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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.**

PETITIONERS' REPLY BRIEF IN SUPPORT OF ENTRY OF PROPOSED FINAL ORDER AND JUDGMENT

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RESPONSE TO THE OBJECTORS' PRELIMINARY STATEMENT

The Objectors' Preliminary Statement bears little resemblance to the trial record. The few remaining Objectors would have the Court believe that the Trustee and Bank of America "co-opted" 22 Institutional Investors and their counsel. They contend that the defenses to successor liability are "make believe," despite dozens of dismissals of every permutation of that claim (including AIG's) by eleven different judges. Most shockingly, they posit a conspiracy theory that would require finding that every fact witness in the case lied. For example, their claim that Bank of America would have funded a judgment against Countrywide no matter the size requires finding that Terry Laughlin lied about the bank's willingness to put Countrywide into bankruptcy. Their claim that the Trustee's pre-settlement experts gave predetermined opinions would require finding that all four lied when they testified to the contrary. Their claim that the Trustee agreed to the Settlement because of an expanded indemnity or a fictional release would require finding that all four Trustee witnesses lied when they explained the rationale for settling. Their claim that the Trustee's counsel was "conflicted" would require finding not only that the Trustee's and Mayer Brown's witnesses lied but also that Mayer Brown breached its professional obligations to the Trustee. And the claim that the Institutional Investors were bought off requires finding that the investor representatives lied when they testified that this is a "great deal."

Petitioners, in their opening papers, walked the Court through the evidence supporting each proposed finding. But after two years of discovery and trial, all the Objectors can offer is speculation and personal attacks. One would expect a settlement objection to challenge the adequacy of the settlement. Yet the Objectors offer no evidence on any aspect of that issue—not trust losses, damages, or expected recovery—and even their own experts have carefully avoided saying that the Settlement is unfair.

The Opposition ("Opp.") has three misstatements in the first paragraph alone. First, the

Objectors say that the Settlement is for "pennies on the dollar" based on unidentified "evidence" "that losses exceed $100 billion." Opp. 1. The only evidence on actual losses was that losses (not damages) to date are about half that amount—$53 billion—and that this figure will account for approximately 90% of lifetime losses. Tr. (Lin) 4063:3-5, 18-19. The Objectors attempt to rely on a presentation by the Institutional Investors—the same investors who testified under oath that the Settlement is a "great deal"—but every witness, including the investors who made the presentation, agreed that it was an aggressive negotiating position at the time and has been conclusively disproved by subsequent performance. Tr. (Smith) 358:22-359:19; Tr. (Waterstredt) 830:18-25, 831:12-13, 832:11-12. The Objectors have no evidence of the Trusts' losses, let alone their legally recoverable damages.

Second, in the same sentence, the Objectors call this "an obscure Article 77 proceeding that has never been utilized for this purpose." Opp. 1; *id.* at 3 ("first case of its kind"). In fact, Article 77 was used for exactly this purpose in *In re IBJ Schroder*, in which the court approved a settlement by a securitization trustee over objections by over 100 investors. And third, the Objectors describe a "request that the Court . . . bar any investor from opting out of the settlement." Opp. 1. But the Objectors have conceded that opt-out is not possible, because only the Trustee can settle trust claims. *See* Br. 5-6 & n.4. The Court agreed more than two years ago when it denied a request for opt-out. 8/5/2011 Hrg. Tr. 18:26-19-2. Since then, the Objectors have never argued for an opt-out.

The Preliminary Statement continues with one brazen misstatement after another. By way of example, the Objectors claim that the Trustee "was admittedly looking to protect only its own self-interest rather than the interests of the thousands of investors . . . it was bound to protect." Opp. 1. The Trustee did not "admit" that, and in fact every Trustee and Mayer Brown witness testified to the opposite. The Trustee made the decision as "if I'm sitting in the investor role" and approved the Settlement because "[w]e looked at this as being very beneficial for holders." Tr. (Stanley) 3124; PTX 646: Tr. (Griffin Dep.) (played 9/25/2013) 148:3-4; *see also* Petitioners' Brief ("Br.") 41-42. The Objectors cite no evidence that the Trustee was looking to protect "only" its self-interest—or that self-interest factored into the decision at all—because *there is none in the record*.

The Objectors also assert that the "settlement assumes away the possibility of recovery against BofA as successor to Countrywide." Opp. 2. In fact, the Settlement recovers from Bank of America $3.7 billion *more* than the net value of all of Countrywide's assets. The new theory that each of the 22 Institutional Investors was bought off depends on the false assertion that Bank of America "release[ed] the investors from their fee agreement with Ms. Patrick's firm." Opp. 4. The record, however, shows that Gibbs & Bruns was working on a contingency and even bearing its own expenses. Tr. (Smith) 440:3-442:3. Without a recovery, the investors would have owed nothing. Finally, the claim that Bank of America gave "the investor group and its lawyers a release from suits by certificateholders" (Opp. 4) is also a total fabrication. There is no such release, nor have the Objectors asserted that the investors could be liable under any theory.

RESPONSE TO THE OBJECTORS' STATEMENT OF FACTS

The Objectors' Statement of Facts does not cite our opening brief, and it never confronts the evidence that directly contradicts the assertions it makes. Here are a few examples:

Mayer Brown: The Objectors state that "BofA knew that it was dealing with a firm, Mayer Brown, that was powerless to take any action adverse to it and had no real negotiating leverage." Opp. 10. The Objectors cite no evidence, and they ignore the testimony, summarized at Br. 14-16, that it was "very clear" that litigation was the alternative to settlement. They also ignore the evidence—elicited by a fellow Objectors' counsel—that that the Trustee had identified counsel that would sue Bank of America on the Trustee's behalf if that became necessary. It is the Trustee, not the law firm, that files the suit, and it is commonplace to have separate settlement and litigation counsel. Tr. (Bailey) 2490:18-22; Tr. (Kravitt 1751:23-1752:2). Central to the objection is the unsupportable charge that Mayer Brown would sell out the Trustee and surreptitiously represent Bank of America's interests over that of its client merely because Bank of America is contractually obligated to reimburse the Trustee for its costs, including attorneys' fees. Opp. at 5. Those accusations are not supported by a scintilla of evidence.

Mind-reading: The Objectors' presentation is rife with conjectures—presented as fact—about witnesses' supposed states of mind, without even a mention of those witnesses' actual *testimony*. For example, they assert that "Mr. Kravitt conceded that, *if* the Trustee had been 'looking for leverage' against BofA, then BNYM may have wanted an Event of Default to occur. However, the Trustee was not looking for leverage." Opp. 12. What Kravitt actually said was that the Trustee was holding the *threat* of an Event of Default in reserve to create leverage "[i]f the negotiations fell apart." Tr. (Kravitt) 1505:2-11. He also explained that the Petitioners used the Forbearance Agreement "to rachet [*sic*] up their pressure on B of A and Countrywide to finish the negotiations." *Id.* at 1369:2-6. That testimony is logical and credible: the Trustee assented to the investors' forbearance in part because preserving the threat of an Event of Default gave it *greater* leverage than an immediate default.

Misstatements about the Forbearance Agreement: The Objectors say that "[d]espite the benefits of an Event of Default for Certificateholders, BNYM 'act[ed] quickly' and 'work[ed] hard' to avoid one." Opp. 13. Even the testimony that they cite contradicts that description. Both Kravitt and BNYM's McCarthy explained, and privileged documents prove, that the Trustee wanted to avoid an Event of Default because it did not believe that an Event of

Default *had* any "benefits . . . for Certificateholders." Tr. (Kravitt) 1505. Regarding the Forbearance Agreement, the Objectors falsely assert that "BNYM thus was brazenly acting without contractual authority or certificateholder consent when it agreed to the Forbearance Agreement." Opp. 13; *id.* at 16. The only evidence on this point is that the Trustee "recognized" that it *did* have authority, because there *was* certificateholder consent from the very holders who sent the Notice of Non-Performance. Tr. (Kravitt) 1570:2-18 ("I believe that the investors had the ability to stop their own notice."). That conclusion was confirmed by Landau, the Trustee's corporate trust expert: "They own that notice, they own that letter . . . . And I've seen it happen . . . where such a notice was filed . . . About two weeks later . . . the certificate holders . . . say . . . 'We are withdrawing it.' And our answer was, 'Fine, it's your notice, you own it.'" Tr. (Landau) 2548:15-2549:2.

Perhaps most egregiously, the Objectors assert that "Mr. Kravitt believed that [Certificateholders other than the Institutional Investors], who were not conflicted or beholden to BofA and would push for loan files and maximum recovery for all injured investors, could destabilize the negotiations between BofA and the Institutional Investors and somehow 'jump into the fray.'" Opp. 14. Again, Kravitt said just the opposite: he was concerned not about holders who were "*not* conflicted" and wanted to *increase* recovery, but about holders who had interests other than winning the best recovery for the trusts:

> Q. Meaning that other certificate holders participating in the process might have a different view than was being presented thus far by Ms. Patrick's group, correct?
>
> A. It's not what I meant. What I meant was we could have unconstructive . . . certificate holders entering into the fray. I don't regard holding a different set of views as being nonconstructive necessarily.
>
> Q. So you at that point didn't want someone who would come in and be not interested in settling?

> A. Who would just be disruptive. I didn't have anything specific in mind, other than knowing I had a responsible—I believed a responsible group of investors in front of me, meaning that *they were trying to act in the best interest, as far as I could tell, of the trust as a whole,* although I recognize they only represented themselves. . . .
>
> A. And I didn't—and they—okay, that was their nature. And *I didn't know what other—what would be the nature or agendas of other people* being added. We added other people to the group, it's not as if no one else was added to the group and other people were invited into the group. We didn't try to keep the group static. I was just worried about people who had the wrong motivation to get into the group.

Tr. (Kravitt) 1748:15-1749:20 (emphasis added); Tr. (Bailey) 2317:12-18 (some holders "may have financial incentives other than trying to strike the best deal they could. They could have other reasons for wanting to insert themselves in the settlement process.").

ARGUMENT

I. The Objectors' Numbers Continue to Dwindle.

Before trial, all told, dozens of investors decided not to object to the Settlement, including the Federal Housing Finance Agency, the New York Attorney General, the Delaware Attorney General, and numerous hedge funds including Monarch Alternative Capital and Walnut Place. Since the Petitioners filed their opening post-hearing brief, even more investors have decided to withdraw their objections. Cranberry Park and the three Federal Home Loan Banks, among others, have all disappeared from the ranks of the Objectors.

II. The Conflict Allegations Are False and Irrelevant.

A. Trustee Conflicts

The only case that the Objectors cite (Opp. 34) on trustee conflicts is *Dabney v. Chase National Bank*. Their theories inadvertently illustrate Judge Hand's warning in that case that

> a possible conflict of interest can be conjured up out of all sorts of situations in which persons of normal scruple would feel no hesitation to go ahead. The law ought not make trusteeship so hazardous that responsible individuals and corporations will shy away from it. . . . Merely vague or remote possible

> selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question.

196 F.2d 668, 675 (2d Cir. 1952) (internal quotation omitted). The "conflict" conjured up by the Objectors in the next sentence is not just "vague or remote," it is definitively fake: an indemnity guarantee that the PSAs explicitly entitle the Trustee to seek; and a "release" that is nowhere in the Settlement Agreement but in the *Proposed* Order, and that will apply only to settlement-related conduct and only if the Court approves the Settlement. Opp. 34. Moreover, the suggestion that the Trustee "capitulat[ed] to a low-ball settlement" (*id.*) is beyond "remote," it is without any support. There is no evidence that the Settlement actually is inadequate (*see* part III.B. below), let alone that the Trustee believed that. Nor is there evidence that the Trustee agreed to the Settlement *because of* an indemnity or the prospect of a judicial finding, both of which are limited to settlement conduct.

B. Mayer Brown Conflicts

The Objectors now also attack the Trustee's lawyers. Opp. 35-36. The claim that Mayer Brown "was ethically *barred* from zealously representing the interests of all certificateholders" (*id.* at 35 (emphasis added)) improperly equates zeal with litigation. It also disregards New York law that counsel is ethically *required* to zealously represent its client, and that it must do so after receiving a conflict waiver, even to the detriment of its waiving client. *See Bennett v. Martoche*, 475 N.Y.S.2d 190, 191 (Sup. Ct. Erie Cnty. 1984) ("An attorney is obligated to zealously represent his or her client"). There is no evidence that Mayer Brown violated that duty, and Kravitt testified that he treated Bank of America no differently than he would have treated "the Bank of Mars." Tr. (Kravitt) 1647:8; *see also* Tr. (Bailey) 2404:3-11. In *Cruden v. Bank of New York*, Judge Keenan not only rejected the notion that lawyer conflicts are imputed to trustees, he held that the Trustee could rely on an opinion from counsel for the party whose interests were directly opposed to those of the bondholders. *See* Fed. Sec. L. Rep. P 95,466, at *11 (S.D.N.Y. 1990). The PSAs, too, confirm that "the Trustee may consult with counsel, financial advisors or accountants *of its selection*." Section 8.02(ii) (emphasis added). They do not require notice before the Trustee does so.

The PSAs also do not contemplate hiring separate counsel for the Certificateholders. *See* Opp. 35. Landau testified that hiring separate counsel is unheard of, because the trustee itself acts for the trusts (though it does not "represent" each holder). Tr. (Landau) 2608-09.

C. The Forbearance Agreement

The Forbearance Agreement conflict theory falls apart with the Objectors' admission that the Trustee was subject to the prudent person standard "with respect to this settlement" even without an Event of Default. Opp. 36 n.7. The Trustee agrees that an Event of Default is irrelevant to the standard of review. It has argued consistently that its settlement conduct should be evaluated for good faith and reasonableness; the general pre-default limits on the Trustee's duties do not supply the governing standard, because the Trustee *did* take actions that were not "specifically set forth" in the PSAs (Section 8.01). It would have made no sense for the Trustee to avoid an Event of Default, in order to preserve its right not to act at all, if was already planning to take optional discretionary actions like negotiating a settlement. The Objectors ignore the ample evidence that the real reason the Trustee wanted to avoid an Event of Default was its concern that an Event of Default would spark immediate litigation on the question of whether an Event of Default had occurred, and delay any recovery for Certificateholders. *See* Tr. (Kravitt) 1333:17-24, 1335:8-14, 1336:5-7; R-1451, R-1458:3.

The Objectors continue to argue that the Trustee has no express power to toll the 60-day period (Opp. 5), but they never explain why that power would need to be expressed. It is black-letter law that the trustee has any power necessary to administer the trust unless it is expressly withheld. *See Restatement (Third) Trusts* § 85(1) (2007). Moreover, they ignore the Institutional Investors' power to decide whether the alleged breaches had been cured during the 60-day period. The caselaw (cited only by the Petitioners (*see* May 3, 2013 brief at 15 & n.7)) shows that forbearance is routine, not extraordinary.

Finally, the suggestion that absent Certificateholders were harmed by the Forbearance Agreement is inconsistent with the PSAs. Section 10.08 permits holders to pursue post-default remedies only if "such holder" has notified the Trustee of an Event of Default. In addition, only 25% holders may take advantage of Section 10.08. If there had been some other 25% group that wanted to declare an Event of Default and employ those remedies, it would not have needed to free-ride on the Institutional Investors' notice, because it could have sent the same notice itself. Walnut Place did just that in May 2011. Tr. (Kravitt) 2144:2-2145:10; PTX 410.

But the most fundamental problem with the Event of Default/Forbearance Agreement theory is the absence of any evidence at all that the Trustee's decision to permit the Institutional Investors to toll their disputed notice influenced its evaluation of the Settlement months later.

D. The Further Assurances Clause

The Objectors suggest that the Further Assurances clause somehow violated the Trustee's duty of loyalty. Opp. 38. The predicate assertion that the clause requires the Trustee "to put BofA's interests in front of certificateholders' interests" (*id.*) or "to support BofA" (*id.*) is unexplained and false. The clause requires only that, pending Court approval, the Trustee support the Settlement, which it already had decided was good for investors. It requires the same of Bank of America. And in light of the dramatic decline in projected trust losses and Bank of America's 100% win rate on successor liability, the Settlement looks even better for the trusts today than it did at the bottom of the housing market in 2011. That Bank of America is locked in, in spite of those developments, is a huge benefit to the Trusts. Moreover, the notion that the duty of loyalty bars trustees from binding themselves to contracts with third parties is contrary to trust law, which permits contracts generally and settlements in particular. *See* Br. 5-6; *Restatement (Second) of Trusts* § 187. Finally, there is undisputed testimony that no settlement would have been possible without such a clause. *See* Tr. (Kravitt) 1538, 1554; Tr. (Fischel) 3538.

III. The Attacks on the Trustee's Experts and Decision-Making Are False and Irrelevant.

A. Loan File Review

The Objectors first contend that the Trustee needs an "excuse" for not reviewing loan files. Opp. at 39. They virtually ignore the testimony showing that both the Trustee and the Institutional Investors, together with their advisors, considered this decision carefully. Tr. (Smith) 380:10-381:17; Tr. (Kravitt) 1346:20-1347:20. Their conclusion was confirmed by Burnaman, who agreed that it was in the Covered Trusts' "best interests to try to come to an agreement without the potential cost, delay and potential for litigation that might arise if they were going to slug it out on a loan file basis." Tr. (Burnaman) 2762:15-2763:6. Using the real-world GSE experience as a proxy—instead of an inconclusive reunderwriting expert battle—was reasonable, and in keeping with industry norms. *Id.* at 3042:11-17. As several witnesses testified, including, inadvertently, the Objectors' expert Dr. Cowan, loan file review leads to wide differences of opinion and disputes, not answers. *See* Br. at 24-25.

B. The Trustee's Analysis of Repurchase Liability

To help it assess the repurchase claims, the Trustee hired a qualified expert, Brian Lin. After attacking Lin before his testimony, the Objectors have now dropped any challenge to his qualifications. Applying his experience in mortgage bond valuation, loss estimation, and his management of Lehman Brothers' loan sales to the GSEs, Lin evaluated projected losses in the Covered Trusts. Using his experience, he concluded that the Trustee could rely on Bank of America's 100,000-loan experience with the GSEs, after various adjustments, to estimate repurchase liability. Lin's estimates of losses and repurchase rates are unchallenged. But even if the Court somehow found them to be wrong, the issue for the Court is only whether it was reasonable for the Trustee to rely on them. *See Cruden v. Bank of New York,* , 957 F.2d 961, 972 (2d Cir. 1992); *In re AIG*, 916 F. Supp. 2d 454, 469 (S.D.N.Y. 2013). The evidence shows that the Trustee had no reason to question Lin's estimate and, if anything, it would have been problematic to *ignore* his advice.

1. Estimate of Losses

Lin estimated total lifetime losses for the Covered Trusts of $61.3-$75.8 billion. PTX 444.110. Two years later, he was "very confident" that losses would be near the low end of that range. Tr. (Lin) 4064:11-14. That testimony stands unrebutted. The Objectors have presented *no evidence* to support higher loss numbers. Indeed, their expert, Dr. Cowan, acknowledged that he did "*no analysis*" to determine whether Lin was right or wrong. Tr. (Cowan) 4266:8-11.

Instead, the Objectors rely on loss numbers put forward by the Institutional Investors during negotiations. Opp. at 41. The Institutional Investors' testimony confirms that their loss figures were aggressive negotiating positions, not best estimates of losses that they would use in their business. Tr. (Waterstredt) 835:6-16, 853:19-22, 866:26-867:3; Tr. (Smith) 671:1-672:16. Similarly, the Objectors argue that Burnaman's loss estimate ($84.7 billion) undermines Lin's work. *See* Opp. at 41. They ignore Burnaman's testimony that his number was "a conservative estimate" based on information available in 2011 (near the nadir of the housing market) and that he too thought that losses would come in lower. Tr. (Burnaman) 2752:3-6. Most importantly, even with his higher loss estimate, Burnaman, like the Institutional Investors, believes that the $8.5 billion settlement was reasonable. *Id.* at 2965:12-15. The Objectors found no one willing to testify to the opposite conclusion. *See* Tr. (Cowan) 4254:22-26 ("Q. And in fact you're not testifying to what a reasonable settlement would have been, because you never actually considered that; true? A. Yes, that's correct. I said that in my report that I was not doing that.").

Finally, the Objectors advance the bizarre theory that "payment default is the wrong metric for determining repurchase liability." Opp. 41. Missed payments over the life of the trusts are the only losses that the trusts can suffer. *See* Tr. (Burnaman) 3044:2-4 ("Q. [I]f a mortgage is paid in full, does an RMBS trust suffer a loss? A. No, it does not."); Tr. (Cowan) 4279:13-80:5 ("Q. If a loan is in the trusts and pays every bit of principal and interest that the loan was supposed to pay, the trust has gotten what is contemplated by the contract; right? . . . A. . . . Recognizing that the trust represents the investors, I would say that the trust got everything it was supposed to get."). The Objectors' alternative measures double-count damages. Lost market value of the loans derives from expected losses—values drop *because* investors expect payment defaults. The Trustee cannot recover such losses anyway, because it cannot sell loans in the market.[1] The same goes for risk—the loan's "risk" is the chance of a payment default, the very thing that Lin counted. *See* Tr. (Cowan) 4239 ("If I undercharge the interest rate for the hundred, then I'm not collecting enough interest to offset the increased risk *of default* that I get from the five guys who did default") (emphasis added). Neither is an additional "actionable harm."

2. <u>Repurchase Rate</u>

Lin used a repurchase rate derived from the adjusted Bank of America-GSE repurchase experience. Tr. (Lin) 3872:3-3874:22; PTX 444.110. The Objectors have two main attacks on the GSE experience: its veracity and its comparability. Neither is borne out by the record.

The Objectors do not even argue that the GSE data was actually inaccurate in any respect. Still, they accuse Lin of "blindly accept[ing] BofA's data without verification." Opp. 23. In fact, Lin did consider whether to rely on the GSE figures. He was satisfied because: (1) Bank of

[1] The same goes for alleged securities losses. Those losses, too, are merely derivative of expected loan losses, and the Trustee cannot recover them because it does not own the securities.

America and Countrywide represented in the Settlement Agreement that they had no knowledge that any of the factual data was incorrect (PTX 1, ¶ 13(b)); (2) as Scrivener testified, the data came from the same databases that support Bank of America's SEC filings (Tr. (Scrivener) 986:7-22) and (3) the breach and success rate breakdown of the repurchase data (36% and 40%, respectively) came from the Institutional Investors, including Freddie Mac (Tr. (Lin) 3942:16-24; 4043:9-44:10)—if Freddie Mac believed that Bank of America had misrepresented the factual data, it is inconceivable that it would have provided this breakdown without comment.

Lin also judged that the GSE repurchase rate, adjusted for relevant differences between the loan populations, was a reasonable proxy. PTX 444.110. Lin's report to the Trustee explained why: the GSE data came from an actual repurchase experience on loans from the same originating platform as the loans in the Covered Trusts. *Id.* Burnaman agreed that the GSE data was a reliable proxy. Tr. (Burnaman) 2741:9-19. The Objectors largely ignore the record on this point and rely solely on statements from Robert Bostrom. Opp. at 24. But Bostrom's views do not undermine Lin's opinion or the Trustee's reliance on it, for two reasons:

First, as Bostrom testified, he is a lawyer, "[n]ot a numbers data person, period." PTX 648; Bostrom Dep. 266:1-4; *see also* Tr. (Burnaman) 2934:18-21. Lin spoke with the "numbers people" at Freddie Mac, and they did not question the utility of the GSE data. Tr. (Lin) 4044-45.[2] This is a critical point, because Bostrom's testimony about the GSE data related to a false premise in the Objectors' questions: that the GSE repurchase experience had been (or could be) applied directly to the Covered Trusts. This was not the approach presented by Bank of America or the approach used by Lin. In fact, the GSE data was used only after (1) identifying differences among the PLS and GSE loan populations that were relevant to the likelihood of underwriting

2 Other witnesses confirmed that Freddie Mac never said that the GSE information was incomparable or irrelevant. Tr. (Waterstredt) 897:11-20; Tr. (Scrivener) 1029:6-16.

defects and then (2) mathematically adjusting the repurchase figures to account for those differences. Tr. (Scrivener) 1102-03. There is no evidence that Bostrom knew of these adjustments or understood which variables were relevant.

Second, FHFA, the conservator of both GSEs, "is aware of no basis upon which it would raise a substantive objection to the proposed settlement." Dkt. No. 260. FHFA, which had originally sought more information, withdrew *after* Bostrom was deposed, and *after* Objectors had repeatedly attacked the use of GSE data. Bostrom also testified that it was *not true* that "FHFA instructed Freddie not to participate in the settlement . . . because of questions about the methodology that Freddie had used to repurchase loans[.]" PTX 648; Bostrom Dep. at 62:5-17.

As noted above, Lin was well aware of the differences between the GSE and PLS pools (Tr. (Lin) 4045:3-15), having headed the desk at Lehman Brothers that sold loans to the GSEs. He had far more direct experience with GSE loans than either the Objectors' statistics expert—who did not look at the GSE data at all—or their various law professors. *See* Tr. (Lin.) 3817:8-24. Lin testified to the difference between *credit* risk (the risk of default and loss) and *underwriting* risk (the likelihood of breaches of underwriting representations). Tr. (Lin) 3929:21-3930:19. In estimating a repurchase rate, he used data that controlled for differences between the GSE and Covered Trust loans on the variables that affect underwriting risk. *Id.* 4021:3-16.[3]

Lin also knew that the GSE experience was not complete in 2011. Tr. (Lin) 4013:10-18. As a result, he included "development factors" to account for future repurchases. Tr. (Scrivener)

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[3] The Objectors claim that Lin believes that uncontrolled-for "credit risk attributes are relevant to the likelihood of breaches of representations and warranties." Opp. 25. What the cited testimony actually says is that credit risk factors have "*very little* relevance to underwriting breaches . . . all I could tell you is *fairly small*," especially after controlling for factors that are directly relevant to underwriting risk. Tr. (Lin) 4024:22-4026:22 (emphasis added).

1016:6-18; Tr. (Lin) 4013:13-18; PTX 36.5.[4] Those adjustments were substantial—for late-defaulting loans, the adjustment quadrupled the actual repurchase rate.

The Objectors characterize the aggregate adjustments as "minor." Opp. 25. In fact, the adjustments raised the expected repurchase rate from approximately 10% for the actual GSE pool to over 14% for the Covered Trusts (*compare* PTX 36.2 *with* PTX 36.5; PTX 444.110)—a forty-percent increase, which increased the estimated repurchase liability by billions of dollars. More importantly, there is no evidence that those adjustments were wrong. Dr. Cowan had no opinion. Tr. (Cowan) 4204:21-23, 4306:3-8. The Objectors again rely entirely on the Institutional Investors' negotiating positions, which Lin, of course, had. PTX 444.105. Lin concluded that he could not rely on them, for the same reason that the Objectors (incorrectly) say that he should not have relied on the GSE data—the supposed "forensic reunderwriting" was totally unsubstantiated. To this day, there is no evidence that it even involved Countrywide loans. Tr. (Smith) 394-97; Tr. (Scrivener) 1033:13-16, 1134:7-12. As Lin also pointed out, the investors' presentation said that the high repurchase figures were the "top of the spectrum" of some unidentified range from the purported reunderwriting. Tr. (Lin) 3888:21-3889:17.

The Objectors claim that Lin "reported to BNYM that the Institutional Investors' analysis had more advantages and less disadvantages than BofA's analysis." Opp. 27. It appears that they simply counted the bullet points in the report. What he actually said was that "based on the limited amount of publicly available information and my industry knowledge, it is my opinion that [the Institutional Investors'] percentages are too high." PTX 444.105. By contrast, he "f[elt] it would be reasonable to utilize BofA's percentages for both rates since they are based on the

[4] The Objectors criticize the Trustee for not "demand[ing] a recalculation of the settlement range" long after the Settlement was signed (Opp. 26), but the record shows that the development factor was accurate, and the Settlement is in line with the complete GSE repurchase experience. *See* PTX 49, Exhibit B; Tr. (Burnaman) 2758:5-2759:23).

performance of a mortgage pool representing actual repurchase experience." PTX 444.110.

The Objectors' criticism boils down to the contention that Lin should have rejected verified GSE data in favor of unsubstantiated negotiating positions. They further contend that the Institutional Investors' bargaining position should have led the Trustee to reject a settlement that the Institutional Investors favor; in other words, that the Trustee should have relied on the Institutional Investors for everything *but* their bottom-line opinion.

C. Capstone

Capstone's opinion that the Trustee could not recover more than $4.8 billion from Countrywide is unchallenged. The Objectors criticize the scope of Capstone's assignment (Opp. 6, 28, 43) but ignore its purpose. The Trustee already knew that Bank of America's assets were substantial. It needed to learn what its chances were of reaching Bank of America at all (which Professor Daines evaluated) and what it could recover from Countrywide if the successor liability claims failed (which Capstone evaluated). *See* Tr. (Bailey) 2212:8-18, 2213:4-8. Asking Capstone to assume Bank of America's liability, whether through successor liability or fraudulent conveyance, would have made the Countrywide valuation a useless back-door valuation of Bank of America.

D. Professor Daines

The Objectors completely ignore the 26 decisions by at least 11 different judges that have dismissed successor liability claims against Bank of America, including in a suit brought by AIG itself. Tr. (Daines) 3237:20-3238:7, 3361:25-3362:8. The Objectors also (understandably) ignore the opinion of their own expert, Professor Coates, who testified at deposition that the chance of successor liability was 45% to 65%, and that a reasonable person could conclude that it was under 50%. *See* Tr. (Coates) 4910:6-4911:5, 4914:7-13, 4916:2-6. The Objectors wrongly assert that Daines did not "look into any facts relevant to the legal theories[.]" Opp. 28; *see also id.* at 6

(Daines had "no facts"). As Daines explained in the same passage, although he did not make findings of fact, he did review the relevant transaction documents and explained their relevance. Tr. (Daines) 3305:15-21; *see also id.* 3340:9-15 ("I asked for transaction documents and materials that were relevant to understanding the transactions . . . I tried to get the facts, and then I understood my job was to make my independent assessment of how these veil piercing or successor liability claims would play out."); *id.* at 3344:24-3345:5 (discussing conversations in which facts were gathered). His report lists over 100 documents that he considered. *See* 444.61-69 (listing materials reviewed in preparation of report).

The Objectors argue that, rather than trying to inform itself with an honest assessment, the Trustee should have told Daines to "develop the best possible successor liability case against BofA." Opp. 28. In fact, it would have been unreasonable for the Trustee to rely on a one-sided view of a successor liability claim the Objectors' own expert admitted was only a coin flip. *See* Tr. (Coates) 4910:6-4911:5, 4914:7-13, 4916:2-6. In addition, it would have made no sense to evaluate *Countrywide's* fraudulent conveyance or fiduciary duty claims, since those were not claims the Trustee could bring. Tr. (Daines) 3263:22-3266:7. In any event, Daines testified that such claims would likely fail if Bank of America paid fair value for Countrywide's assets, and neither the Objectors nor others suing Bank of America have challenged that valuation. *Id.*

Against this unrebutted evidence, the Objectors point to Bank of America's decisions to contribute capital to Countrywide, but these voluntary infusions "provide no assurance whatsoever that Bank of America, if it determined that it was in its self interest to allow Countrywide to go into bankruptcy," would not do so. Tr. (Fischel) 3665:6-20; *see also id.* 3666:5-19 ("[It is a] logical error to assume that because Bank of America was willing to infuse a certain amount of money into Countrywide, that means [that] they're willing to inject any amount of money into Countrywide"). As Judge Pfaelzer, like other courts, has noted, "[t]he fact that Bank of America has voluntarily paid certain debts of Countrywide does not mean that it was legally obligated to pay them, nor that it is legally obligated to pay others." *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1231 (C.D. Cal. 2012); *see also Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1192 (C.D. Cal. 2011) (finding "nothing that would indicate that Bank of America impliedly assumed Countrywide's liabilities"). To the contrary, the record shows that Bank of America's chief risk officer told the negotiating parties that Bank of America "would pursue that option [of putting Countrywide into bankruptcy] if necessary."[5] Tr. (Laughlin) 718:7-8. If Bank of America were faced with claims of the magnitude the Objectors insist should have been asserted, a Countrywide bankruptcy would have been an entirely reasonable course of action.

E. Professor Adler

The Objectors' assertion that Professor Adler was not an expert on PSAs (Opp. 29) ignores his relevant expertise in contract interpretation. There are competing interpretations of the phrase "materially and adversely affects" and, at the time of Professor Adler's report, limited and conflicting case law. *See* PTX 444.76-88; Tr. (Adler) 4457:22-25. Accordingly, it was appropriate to apply general principles to that provision. Tr. (Adler) 4418:19-4419:11. The trial record leaves no doubt that Professor Adler understood his assignment to be to provide an independent assessment of this issue, which he did. *Id.* 4382:17-26, 4419:6-11.

[5] Successor liability was not at issue in the recent case briefly mentioned by Objectors, Opp. 2, involving a single Countrywide program. *See* Answer, *United States ex rel. Edward O'Donnell v. Bank of America Corp., et al.*, 12 Civ. 1422 (JSR), Doc. No. 81. ¶ 162 (S.D.N.Y. May 23, 2013) ("Defendants, however, elect not to contest Plaintiff's successor-liability claims in this action given the circumstance that the great bulk of the loans at issue in the instant action were originated by an entity as to which BANA is the successor by *de jure* merger."). That entity, Countrywide Bank, fsb, gave no representations to the Covered Trusts.

F. The Trust Committee

The Objectors' discussion of the Trust Committee meeting is pure fantasy. They conclude that "the Trust Committee was nothing but an ill-informed rubber stamp of the settlement that BNYM's conflicted lawyers crafted to protect BNYM from any potential liability." Opp. 31-32. In fact, there is no evidence that Mayer Brown had anything to do with the Trust Committee meeting, which was convened by Robert Griffin of BNYM and consistent with the Trustee's standard practice and industry practice. Griffin Dep. 46 (R-4153); Bailey 2219-21; Landau 2538-39. They contend that the committee was a "rubber stamp" because it did not discuss each of the Objectors' pet theories. Opp. 31. But the only evidence in the record about what a trust committee should actually do comes from Landau, who led Bankers Trust's corporate trust group, among others. He explained that trust committees are the end, not the beginning (*see* Tr. (Landau) 2538-39, 2540-41), a "management check" rather than a "check on detail." Tr. (Landau) 2660-63; Tr. (Stanley) 3104:16-3105:9 ("it tends to take place at the end of the processes . . . . In this particular case, it would be, given the unusual nature and importance of this particular issue, an[] ad hoc committee would be just another governing check point to make sure we have done all the due processes that should be considered.").

IV. The Settlement Does Not Amend the PSAs.

The Objectors argue that any agreement to accept consideration that differs from what the PSAs provide is an "amendment." Opp. 47-49, Triaxx Br. 9-11. Thus, they conclude that the repurchase compensation, the servicing improvements, and the document cures are all improper amendments. Courts reviewing trustee settlements, however, have rejected this argument. In the *ResCap* bankruptcy, objecting certificateholders argued that a settlement between trustees and a monoline insurer improperly amended the trusts' governing agreements by releasing the insurer in exchange for a cash payment. *In re Residential Capital, LLC*, 497 B.R. 720, 728-29, 731

(Bankr. S.D.N.Y. 2013). Rejecting that objection, the court explained that "the Settlement Agreement is not an amendment to the Governing Agreements; it is a resolution of a claim against an insurer." *Id.* at 748; *see also Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1281 (9th Cir. 1992) (bondholder approval not required under governing agreement for action that was "a result of [trustee]'s discretionary decision to enter into settlement agreements").

Every settlement takes that form—one side pays, and the other releases claims. If releases were amendments, then no trustee could settle, but even the Objectors have given up arguing that New York law bars trustee settlements. *See, e.g., In re IBJ Schroder*, Index No. 101580/98, slip op. 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) ("the trustee's decision to compromise . . . is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference").

The Objectors cite no case holding otherwise. They can point only to cases that recite the general rule that courts may not rewrite contracts. *See, e.g.*, *Matter of Gilbert*, 39 N.Y.2d 663, 667 (1976) (cited at Opp. 47 & Triaxx Br. 10). The Objectors thereby *assume*, but do not demonstrate, that approving the Settlement would require rewriting the PSAs. Triaxx makes the same error when it cites *Perosi v. LeGreci*, 98 A.D.3d 230, 235 (2d Dep't 2012), which holds only that amendments to trust instruments must follow the prescribed procedure. Triaxx Br. 10.

The Steering Committee also argues that the Forbearance Agreement altered the PSAs' 60-day cure period. Opp. 47. In fact, the PSA cure period remains intact. The Forbearance Agreement applied only to a particular notice, and forbearance was agreed to by the investors that had sent that notice. *See, e.g.,* Tr. (Kravitt) 1367:13-18 (Forbearance Agreement "by its terms only applie[d] to the notice that Kathy Patrick's clients had given"); Tr. (Landau) 2548:2-2549:21 (certificateholders who provide notice "own that notice" and can withdraw it).

The Steering Committee next argues that the Settlement somehow amends the PSA language defining the "Purchase Price" for every repurchased loan. Opp. at 48-49. They thus conflate the repurchase of loans with the settlement of repurchase claims. If the Objectors were right, the Trustee could *never* settle even one loan repurchase. That position would doom the courts and the Trusts to litigation regardless of the costs or the benefits of settlement. Even more fundamentally, by citing a provision that applies only to loan *repurchases*, the Objectors ignore another key strength of the Settlement. Unlike the repurchase remedy under the PSAs, the Settlement does not require the trusts to transfer loans back to Countrywide. The trusts keep the loans *and* get $8.5 billion on top. The PSA repurchase language does not even apply here.

The Objectors argue that the Settlement modifies the payment waterfall (Opp. 48), but it is careful not to say *how*. The provision at issue (Paragraph 3 of the Settlement Agreement) prevents Settlement proceeds from going back to the Master Servicer, Bank of America. *See* Buechele Dep. 86:3-22. As BNYM's Jason Buechele—the Objectors' sole authority on this point—testified, "[t]he intent is to make sure that the settlement money goes to the bondholders and not to the servicer." *Id.* at 64:23-65:15. For obvious reasons, the Objectors do not object to the substance of that provision. As Buechele also testified, while the PSAs do not prohibit settlements, they do not specify how to distribute settlement payments. On the very page that the Objectors cite, he said that "I don't believe it changes the way it—the [PSA] calls for it. I don't think there's anything in the [PSA] that calls for the residual [*i.e.*, Bank of America] to take some of that money." Buechele Dep. 85:21-86:2. Paragraph 3 of the Settlement thus speaks to a topic on which the PSAs are silent. It is not an amendment.

V. There Is No Evidence That the Settlement Is Inadequate.

After urging the Court to disregard the Trustee's discretionary power, and instead to evaluate the "substantive fairness" of the Settlement, the Objectors spend just over one page arguing that the Settlement does not provide adequate compensation.

A. Representation and Warranty Claims

The Objectors briefly argue that the Settlement payment must be inadequate because the Trustee employed "assumptions" in its analysis. Opp. 46. The only way to avoid assumptions would be to wait until every loan has matured (and all statutes of limitations have expired) and then review all 1.6 million loan files. Moreover, the Objectors have no alternative other than *their own* untested assumptions—namely, that loan file review would produce greater recoveries, that it is costless and riskless, that a Countrywide bankruptcy would not occur or adverse appellate decisions on key aspects of the Trusts' claims would not issue, and so on. The Court gave the Objectors 150 loan files: they offered *none* in evidence. The Court gave the Objectors two years to develop evidence that the Settlement was *substantively* unfair. After what will soon be nine weeks of trial, the Objectors have offered *not one witness*—not even the Objectors themselves—to testify that the Settlement is unreasonably low. That the Objectors have urged the Court to cast aside $8.5 billion in cash, $3 billion in servicing improvements, and document cures based on nothing more than speculation that they might do better is unfair to the thousands of other investors waiting for their recovery. The Objectors have offered nothing, at all, to refute the wisdom and fairness of the Trustee's decision.

B. Servicing Claims

The Objectors' treatment of the multi-billion dollar servicing improvements (Tr. (Burnaman) 2730:3-5) is superficial.[6] Their suggestion that the Settlement "simply bring[s] BofA up to industry standards" ignores unchallenged evidence that the Settlement will require BofA to perform at a *higher* level than the PSAs require by, among other things, requiring subservicing of

[6] The Objectors do not challenge Burnaman's valuation of the servicing improvements, saying only that the Trustee should have hired him to value the servicing claims too. Opp. 30.

high-risk loans at the Master Servicer's expense and creating automatic financial penalties if Bank of America's servicing falls below quantified standards. Tr. (Kravitt) 1760:8-15; Tr. (Burnaman) 3038:22-26, 2768:16-2769:12. Their "objection" also ignores that the FHFA "considers it positive that the proposed settlement includes subservicing requirements, specific terms for the servicing of troubled mortgages and the curing of certain document deficiencies." Notice of Cond'l Objection (SDNY doc 15) at 2.

C. Document Defect Claims

The Objectors' one-sentence assertion that the Trustee never placed a dollar value on document defects ignores the record explaining *why* the Trustee did not do so (Br. 40-41), as well as the record of the negotiation (*id.* at 13), investigation, and evaluation of the claims (*id.* at 27), and the Trustee's judgment that the cure provisions were a good remedy (*id.* at 40-41). In challenging the value of that remedy (Opp. 46-47), which Professor Levitin described as "a pretty good smart settlement for BAC and the investors" (Levitin Dep. Ex. 4 ¶ 5; Levitin Dep. 141:24-142:2), the Objectors miss a key source of value: The PSAs' repurchase duty applies only if a document defect cannot be cured, and it applies only to Countrywide, so that that remedy is limited by Countrywide's ability to pay. The Settlement obligates the Master Servicer (Bank of America) to reimburse for document-related losses, an unquestionable improvement.

D. The Trustee's Consideration of Loan Modifications Was Reasonable and Adequate.

Triaxx's assertion that the Trustee failed to adequately consider the argument that the Master Servicer is required to purchase mortgage loans from certain of the Covered Trusts if the loans were modified to mitigate trust losses is meritless. The Trustee gave careful consideration to the issue, reasonably concluded that the argument was weak, and made the sensible judgment that focusing on stronger claims in the negotiations would advance the overarching goal of maximizing the value of the trusts claims.[7]

1. The Trustee Properly Considered the Loan Modification Issue.

The Trustee and its counsel were fully aware of the argument that the Master Servicer is required to purchase modified loans (Tr. (Kravitt) 1927:15-24) and included it in a "List of Settlement Issues" sent to counsel for Bank of America and Countrywide early in the negotiations. R-58.3.[8] The Trustee further evaluated the merits of the issue (Tr. (Kravitt) 2138:16-2140:13) and concluded that it "was a losing argument legally." *Id.* 2138:16-2140:13. Based on this conclusion, the Trustee decided to emphasize strong claims over weak ones in the settlement negotiations. Tr. (Kravitt) 1925:26-1926:10, 2138:16-2140:13. As discussed below, the Trustee's conclusion that this was a "losing argument" was entirely reasonable.

2. The Trustee's Conclusion That the Triaxx Argument Lacks Merit Was Reasonable.

The Trustee correctly rejected Triaxx's argument, because it conflates two types of modifications—those done to mitigate losses and those carried out as an alternative to refinancing with another lender. Each has a different purpose; each is governed by different contract provisions.[9] Triaxx's argument rests on the fallacy that language that *authorizes* interest rate modifications on *performing* loans, as an alternative to refinancing where the loans are purchased out of the trust, somehow also requires the Master Servicer to purchase *troubled* loans

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[7] The Court is not being asked to decide whether any of the PSAs mandate the repurchase of modified loans. Rather, the sole issue is whether the Trustee acted reasonably and in good faith in considering the issue. *See, e.g.*, *Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010) ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith.").

[8] The argument had been raised, and fully briefed, before this Court, long before the settlement negotiations at issue here had begun. *See Greenwich Fin. Serv. Distressed Mort. Fund 3, LLC. v. Countrywide Fin. Corp.,* No. 650474/2008 (Sup. Ct. N.Y. Cnty.) (Kapnick, J.).

[9] There is no evidence that any loan in the Covered Trust was modified as an alternative to refinancing. *See* Tr. (Scrivener) 1201:14-17 ("I don't believe it's a practice or process of Countrywide of Bank of America to do . . . in lieu of refinance modifications.").

that are modified to mitigate losses as part of the Master Servicer's prudent servicing obligation.

Loss mitigation modifications are part of the Master Servicer's duty, under Section 3.01 of the PSAs, to service the loans in accordance with "customary and usual standards of practice of prudent mortgage loan lenders." *See, e.g.*, R-3462.103, §3.01. Under those standards, "[w]hen a loan defaults, a servicer has two options. It can proceed to foreclose *or it can attempt to modify the loan*."[10] This decision turns on an "evaluation of the comparative net present value of these options." *Id*. at 1. Thus, loss mitigation modifications are for the benefit of investors, to mitigate losses on *delinquent* loans, as part of "prudent" servicing under Section 3.01.[11] Section 3.01 does not require repurchase of loans that are modified for loss mitigation purposes.

Modifications "in lieu of a refinancing" are a separate type of modification and are authorized by and addressed in a separate section of the PSAs.[12] This section permits the Master Servicer (or in some cases the loan originator) to reduce the interest rate for a *performing* borrower who requests such a reduction as an alternative to refinancing, provided that the

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[10] Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, Winter 2011, at 34 (emphasis added). The lead author of this article is a testifying expert for the Objectors.

[11] *See* Tr. (Scrivener) 1189:6-11 ("It is very standard practice to, when a borrower goes delinquent to work with them to see if a modification is appropriate . . . [t]hey have been in the business as long as I have been in the business."); *id*. at 1189:26-1190:2 ("modifications have always been involved in the servicing business"); *id*. at 11, 34 ("Servicers are responsible for . . . attempting to mitigate investor losses . . . [w]hen a loan defaults, a servicer has two options. It can proceed to foreclose or it can attempt to modify the loan."); *see also* 15 U.S.C. § 1639a(c) (providing that qualified loss mitigation plans, including loan modifications "shall constitute standard industry practice for purposes of all Federal and State laws").

[12] Triaxx bases its claim on PSA and prospectus language for 437 of the Covered Trusts that fall into three variants, identified as Variant 1, 3, and 5. *See* Triaxx Brief at 2. The relevant PSA and prospectus supplement language for Variants 1, 3, and 5 is set out at both R-4126 at 001, 003, 005 and PTX 620 at 1, 3, and 5. The language at issue appears in Section 3.11 or 3.12.

mortgage is then purchased from the trust.[13] The plain language of the governing documents makes clear that this obligation to purchase applies *only* to modifications carried out as an alternative to refinancing. In 388 of the trusts, the relevant section of the PSA states that the purchase obligation applies only "if the modification is in lieu of a refinancing." *See* R-4126 at 003, 005; PTX620 at 3, 5. For the other 49, the prospectus supplement makes the same point: purchase is required only where "borrowers request modification as an alternative to refinancing." *See* R-4126 at 001; PTX620 at 1.[14] Nowhere do the governing documents state that *troubled* loans modified to mitigate losses under PSA Section 3.01 must be repurchased.

That refinance modifications are required to be purchased from the trusts, and loss mitigation modifications are not, is apparent on the face of the documents and it is consistent with the economics of RMBS transactions. Refinance modifications benefit the Master Servicer, not the trusts, because they allow it to maintain a servicing relationship with a performing borrower that would be lost if the mortgage were refinanced with another lender. Logically, such modifications would be conditioned on making the trust whole by purchasing the mortgage out of the trust. In contrast, it makes no sense to require the Master Servicer to purchase delinquent loans modified for loss mitigation purposes: it would transform loss mitigation modifications from a prudent servicing tool to an arbitrary device by which the risk of loss on non-defective, prudently serviced mortgages—the *very* risk that RMBS investors accept when they purchase

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[13] *See* R-4126 at 001, 003, 005; PTX620 at 1, 3, 5 (PSA and prospectus language for Variants 1, 3, and 5 placed at issue by Triaxx). In 173 trusts, it is the loan originator, Countrywide Home Loans, Inc., that may modify in lieu of refinance, provided that it purchases the mortgage. In the other 264, the Master Servicer has this right and responsibility. *Id*.

[14] Under New York law, RMBS PSAs are interpreted in light of the relevant prospectus supplement. *Wells Fargo Bank, N.A. v. Fin. Sec. Assur., Inc.*, 504 Fed. App'x 38, 40(2d Cir. 2012) ("[W]e reject Assured's argument that the district court erred in considering, in interpreting the PSA, the Prospectus Supplement and other transaction documents related to the PSA. Under New York law, which governs the PSA, the district court properly considered all writings forming a part of a single transaction.").

certificates—is shifted to the Master Servicer, not because it is responsible for the loss, but because it has prudently attempted to mitigate it.

VI. There Is No Objection to Any of the "Opaque Terms."

The Objectors further contend that there is no "evidence on" various terms of the Settlement. Opp. 49-50. But what those terms mean is established by the language of the Settlement Agreement itself. Moreover, since none of those terms is challenged as improper, they provide no reason to reject any part of the Proposed Order.

The tepid "objections" merely repeat arguments that we have responded to before and that the Objectors dropped at the hearing. They profess concern that Bank of America might exclude trusts. Opp. 49. But if the Objectors really believed that the Settlement is inadequate, that would be of little concern. They assert that "BofA appears to have a right to exclude trusts on some other unspecified basis" (*id.*), but if the right is "unspecified" in the Settlement Agreement, then it does not exist.[15] The Objectors do not explain why it "appears" otherwise, and they questioned no Bank of America witness about that. As the agreement says, any excluded trust will not receive payment, but it also will retain all of its claims. The "confidential percentage" binds Bank of America to the Settlement even if some trusts are excluded by the Court or by investor direction, a change that otherwise would void the contract. The Objectors point out that there is no "official" indicative per-trust allocation by NERA, though they draw no conclusion from that and they do not dispute that Bloomberg and various securities analysts have published projected allocations. Opp. 49-50. As we also explained in our May 13 pre-trial brief (at 54), courts routinely approve settlements without seeing a calculation for each plaintiff, or in some cases even "before a distribution scheme has been adopted." *See, e.g.*, *In re Agent Orange*

[15] If there were some secret side agreement (which there is not), it would be invalid under the Settlement Agreement's merger clause (¶ 31), and also would not be approved by the Court.

Prod. Liab. Litig., 818 F.2d 145, 170 (2d Cir. 1987).

VII. The Objections Based on Other Litigation Against the Trustee Are Irrelevant But Show the Need for the Bar Order.

A. The Scott + Scott Objection

Scott + Scott is concerned that an order by this Court could impair its separate case in federal court. They are right to a certain extent—any federal claim *that depends on matters that are decided in this proceeding* will be barred by res judicata if the Proposed Order is granted. But it does not follow that the Court lacks authority to issue the Proposed Order. "[I]t is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939).

Scott + Scott also argues (at 8-9) that investors who were not named as defendants and served with process cannot be bound; this contention apparently includes parties that appeared, intervened and actively litigated, like their self-styled "Public Pension Fund Committee." To the contrary, resolving trust matters as to all beneficiaries is well within the power of this Court:

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

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Due process is satisfied by giving "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also* Br. 48-49. The Trustee has done that here. *See* Br. 3-4.

There is nothing unusual about the proposed bar order. *See Restatement (Second) of*

Trusts § 220 ("The beneficiary may be barred by a decree of a proper court from holding the trustee liable for a breach of trust."). As acknowledged by the Second Circuit in this case, "[t]he injunction against certificateholders . . . simply gives effect to the primary relief sought in the Article 77 proceeding—the determination that The Bank of New York Mellon acted reasonably in entering into the Settlement Agreement and in accordance with its duties as trustee for all certificateholders." *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 178 (2d Cir. 2012).

B. Knights of Columbus

The Knights of Columbus objection confirms the fairness of the Settlement. The Knights have identified "specific potential servicing violations" and have an "interest[] in assessing the losses related to those violations," and they make no objection to the adequacy of the Settlement. The objection they do make is even more pointless than Scott + Scott's. On the one hand, they argue that they sued the Trustee for an accounting in order to investigate claims against Countrywide and Bank of America, presumably as a prelude to seeking remedies against them. On the other hand, they complain that the Trustee *won* major remedies against Countrywide and Bank of America, but did so without Mr. Franklin's involvement (and without paying his fees). Then the Knights complain that "a lengthy and expensive proceeding" was needed to evaluate the very claims that they had intended to pursue at their own expense.[16] That grievance rings hollow coming from a party that will receive the full benefit of the Settlement while still pursuing claims against the Trustee, but whose lawyers attended only a few days of the hearing.

No objection would be complete without a potshot at the Trustee's counsel, whom the Knights say "misled" them, because they did not immediately tell him how it would respond to

[16] And the belief that it was the *Trustee* that subjected the *Objectors* to unnecessary delay and expense is unlikely to be shared by anyone who actually attended the hearing.

his lawsuit. Even if the Trustee were somehow required to disclose its litigation strategy to an adversary, this is no reason to reject an $8.5 billion settlement.

VIII. Each of the Ancillary Findings Is Appropriate.

A. Notice

As stated in the Petitioners' Brief (pages 3-4), Certificateholders were provided with ample notice of this proceeding. The notice program ordered by the Court was one of the most robust notice programs ever implemented (Tr. (Fraga) 3454:7-10, 20-24), and far exceeded the requirements of the PSAs (Tr. (Bailey) 2282:10-13; Tr. (Landau) 2542:19-2543:25).

The Objectors challenge paragraphs (c) and (d) of the Proposed Order solely on the ground that the Trustee should have given notice of settlement negotiations. Opp. 50; *see also* Knights Brief. Bailey explained the Trustee's detailed rationale for not giving notice (Tr. (Bailey) 2194:21-2196:6)), which is not required by the PSAs. *See, e.g.*, PTX 71 at 71.112 § 7.03; *see also In re Residential Capital, LLC*, 497 B.R. 720, 747 (Bankr. S.D.N.Y. 2013) (finding notice adequate and due process satisfied even though trustees did not give notice of mediation). In any event, paragraph (c) does not even ask for a finding about when notice should have been given; it asks for a finding that the notice of *this* proceeding was adequate.

B. Paragraph (s)

Paragraph (s) does not, as the Objectors assert, seek a release regarding future conduct. Rather, it seeks finality limited to the calculation and distribution of each trust's Allocable Share and related tax issues. The Objectors have never challenged the allocation method, let alone argued for any plausible alternative. Nor have they challenged the distribution terms on their merits. Because the underpinnings of paragraph (s) are unchallenged, the relief is appropriate.

CONCLUSION

For all of these reasons, the Court should issue the Proposed Final Order and Judgment.

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Respectfully submitted,

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