSA" are to the PSA for CWALT 2006-OC7 (Ex. 1). All of the contracts are governed by New York law.

The representations and warranties of the Seller—Countrywide—are at the core of this case. In each PSA, Countrywide represented and warranted various matters regarding each Mortgage Loan, such as the ratios of the loan amount to the home's value and of the monthly payment to the borrower's income. The remedy for a breach of a representation or warranty is specified in Section 2.03 of the PSAs. (Ex. 1). It provides that, upon discovery and notice of a breach with respect to a particular Mortgage Loan that materially and adversely affects the interests of the Certificateholders, the Seller shall either cure the breach within 90 days or repurchase the Mortgage Loan at its "Purchase Price" (*i.e.*, the loan's unpaid principal balance).

The State of Play in 2010

In the summer of 2010, no trustee in the residential mortgage-backed securitization ("RMBS") industry had filed suit to enforce either loan-repurchase or servicing obligations, and no investors had done so on behalf of securitization trusts. Several monoline insurers had filed lawsuits on their own behalf, but none had come close to judgment. Indeed, to this day, no trustee, investor, or monoline has recovered a single dollar by litigating repurchase or servicing claims to judgment.[2] For example, MBIA sued Countrywide in 2008, and Justice Bransten denied the latest in a series of successive summary judgment motions only this week. Nor, to our knowledge, has any RMBS trustee ever brought litigation without a direction and indemnity from investors.[3]

One prominent RMBS reporter recently summarized the state of affairs as follows:

> MBS investors struggled mightily to amass the requisite voting rights to begin the process of asserting breach-of-contract claims under pooling and servicing agreements that favored sponsors. For years after the crisis, we saw only

[2] One case in which a monoline won at trial is now on appeal. *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,* 892 F. Supp. 2d 596, 599 (S.D.N.Y. 2012).

[3] Since 2010, when investors have given a direction and indemnity, some trustees, including BNYM, have sued securitization sponsors and originators.

> sporadic private-label put-back claims by an investor or two, none of whom made much headway in litigation. To date, more than five years after the crash of 2008, the embattled Bank of America settlement remains by far the biggest potential put-back recovery for investors in private-label mortgage-backed securities. More investors have stepped up and sued individually via trustee actions, but none of their cases have yet settled—and even if they do, money will flow only to plaintiffs, not to investors who didn't bring claims.
>
> Realistically, most MBS investors won't be able to obtain across-the-board recoveries under the PSAs they agreed to unless trustees have the power to sign global deals. The banks that acted as MBS sponsors can and have dragged out individual cases. Only when they're faced with the prospect of broad claims will they take action. And once they do, they want broad releases.

Alison Frankel, Reuters, *Do MBS trustees have power to make global put-back deals?* (Apr. 15, 2013) (Ex. 2).

It was against that backdrop that Kathy Patrick, on behalf of the Institutional Investors, sent a series of letters to the Trustee in the summer of 2010, [redacted] BNYM_CW-00253760-65 (Ex. 3); BNYM_CW-00250004-21 (Ex. 4). [redacted] BNYM_CW-00008784 (Ex. 5); BNYM_CW-00285661-74 (Ex. 6); BNYM_CW-00249933-34 (Ex. 7); II-0000040-49 (Ex. 8). As discussed below, [redacted]

The Notice of Non-Performance and Settlement Negotiations

On October 18, 2010, Ms. Patrick sent a letter to the Trustee and Master Servicer—at that time, BAC Home Loans Servicing, Inc.—titled "HOLDERS' NOTICE TO TRUSTEE AND

MASTER SERVICER OF FAILURE OF MASTER SERVICER TO PERFORM GIVEN [sic] PURSUANT TO § 7.01(ii).” BNYM_CW-00008683-96 (Ex. 9). That letter was not a notice of an Event of Default; instead, it purported to trigger a cure period in Section 7.01(ii) of the PSAs, which states that a material breach of the PSAs by the Master Servicer could become an Event of Default if not cured within 60 days after the Master Servicer receives notice of the breach from either the Trustee or, in this case, holders of 25% of the Voting Rights in each trust. Following the expiration of the 60-day cure period, the noticing parties—and only the noticing parties—may serve on the Trustee a notice of an Event of Default. PSA §§ 7.01(ii), 10.08 (Ex. 1). Holders of 25% of the Certificates may also offer a direction and indemnity for the Trustee to sue the Master Servicer, and if the Trustee does not act within 60 days, the Certificateholders may sue on the trust’s behalf – but only if those same Certificateholders have served a notice of an Event of Default, and only if the Trustee refuses to act on the proffered direction and indemnity. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 951 N.Y.S.2d 84 (Sup. Ct. N.Y. Cnty. 2012), *aff’d*, 96 A.D.3d 684 (1st Dep’t 2012); *see also* PSA § 10.08 (Ex. 1).

[redacted] BNYM_CW-00008762-65 (Ex. 10). [redacted] Kravitt Tr. 165-66 (Ex. 11).

Early in that process, the Institutional Investors agreed that [redacted] II-0000247 (Ex. 12). [redacted] *Id.* Thus, without conceding that any cure period had been triggered, the investors, Bank of America, and the Trustee entered into a forbearance agreement, deferring the expiration of any cure period while the parties explored the possibility of a settlement. BNYM_CW-00271275-81 (Ex. 13). "[T]he purpose of the forbearance agreement was to create stability while [the parties] thought there was still a good chance of negotiating something constructive." Kravitt Tr. 183 (Ex. 11). The parties extended the forbearance agreement several times after that, at shorter intervals, to allow them to continue settlement discussions.[4] The forbearance agreement did not preclude any other holders from filing their own notice of non-performance and seeking to declare an Event of Default. Kravitt Tr. 629:17-630:4 (Ex. 11)

[redacted] *See* Mirvis Tr. 90:12-91:16 (Ex. 22) [redacted]

[4] *See* BNYM CW-00270083-88 (Ex. 14), BNYM CW-00268756-59 (Ex. 15) (Jan. 28, 2011, Feb. 28, 2011, extending by 30 days); BNYM CW-00266296-302 (Ex. 16) (Mar. 31, 2011; 22 days); BNYM CW-00271369-73 (Ex. 17) (Apr. 19, 2011; 10 days); BNYM CW-00271318-23 (Ex. 18) (May 2, 2011; 7 days); BNYM CW-00263406-10 (Ex. 19) (May 9, 2011; 17 days); BNYM CW-00262430-33 (Ex. 20) (May 25, 2011; 19 days); BNYM CW-00271376-79 (Ex. 21) (June 13, 2011; 16 days).

[redacted] Laughlin Tr. 237:6-12 (Ex. 23) [redacted] The Notice of Non-Performance still remains outstanding, so that, if the Settlement is not approved, the 60-day cure period (assuming it was triggered in the first place) will expire soon thereafter. Settlement Agreement ¶ 7 (Ex. 24). And because the Forbearance Agreements also toll statutes of limitation and repose on the trusts' claims, Certificateholders would remain free (as they were two years ago) to direct the Trustee to initiate litigation.

As one would expect, this multi-billion-dollar transaction—the largest settlement of private litigation in U.S. history—did not happen overnight, and it did not happen easily. The discussions were often acrimonious, and the negotiations over many terms were complex. [redacted] *See, e.g.*, Mirvis Tr. 85:17-25 (Ex. 22) [redacted] Laughlin Tr. 224:11-14 (Ex. 23) [redacted] Kravitt Tr. 158-59 (Ex. 11) ("Sometimes you have really good meetings and you think ah, we're going to have a settlement. Sometimes you have frustrating meetings and you wonder will we ever have a settlement").

Throughout the negotiations, the Trustee retained various outside advisors. Beginning in October 2010, it retained Mayer Brown.[5] In March of 2011, it retained RRMS Advisors, a

[5] Although Mayer Brown represented the Trustee throughout settlement negotiations, the Trustee hired Mayer Brown initially "to represent[] the [Trustee] in connection with investor directions arising in connection with the notice of non-performance." BNYM_CW-00285661-74 (Ex. 6). Though the investors ultimately never agreed with the Trustee on the terms of a

mortgage securities consultancy, to advise on the servicing and methodological issues that the parties were discussing. And in the spring of 2011, as it finally began to appear that the parties were making real progress toward a proposed settlement, the Trustee retained several other advisors to prepare reports on key issues that the Trustee thought relevant to the ultimate decision whether to enter into any settlement that might emerge from the negotiations.

The Trustee's Expert Reports

Before deciding whether to commit to the Settlement, the Trustee received five formal reports to help it evaluate the reasonableness of the Settlement:

Countrywide valuation: The party on which the PSAs impose liability for loan repurchases is Countrywide. *See* PSA § 2.03 (Ex. 1). The Trustee retained Capstone Advisory Group, a leading business-valuation consultancy, to estimate the amount that a judgment creditor could recover from Countrywide, assuming it prevailed in litigation. Capstone concluded that "the value of the assets of [Countrywide Financial Corp. ("CFC")] would enable a maximum recovery of no more than $4.8 billion . . . , excluding any liquidation costs required to convert all loans, leases, and other assets to cash." Capstone Report 3 (Ex. 25). The $4.8 billion figure also was premised on the assumption that any "judgment would be sufficient to cause the Trustee to become 99.9% of the total unsecured creditors of CFC." *Id.* at 5. These assumptions meant that $4.8 billion "likely overstates the value of CFC's assets at the hypothetical orderly liquidation and, as such, quantifies the *maximum* potential recovery to the Trustee." *Id.* at 6 (emphasis added).

Successor liability: Given the limited assets of the only party with direct contractual liability for loan repurchases, the Trustee also considered what claims it could bring against

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direction, the very terms of the engagement letter confirmed that Mayer Brown was not retained, as some potential objectors have suggested, to negotiate a settlement.

Bank of America. It retained Professor Robert Daines, of Stanford Law School, who prepared a 58-page single-spaced report evaluating a variety of successor liability theories. Professor Daines not only investigated case law from multiple jurisdictions, but he also pored over dozens of contracts documenting Bank of America's acquisition of Countrywide. His index of documents and cases runs 15 pages. He opined that:

> If Delaware law applies, as I think it would, BAC would probably not be liable unless the Trustee could show that BAC materially underpaid in the Transactions [in which it acquired Countrywide]. Assumption of liability arguments will likely fail given the express language to the contrary in the [Bank of America/Countrywide] Transaction documents; [liability on a theory of] "mere continuation" is unlikely because the primary purchaser was BAC, an entity that had approximately $1.7 trillion in assets prior to the transactions at issue; and a de facto merger [theory of liability] is unlikely because Delaware courts eschew the kind of uncertainty such a holding would bring and tend to focus on whether the sale harmed creditors.

Daines Report 37-38 (Ex. 26). He concluded as follows:

> In the end, I believe that a successor liability case would be difficult to win unless the Transactions materially reduced the value of the legacy Countrywide subsidiaries. It is simply too hard to explain why BAC should be liable—and a fundamental rule of corporate transactions set aside—if the Transactions caused no harm to investors.

Id.

Damages valuation: The amount of damages attributable to breaching loans was, of course, hotly disputed. [redacted]

Laughlin Tr. 227:7-13 (Ex. 23). [redacted]

[redacted] BNYM_CW-00000206-07 (Ex. 27); BNYM_CW-00000167-70 (Ex. 28). [redacted]

Brian Lin, a partner at RRMS with more than 15 years of mortgage industry experience, including having managed Lehman Brothers' relationship with Fannie Mae and Freddie Mac, reviewed and critiqued those analyses, and then arrived at an independent range of damages. Lin did not know that the proposed Settlement Amount was $8.5 billion. Lin Tr. 156:9-17 (Ex. 29). In calculating his range, Lin first tallied losses-to-date in the trusts and projected future losses using estimates of loan default and loss severity. He then multiplied these loss figures to reflect the percentage of losses that had occurred on loans that had breached represented underwriting standards. His conclusion was that the trusts' potential damages were between $8.8 and $11 billion, *without* taking into account Countrywide's limited net worth and other obvious litigation discounts. Even compared to the high end of that range, the $8.5 billion Settlement Amount is a 77% recovery.

Material and adverse effect (causation): The PSA provision that requires Countrywide to repurchase breaching loans, Section 2.03, limits that duty to loans in which Countrywide's breaches of representations and warranties "materially and adversely affect[] the interests of the Certificateholders in that Mortgage Loan."[6] Based on this language, Countrywide argued that if the Trustee were to bring an action to enforce Countrywide's repurchase obligations under Section 2.03 of the Governing Agreements, the Trustee would need to prove, on a loan-by-loan

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6 In the *MBIA* case, Justice Bransten refused to grant summary judgment on any loan—after five years of litigation—because the question of whether alleged breaches had a material and adverse effect required a trial. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008 (Slip. Op. on Mot. Seq. No. 57, Apr. 29, 2013), at 55, 64.

basis: (i) that Countrywide breached specific representations and warranties in the Governing Agreements, (ii) that the breach was material, and (iii) that the breach materially and adversely affected the interests of the Certificateholders in the loan. With respect to the final requirement, Countrywide argued that the Trustee would have to prove, on a loan-by-loan basis, that the breach itself caused Certificateholders to suffer a significant loss. The Institutional Investors took a different position—namely, that a breach is "material and adverse" if it would have affected their investment decision. They also took the position that a loan-by-loan review may not be necessary, and that a properly structured sampling approach could be accepted by a court.

As part of its evaluation of the proposed Settlement, the Trustee obtained an opinion from Professor Barry Adler of NYU Law School. His expert report independently considered cases decided as of early 2011 and concluded that Countrywide's argument is reasonable and could be adopted by a court. As Professor Adler opined, "it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders should turn on the harm caused by the breach." Adler Report 13 (Ex. 30).

Servicing improvements: Finally, the Trustee received an independent review and analysis of the proposed servicing improvements from Brian Lin of RRMS. He concluded that each of the proposed improvements was at least consistent with industry practice and that many were precedent-setting:

> [T]he approaches as outlined for both first and second lien mortgage assets to be reasonable and in accordance with or exceeding customary and usual standards of practice for prudent mortgage loan servicing and administration. It is my opinion that this settlement can be viewed as an industry precedent setting, pro-active approach in regard to establishing a framework to enhance recovery efforts for underperforming loan pools.

Lin Report 6 (Ex. 31).

* * *

Based in part on these expert reports, the Trustee's decision to enter into the Settlement was not a difficult one. Certificateholders with billions of dollars in holdings requested that the Trustee enter into it. The settlement amount—$8.5 billion—was $3.7 billion *more* than Countrywide was able to pay assuming (counterfactually) no other liabilities, and the prospect of recovering from Bank of America under theories of successor liability were dim. The servicing improvements could not be achieved absent a global settlement, and they added significant value (since calculated at approximately $3 billion) to the deal. The "material and adverse" language was, and still is, open to debate, raising the meaningful possibility of loan-by-loan review (for 1.6 million loans) to determine whether any breach existed and actually caused harm to Certificateholders. And the alternative of years of litigation with no certain outcome was one that the Trustee in good faith believed was not in the best interests of Certificateholders.

The Trustee signed the Settlement Agreement on June 28, 2011 and began this proceeding the next day.

ARGUMENT

The objectors seem to agree with the Trustee on the standard of review, which is, in any event, not subject to serious dispute, as it is grounded in decades of New York case law, confirmed in the *Restatement*, and applied in at least one other Article 77 proceeding reviewing a litigation settlement by a securitization trustee. That standard is that a trustee's discretionary action is not subject to control by a court except in cases of bad faith or abuse of discretion. Only if a trustee acted in bad faith, or had a disabling conflict of interest, as when it seeks to purchase trust property for itself, may a court delve into the merits of its decision. Regardless, the evidence here shows not only that the Trustee acted reasonably and in good faith but also that the settlement was substantively fair in every respect, meaning that it must be approved regardless of what the Court thinks about the Trustee's motives or decisionmaking.

Following that standard, after first demonstrating the Trustee's power to litigate and settle (Part I), we show that the Trustee acted in good faith by entering into a settlement that it believed was in the interests of Certificateholders (Part II.A.). That decision was easily within the scope of the Trustee's discretion (Part II.B.)—indeed, the argument could be made that rejecting the Settlement would have been an abuse of discretion. We then address what the objectors have called "substantive fairness" (Part III) which seems to refer to a *de novo*-type review that would apply only if the Court first finds (against all the evidence) that the Trustee acted in bad faith. Remarkably, the objectors have no evidence whatsoever that the Settlement fails their preferred standard. Thus, after nearly two years of delay, in which the objectors have challenged the Trustee's good faith at every turn, that question turns out to be irrelevant to the outcome. Because the objectors effectively concede the adequacy of the Settlement consideration, the Settlement must be approved.

I. The Trustee Has the Power to Enforce and Settle Repurchase and Servicing Claims.

There can be no doubt that the Trustee has the power to enforce claims for the repurchase of securitized loans. *See LaSalle Bank Nat'l Assoc. v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 633 (D. Md. 2002) ("Section 2.01 of the PSA in this case, when read together with other provisions of the PSA, grants [the trustee] the authority to institute this action as the real party in interest"). That power belongs to the Trustee and only the Trustee. *See Asset Securitization Corp. v. Orix Capital Markets, LLC*, 12 A.D.3d 215, 215 (1st Dep't 2004) ("authority [to commence litigation under PSAs] is committed solely to the trustee of the pooled loans"); *Wells Fargo Bank, N.A., Trustee v. Konover*, 2009 WL 2710229, at *3 (D. Conn. 2009) ("The PSA establishes that Wells Fargo as Trustee does have these customary powers [to sue], as other courts have held in cases involving similar PSAs").

Here, the representations and warranties by the Seller and the Master Servicer are made *to* the Trustee (PSA § 2.03(a), (b)), and the PSAs convey to the Trustee "all right, title, and interest in the Trust Fund together with the Depositor's right to require each Seller to cure any breach of a representation or warranty." PSA § 2.01(b); *see also* PSA § 2.04 (same) (Ex. 1). Interpreting identical language, Judge Buchwald held that "[t]he plain meaning of these words ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted." *LaSalle Bank Nat'l Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001).

Of course, it is equally well-established that "[a]n incident to the right to sue or be sued is the power to compromise or settle suits." *Levine v. Behn*, 282 N.Y. 120 (1940); *see also Brown v. John Hancock Mut. Life Ins. Co. of Boston*, 145 Misc. 642, 646 (N.Y. Mun. Ct. 1932) ("The power to sue ordinarily carries with it the power to settle."). The folly of the alternative—that any trustee that brings suit is irrevocably committed to gamble on ultimate success—is obvious.

II. The Trustee Is Entitled to Settle If It Acts Reasonably and in Good Faith.

Judicial review of trustees' conduct is defined by the governing contracts and the law of trusts. A court's role is to determine whether the trustee's actions are consistent with its powers and duties. Under longstanding law, courts review trustees' discretionary decisions for two elements—good faith and reasonableness.

"Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith." *Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010); *see also In re First Trust & Deposit Co.*, 280 N.Y. 155, 163 (1939) ("We find no abuse of discretion and no evidence of bad faith or that the trustee administered the trust in a careless or negligent manner"). The *Restatement* agrees.[7] Section 187 says that "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an *abuse by the trustee of his discretion*." (Emphasis added.); *see also id.* § 259 cmt. d ("Where a matter rests within the discretion of the trustee, the court ordinarily will not instruct him how to exercise his discretion").

In fact, numerous authorities have applied that standard of review to trustees' decisions to settle. The *Restatement*, Section 192, provides that "[t]he trustee can properly compromise, submit to arbitration or abandon claims affecting the trust property provided that in doing so he exercises *reasonable prudence*." *In re IBJ Schroder* is another example in a highly similar context. In that Article 77 proceeding, a securitization trustee sought approval of a settlement. Nearly 200 beneficiaries objected, arguing that the trustee had settled too cheaply and "failed to take any discovery." Index No. 101580/98, slip op. at 5-6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000). The court refused to "invalidate the proposed settlement merely because certain beneficiaries believe a greater recovery might be obtained if the . . . action is submitted to an expensive and unpredictable litigation." *Id.* The trustee's decision to compromise "was entitled to judicial deference," and "the trustee's view must prevail" because of "the trustee's showing of [its] reasonableness." *Id*. at 6 ("the trustee's decision to compromise the . . . action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference").

[7] Unless otherwise noted, cites to *Restatement* are to the *Restatement (Second) of Trusts* (1959).

A. The Trustee's Decision Was in Good Faith Because the Trustee Entered Into the Settlement to Benefit Certificateholders.

The objectors have challenged the Trustee's good faith with an ever-changing array of speculative conflicts of interest. These attacks incorrectly presuppose that a trustee acts in bad faith merely because it has a potentially conflicting motive. Bad faith, however, requires not just that a conflicting motive exist, but also that the trustee has awareness of the conflicting motive, and the trustee then acts on it to the detriment of beneficiaries—none of which occurred here. The evidence all points in one direction—the Trustee settled in order to benefit Certificateholders, and no other interest played any role in its decision.

Even based solely on depositions taken by the objectors, the evidence shows unambiguously that the Trustee entered into the Settlement because it believed the Settlement was in the best interest of Certificateholders.

- Rick Stanley (head of Trust Committee)
  - [redacted] Tr. 181-82 (Ex. 32).
  - "[redacted] Tr. 183-84.
  - [redacted] Tr. 184-85.
- Bob Griffin (Managing Director, Corporate Trust)
  - [redacted] Tr. 63 (Ex. 33).

- [redacted] Tr. 65-66.

- Loretta Lundberg (Managing Director, Corporate Trust): [redacted] Tr. 213-14 (Ex. 34).

By contrast, the BNYM witnesses were not even aware of any of the Trustee's supposedly conflicting personal interests:

- Bob Bailey (in-house counsel)
  - [redacted] (Ex. 35).
  - [redacted] Tr. 322.
  - [redacted] Tr. 146.
- Jason Kravitt (Mayer Brown): [redacted] Tr. 354 (Ex. 11).
- Loretta Lundberg: [redacted] Tr. 315-16 (Ex. 34).
- Rick Stanley: [redacted] Tr. 104 (Ex. 32).

- Terry Chavez (head of BNYM document custody): [redacted] Tr. 78-79 (Ex. 36).
- Doug Chapman (risk officer): [redacted] Tr. 155, 168 (Ex. 37).

To prove bad faith, the objectors would have to show that the Trustee entered into what it thought was a bad settlement in order to benefit itself. They have not done so. Regardless of what "benefit" the objectors might imagine, there is simply no evidence that the Trustee did not believe that the Settlement was good for investors. By definition, the Trustee acted in good faith.

B. The Trustee's Decision Was Not an Abuse of Discretion.

As long as a trustee acts in good faith, its decision cannot be disturbed except in rare cases. The reasonableness of the Trustee's decision necessarily follows from the merits of the Settlement (Part III) and the absence of any evidence that the Settlement is inadequate. But several other factors, discussed in this section, are sufficient on their own to show that the Trustee did not abuse its discretion.

1. A large and diverse group of sophisticated investors participated in the negotiations and support the Settlement.

The support of a diverse plurality of investors strongly supports a finding that the Trustee's decision was reasonable. At the time of the Settlement, the Institutional Investors held $34.2 billion in affected securities and had $8.4 trillion in assets under management. Fischel Exs. C-D. Those vast holdings gave them a tremendous and direct interest in the health of the trusts. It is difficult to imagine an interest of anything approaching equivalent magnitude that would lead the investors to work *against* their own securities holdings. According to Professor Fischel, former Dean of the University of Chicago Law School, and a professor at the law and business schools there, the fact "[t]hat these sophisticated institutional investors support the Settlement is powerful economic evidence of its reasonableness and adequacy." Fischel Report ¶ 23 (Ex. 38).

The Institutional Investors have tens of billions of dollars of their own and their clients' money at stake, and they are also among the most capable bond investors in the world. For many, their entire business consists of analyzing and pricing fixed-income securities. But they are not alone. Another holder of $630 million in affected securities, Monarch Alternative Capital LP, announced its support as well, in response to AIG's false suggestion that it represents some silent majority. *See* Feb. 4, 2013 letter to the Court (Ex. 39). Just yesterday, a holder of yet another $550 million in affected securities, Fir Tree, Inc., "urge[d] the Court to . . . approve the proposed settlement" because it is "fair and reasonable." *See* May 2, 2013 letter to the Court (Ex. 40). Fir Tree noted the "staggering task and complexity of organizing a settlement of more than 530 trusts and the costs associated with having to potentially reunderwrite and investigate millions of mortgage loan files if the settlement were not approved." *Id.*

The supporters' holdings far exceed those of even *potential* objectors—many of whom have now withdrawn. The ruling that the objectors seek is breathtaking: a decision supported by the Trustee, each of the 22 Institutional Investors, and two other major holders, is not only wrong, but so obviously wrong as to constitute an abuse of discretion. In short, the 24 separate votes of support that the Trustee has now received are alone sufficient evidence to show that the Trustee's decision was, at a minimum, not an abuse of discretion.

2. <u>The negotiations were conducted by experienced counsel and were highly adversarial.</u>

Another factor supporting a finding of reasonableness is that the Settlement was the product of hard fought negotiations. The Court of Appeals, addressing the only settlement in American history larger than this one, emphasized that "the nature of the bargaining, including its good faith, plays not only the role of supporting a presumption in favor of the settlement, it is also an independent factor in deciding its status as fair, adequate and reasonable." *State v. Philip Morris, Inc.*, 179 Misc. 2d 435, 440 (Sup. Ct. N.Y. Cnty. 1998), *aff'd*, 263 A.D.2d 400 (1st Dep't 1999) (emphasis added).

There is no question that the negotiations were adversarial. [redacted] Koplow Tr. 86:16-87:8 (Ex. 41). When the Institutional Investor group made its initial demand, [redacted] Laughlin Tr. 225:8 (Ex. 23). Throughout the process, [redacted] Koplow Tr. 80:9-81:21 (Ex. 41). As Bank of America's counsel put it, [redacted] Mirvis Tr. 82 (Ex. 22). As recounted above, the negotiations lasted more than seven months and produced 25 draft agreements, as the parties reached impasses on the settlement amount, hammered out the details of the servicing improvements, and addressed Bank of America's unsuccessful demands for releases of securities fraud claims. Given that process, the outcome of these negotiations is almost certainly the best settlement for the trusts that Bank of America would agree to, and there is no reason to suppose, as AIG's counsel recently suggested, that the certificate holders could "[g]et more money." April 12, 2013 Tr. at 110 (Ex. 42).

3. The Trustee reasonably relied on subject-matter experts.

Yet another relevant factor is the Trustee's decision-making process, including particularly its reliance on outside advisors. The PSAs expressly endorse the Trustee's consulting with such advisors:

> the Trustee may consult with counsel, financial advisors or accountants of its selection and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel.

PSA § 8.02(ii) (Ex. 1); *see also In re Joost's Estate*, 100 N.Y.S. 378, 381 (Sur. Ct. Kings Cnty. 1906) ("where, in the course of the administration of his trust, he 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"), *aff'd*, 126 A.D. 932 (2d Dep't 1908).

Here, the Trustee relied on several experts, as set forth on pages 8-12 above. In addition to those experts, who gave advice to the Trustee on issues relevant to the merits of the Settlement, the Trustee consulted with external and internal experts on the drafting or implementation of the agreement. EmphaSys Technologies, Inc. and BNYM's in-house waterfall analyst, Jason Buechele, [redacted] Lundberg Tr. 74:19-25 (Ex. 34). [redacted] Chavez Tr. 146:9-147:7, 205:7-22 (Ex. 36); Lundberg Tr. 364:12-21 (Ex. 34). In addition, throughout the process, the Trustee was represented by external counsel, including Jason Kravitt, a renowned securitization expert and the author of the leading treatise, *Securitization of Financial Assets*.[8] [redacted] *See, e.g.*, Lundberg Tr. 10-11 (Ex. 34), Griffin Tr. 137 (Ex. 33). Finally, when the time came to announce the proposed Settlement and this proceeding, the Trustee hired a firm that specializes in large-scale litigation notice programs, Garden City Group, to design a worldwide campaign and build a website to give notice to all Certificateholders. The record reflects an exceptionally thorough evaluation of the Settlement. It was far from an abuse of discretion.

Robert Landau, the former head of Bankers Trust's corporate trust group, with 50 years' experience in the industry, reviewed all of the deposition testimony and thousands of pages of documents and concluded that

> The Trustee's process of evaluating the Settlement was thorough in comparison to industry standards—the Trustee sought legal counsel from a leading securitization law firm, and maintained regular and extensive contact with that counsel; it worked closely with a diverse group of sophisticated investors who held an enormous amount of affected securities and were themselves represented by experienced legal counsel; it directly or through counsel participated in the settlement negotiations; it ensured that the employees with day-to-day responsibility over the settlement negotiations kept their superiors informed of those negotiations and the process of evaluating the Settlement (and those superiors, in turn, informed senior executives as appropriate); it consulted employees with responsibility for administering particular aspects of the Settlement, so as to ensure that the Settlement could be implemented effectively; it identified a variety of topics on which it needed the advice of outside advisors, and it obtained detailed reports from qualified experts on those topics; it concluded this extensive process with a final review by the relevant trust committee; and it then subjected its decision to judicial review and a broad program of notice to investors. In my expert opinion and based on my industry experience, that

[8] The PSAs protect the Trustee when it acts in *reliance on* advice of counsel. § 8.02(ii) (Ex. 1). Here, the Trustee has chosen not to invoke that provision and waive attorney-client privilege, but the fact of having received legal advice at all has independent relevance. *See, e.g.*, *In re Comverge, Inc. Shareholders Litig.*, 2013 WL 1455827 at *4 (Del. Ch. 2013) ("a number of cases have held that it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice").

> process was reasonable, prudent and consistent with industry custom and practice.

Landau Report 4 (Ex. 44).

Similarly, Professor John Langbein, the Sterling Professor of Law and Legal History at Yale Law School and the preeminent authority on trust law, concluded that:

> [T]he Trustee here appropriately obtained the expert assistance of counsel and other experts in a deliberative effort to reach a determination on the best course to follow. In my opinion, the Trustee's engagement as described in Petition ¶¶ 58-96 exemplifies wise exercise of expertise, acting to facilitate a value-maximizing settlement in circumstances of great complexity. There is thus no reason why those actions should be reviewed under any standard short of abuse of discretion.

Langbein Report 12 (Ex. 45).

4. <u>The presence of disputed facts counsels heavily against a finding of abuse of discretion.</u>

The objectors have quibbled with certain aspects of the work performed by the Trustee's advisors, but the Court need not resolve those disputes, especially if it finds that the Trustee acted in good faith. The Court could even disagree with some aspects of the Trustee's analysis or identify things that the Trustee or its advisors might have done differently, but that would not make its decision an abuse of discretion. As this Court wrote recently, applying a similar standard of review in an Article 78 proceeding: "The inquiry is not whether the result would have been different had the NYID hired certain experts or conducted the review on a different time line or with different resources." *ABN AMRO Bank N.A. v. Dinallo*, Index No. 601846/2009 (Mar. 4, 2013), at 55. Courts evaluating class action settlements, under a stricter standard, agree. Thus, although this Court *could* determine liability with precision by trying the underlying claims

> [s]uch procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of

> business judgment in determining whether the proposed settlement is reasonable.

Grinnell, 495 F.2d at 462 (citing *Neuwirth v. Allen*, 338 F.2d 2 (2d Cir. 1964)); *see also Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982) (when reviewing settlement, the "court does not adjudicate the dispute").

The presence of legitimately disputed issues of law and fact means that the Trustee's decision was reasonable. For example, in *In re American Bank Note Holographics, Inc.*, the court approved a settlement after observing that "the damage assessments of Plaintiffs' and Defendants' experts who would be called at trial were sure to vary substantially, thus precipitating a 'battle of the experts.' In such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses." 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001); *see also AIG*, 2013 WL 68928, at *11 (S.D.N.Y. 2013) ("Where there are conflicting opinions from experts . . . , the Court need not partake in a back and forth prior to approving a settlement, but can proceed on the reasonably certain factors with which it is presented"); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) ("The determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions; ultimately, proving damages would come down to a 'battle of the experts,' and it is impossible to predict which expert and theory of damages a jury would accept . . . the Court finds that the risk of proving damages similarly supports the approval of the settlement in this matter").

If reasonable minds could differ about the merits of the Settlement, then the Trustee's decision satisfies the reasonableness prong by definition. Deciding *which* reasonable decision is the "correct" one means trying the case, which is what courts consistently, and wisely, refrain from doing in this context.

III. The Settlement Is Substantively Fair.

As explained above in Parts I and II, the Trustee is vested contractually with the power and discretion to make business judgments, including whether to bring or settle litigation. The rule that such decisions may be reviewed only for bad faith or abuse of discretion is established by well-developed case law. Nonetheless, even if the Court reviews the Settlement without regard to the views of the Trustee, the Settlement still passes with flying colors.

It is startling, in fact, that the objectors have offered no expert opinion that the Settlement fails their own preferred standard.[9] They have offered no evidence that the claims are worth more than $8.5 billion. The only data that they argue even hints at a larger settlement was prepared—in the course of negotiation—by the Institutional Investors, *who all support the Settlement.* Likewise, the objectors have no evidence that Countrywide can afford to pay more than $4.8 billion. Rather, their sole position on the collectability of a judgment is that the Trustee should roll the dice on a successor liability claim that no court has accepted. In short, there is no evidence that the Settlement is not substantively fair. Even accepting the objectors' scurrilous allegations of bad faith, therefore, the Settlement still must be approved.

A. The Settlement Terms Are, In Fact, Fair and Reasonable.

1. <u>The $8.5 billion Settlement Amount alone exceeds any likely recovery from Countrywide.</u>

The inability of the defendant to pay a judgment greater than the proposed settlement amount weighs strongly in favor of settlement. *See, e.g.*, *In re Saxon Secs. Litig.*, 1985 WL 48177, at *13 (S.D.N.Y. 1985) ("the maximum possible *recovery* that the classes could

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9 No objector other than AIG even served expert reports.

reasonably hope to achieve after trial is considerably less than the best judgment on damages theoretically obtainable; recovery is limited by the resources available to the defendants to satisfy a judgment"). Here, the monetary payment alone far exceeds the net worth of the party that bears contractual liability for the claims being settled.

a. Countrywide's limited net worth

The obligation to repurchase loans that breach representations and warranties falls only on the Seller under the PSAs. *See* PSA § 2.03 (Ex. 1). The Seller for all 530 trusts is Countrywide. Before the Settlement, the Trustee hired Capstone Advisory Group to estimate Countrywide's net worth. Capstone, which did not know that the Settlement Amount would be $8.5 billion (Kravitt Tr. 514:18-21 (Ex. 11); Bingham 328:8-14 (Ex. 46)), calculated that, after paying secured creditors, Countrywide's assets could be liquidated for a maximum of $4.8 billion. Thus, even assuming that Countrywide had no unsecured creditors other than the Trustee—an extremely conservative and plainly counterfactual assumption—the Trustee could recover no more than $4.8 billion. The objectors have presented no evidence whatsoever that Countrywide was worth more than that.

Thus, it is likely that the Settlement provides investors with *at least* $3.7 billion *more* than they could recover even in a completely successful litigation. Perhaps the law would allow the Trustee to gamble with estate assets by turning down a settlement of this magnitude, but it surely does not compel that result.

b. Risk that Bank of America is not liable as a successor.

The Trustee did not stop with the assets of the party that is contractually obligated to repurchase loans. It also evaluated its ability to reach deeper pockets by suing Bank of America Corp., which did not make representations in the PSAs and became the ultimate parent of Countrywide long after those representations were made. The Trustee considered various theories of successor liability, *de facto* merger, and corporate veil piercing under various states' laws. The objectors have argued that the Trustee's evaluation of this claim was unduly pessimistic. But as AIG's own expert has previously stated, "the subsidiary cannot simply grab assets of the parent company for its own benefit, or for the benefit of its creditors, because the parent will have creditors (and shareholders) of its own that have prior claims to those assets." Report of John Coates in *Starr Int'l Co. v. AIG*, S.D.N.Y. No. 05-cv-6283, dkt. #184-2 (Feb. 2, 2009) (Ex. 47). Indeed, AIG's expert acknowledges the "strong, long-standing, and consistent recognition of corporate separateness" and the "consistent reluctance of the law to allow shareholders, creditors, or agents of one corporation to attach or obtain assets of another corporation by setting that separateness aside, whether styled as veil-piercing, reverse veil-piercing, substantive consolidation, constructive trusts, or other legal or equitable doctrines." *Id.* at 1.

During his deposition in this case, AIG's own expert confirmed the soundness of the Trustee's decision. He testified that based on all his claimed knowledge of the matter, including years of discovery in the *MBIA* litigation, his best estimate of the likelihood of a court imposing successor liability on Bank of America was between 45% and 65%. Coates Tr. 224-30 (Ex. 48). Even he agreed that a reasonable person could well conclude that it was more likely than not that the claim would fail. *Id.* Indeed, he admitted that a reasonable person would assign an even *lower* probability of success if it was assumed that the likely application of New York law was less than 90%. (*id.* at 230)—a particularly significant point since *none* of the decisions to date on the issue have in fact selected New York as the state with the most significant interest on the question. In short, the objectors are contending at best that the Trustee should have flipped a coin with the Certificateholders' money. That the Trustee declined to do so cannot remotely be considered unreasonable.

In any event, if the Trustee had pursued successor liability claims against Bank of America, it would not have been the first to try. As of the Settlement Date, in 14 published opinions addressing claims that Bank of America was responsible for Countrywide's liabilities, courts had dismissed those claims with prejudice, or denied leave even to assert them, 11 times. *See* Daines Rebuttal Report, Ex. 13 (Ex. 49). Twelve of the 13 cases decided since then have done the same. The four other decisions have merely let claims proceed past the pleading stage—*no* court has ever found Bank of America actually liable. In the *MBIA* case, after almost five years of litigation and discovery, the court has still not ruled on successor liability, denying summary judgment for both sides and leaving the issue to be resolved at trial. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008 (Slip. Op. on Mot. Seq. No. 60, Apr. 29, 2013). According to the report that Professor Daines gave the Trustee, that result is no surprise. After reviewing case law in three different jurisdictions and the details of the Bank of America/Countrywide transactions, he concluded that "a successor liability case would be difficult to win unless the Transactions [between Bank of America and Countrywide] materially reduced the value of the legacy Countrywide subsidiaries." Daines Report 38 (Ex. 26). Objectors have not even suggested that these transactions reduced the value of the Countrywide subsidiaries.[10]

Nonetheless, the Court need not dwell on the merits of successor liability, and it certainly need not resolve the question. Because the Settlement recovers at least $3.7 billion beyond what

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[10] Notably, in *MBIA*, which has involved vast discovery and repeated motions on successor liability, the plaintiff did not even attempt to rebut the expert opinion that Bank of America paid adequate consideration for the Countrywide assets. *See* Daines Rebuttal Report at 10 (Ex. 49).

Countrywide optimistically could pay, successor liability would have to have been overwhelmingly likely before the Court could seriously question the adequacy of the settlement amount. A settlement must not be judged "in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Settlement here clears that hurdle easily.

2. The $8.5 billion settlement payment is a sensible compromise given the disputed damages calculations.

a. Many valid reasons support settling for less than the maximum possible claim.

Even assuming that Countrywide, or someone else, could have paid the full amount of any judgment, the Settlement is a reasonable compromise in light of the uncertain value of the settled claims. "In applying the standard of fair, adequate and reasonable to [a proposed settlement], the court must assess the risks in the ongoing litigation or the likelihood of plaintiffs' ultimate success." *Philip Morris, Inc.*, 179 Misc. 2d at 440. The "uncertainty" of litigation must be "weighed against the immediate and tangible benefits conferred by the Settlement." *Maley v. Del Global Techs. Corp.*, 196 F. Supp. 2d 358, 361 (S.D.N.Y. 2002).

Of course, the expense and delay inherent in litigation also matters. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *7 (S.D.N.Y. 2007) ("Delay, not just at the trial stage but through post-trial motions and the appellate process, would cause Class Members to wait years for any recovery, further reducing its value."). Thus, in a recent decision approving a settlement by AIG, Judge Batts emphasized that the settlement

> must take into account a number of variables that may impact the parties' expected gains from foregoing trial, including settlement awards in comparable suits, the cost of delay, the value of potential verdicts in related suits, and changes in the bargaining position of the parties, among other factors.

In re AIG Secs. Litig., 2013 WL 68928, at *12 (S.D.N.Y. 2013).

One also cannot blindly assume that the trusts' claims will grow over time: discovery and litigation lead sometimes to greater recovery and sometimes to less. *See In re Blech Sec. Litig.*, 2000 WL 661680, at *5 (S.D.N.Y. 2000) ("While additional years of litigation might well have resulted in a higher settlement or verdict at trial, continued litigation could also have reduced the amount of insurance coverage available and not necessarily resulted in a greater recovery"). Fischel Report 8 ("there is no guarantee that an additional expenditure of resources and time will produce a more favorable outcome – it may produce the opposite result. In such a case, the decision to reject a settlement offer and engage in additional information gathering and investigation produces the dual bad outcome of wasted time and money only to get a worse outcome as a result") (Ex. 38).

The Court also should consider that any litigation over repurchase claims involving 1.6 million loans on 530 trusts, as well as loan-servicing claims that have rarely, if ever, been litigated, "would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court." *Giant Interactive*, 279 F.R.D. at 160 (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998)). "[S]ettlement is favored" in such cases. *Id.* Because of the lack of precedent for Trustee-initiated repurchase litigation, estimating the length and cost of litigation is difficult. But one example is provided by MBIA's suit against Countrywide on similar claims (albeit limited to 15 trusts, less than 3% of the number of trusts here). That case was filed in 2008, and summary judgment motions were denied only this week. *MBIA Ins. Co. v. Countrywide Home Loans Inc.*, Index No. 602825/2008 (Sup. Ct. N.Y. Cnty.). Any recovery is still years away.

Furthermore, some courts have resisted joining multiple securitizations in one case. Just last week, Justice Ramos described a case involving 163 securitizations, far fewer than in this case, as "ridiculous" and ruled that "I'm going to make you break this down . . . even if it looks like 163 different cases, I want to deal with each offering separately." Eric Hornbeck, Law360, *'Ridiculous' $2.7B MBS Suit Needs Reining In, Judge Says* (Apr. 24, 2013) (Ex. 50). And in yet another case, a Florida judge blocked a plaintiff from consolidating claims on *eight loans*, ruling not only that the claims had to be proved loan-by-loan, but also that each loan had to be the subject of a separate case. *Lehman Bros. Holdings, Inc. v. Universal Am. Mortg. Co., LLC*, 2013 WL 169997, at *1 (S.D. Fla. 2013).

Relatedly, the Court cannot ignore the burden on the judicial system from litigation involving 530 trusts and over 1.6 million loans:

> [U]ntil the day of unlimited judicial resources dawns, the fact will remain that each hour of judicial effort that is expended on the claim of one plaintiff will mean that fewer hours will be available for all others. Thus, the consideration of 'judicial burden' does not really amount to a weighing of the interests of the courts against those of the plaintiffs, but rather it is a weighing of the bona fide interests of these plaintiffs against the interests of all others who are pursuing just causes of action.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 467 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). These factors, among many others, explain why "[a]s a matter of policy, settlement is favored as a means of facilitating the resolution of disputes and preserving judicial resources." *Jakobowicz v. A.C. Green Elec. Contractors, Inc.*, 25 A.D.3d 146, 152 (1st Dep't 2005).

b. The percentage recovery here shows that the Settlement Amount is fair and reasonable.

As explained in the Statement of Facts, the Trustee hired an outside expert, Brian Lin of RRMS Advisors, to estimate the potential damages on loan-repurchase claims. His conclusion was that, without discounting for (a) the risk that the trusts would lose any litigation, and in particular the risk that they would have to prove loss causation for every loan, (b) the cost of litigation, (c) the lost time value of money while the trusts waited for recovery, or (d) the ability to collect a judgment from Countrywide, the trusts' potential damages were between $8.8 and $11 billion. Even compared to the high end of that range, the $8.5 billion Settlement Amount amounts to a ***77% recovery***.

Similarly, an expert witness in this litigation, Philip Burnaman, estimates that potential damages are between $8.2 and $12.9 billion, again without discounting for any of the factors noted above. Burnaman Report 28 (Ex. 51).[11] Burnaman's analysis has gone unrebutted—the objectors have no expert witness who can testify to the range of the (undiscounted) damages. Using the high end of Mr. Burnaman's range, the $8.5 billion settlement amounts to a ***66% recovery***.

During settlement negotiations, the Institutional Investors estimated that potential damages could reach $32.3 billion, and the objectors have seized on this estimate to argue that any settlement below that amount is necessarily unreasonable. Putting aside the absurdity of the notion that an initial demand is a floor rather than a ceiling, this objection ignores two critical facts. [redacted] BNYM_CW-00000165-70 (Ex. 28). The other is that, as Professor Fischel explained, "this claim makes no sense because these supposedly 'more favorable' loss assumptions and

[11] Mr. Burnaman has 30 years of experience in structured finance, including management of ING Bank's proprietary trading business, which had $14 billion of assets under management including $5 billion of mortgage-backed securities. Burnaman Report 52 (Ex. 51). Mr. Burnaman also founded NewStar Financial and headed its ABS/structured products group, which invested in a variety of mortgage-related products until it divested the majority of its holdings near the market peak in July 2007. *Id.*

higher 'breach and success rate metrics' were presented in a spreadsheet provided by the very same Institutional Investors who support the Settlement." Fischel Report ¶ 15 (Ex. 38). That is not surprising, [redacted] Patrick Tr. 276:10-277:2 (Ex. 52). Even accounting for all of these "plaintiff-style" assumptions, the $8.5 billion Settlement Amount amounts to a ***26.5% recovery***.

In the end, the Court need not attempt to decide the "right" damages even if it were to accept the objectors' substantive fairness standard, rather than the proper standard discussed in Part II above. In evaluating a privately-negotiated settlement, courts need "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). It is precisely to avoid those risks that parties settle. Even in cases "[w]here there are conflicting opinions from experts . . . , the Court need not partake in a back and forth prior to approving a settlement, but can proceed on the reasonably certain factors with which it is presented." *AIG*, 2013 WL 68928, at *11; *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (approving settlement for "approximately 16.5% of the class' maximum provable damages"). Indeed, the *AIG* court approved a settlement in the face of a wide range of expert opinions:

> The NYAG's plea for the Court to send Parties to commence entirely new negotiations not only raises the concern of undue delay, but it would also demand that the Court mandate action based on sheer speculation and hotly contested expert evaluations. Over the course of the time when it became clear that the NYAG would object, various expert projections and arguments as to the amount of damages . . . have been floated, including nothing, $100 million, $543 million, $1.2 billion, and $6.5 billion.

AIG, 2013 WL 68928, at *11. In light of the uncertainty over both liability and damages, and the *absolute* certainty that any recovery in litigation would be costly and take many years, the

Settlement Amount of $8.5 billion—the largest settlement of private litigation claims in American history—is eminently reasonable.

3. The servicing improvements and document indemnity provide valuable benefits not available in litigation.

Finally, unlike many settlements in which cash provides the sole consideration, the Settlement also mandates unprecedented improvements to Bank of America's servicing practices that go far beyond what is required under the PSAs. Most importantly, it requires Bank of America to transfer the servicing of high risk loans to "high touch" specialty subservicers (Settlement Agreement ¶¶ 5(a)-(b)) (Ex. 24), and it mandates reductions in the unreimbursed advances if Bank of America's servicing performance does not meet various industry benchmarks each month (¶ 5(c)). The Settlement also establishes a mechanism to identify and cure document deficiencies that may impair the trusts' ability to foreclose, and to compensate the trusts for any such damages caused by uncured defects (¶ 6). These improvements could not possibly have been achieved in litigation, and they provide a significant ongoing financial benefit to Certificateholders by improving loan performance.

Using conservative assumptions and excluding the document cure provisions, Mr. Burnaman estimates that, based on information available in June 2011, the servicing improvements should be valued between $2.51 and $3.07 billion in additional value. Burnaman Report 5 (Ex. 51). These amounts bring the total value of the Settlement to at least $11 billion.

Whatever the standard, this Settlement meets it.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Trustee's Verified Petition.

Dated: May 3, 2013
New York, New York

Respectfully submitted,

s/Matthew D. Ingber

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