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), *et al.*,

Petitioners,

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

Index No. 651786-2011

NOTICE OF ENTRY

PLEASE TAKE NOTICE THAT within is a true and correct copy of a Decision/Order/Judgment, dated January 31, 2014 of the Honorable Barbara R. Kapnick, J.S.C., duly made and entered in the office of the Clerk of the Supreme Court, New York County, on February 21, 2014.

Dated: February 21, 2014
New York, New York

Respectfully submitted,

By: _____
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To:
All Counsel of Record

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

PRESENT: BARBARA R. KAPNICK **PART** 39

Justice

Bank of New York Mellon

INDEX NO. 651786/2011

MOTION DATE _____

-v-

for an order pursuant to CPLR 7701, seeking judicial instructions and approval of a proposed settlement.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ **were read on this motion to/for** _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/31/14

BARBARA R. KAPNICK **J.S.C.**

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) *et al.*

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement

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DECISION/ORDER/JUDGMENT
Index No. 651786/11
Motion Seq. Nos. 001, 024, 042

BARBARA R. KAPNICK, J.:

The instant proceeding was commenced by a Verified Petition, dated June 28, 2011 (the "Petition") (NYSCEF No. 1)[1], seeking a judgment pursuant to CPLR Section 7701, which provides in relevant part that "[a] special proceeding may be brought to determine a matter relating to any express trust . . .[,]" in the form of the Proposed Final Order and Judgment (the "PFOJ") (NYSCEF No. 7), which was attached to the Petition, and proposes the following twenty-two findings:

a) For purposes of this Final Order and Judgment, the Court adopts all defined terms set forth in the Settlement Agreement. Capitalized terms used herein, unless otherwise defined, shall have the meanings set forth in the Settlement Agreement.

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[1] "NYSCEF" stands for the New York State Courts E-Filing system.

b) The Court has jurisdiction over the subject matter of this Article 77 Proceeding. The Court has jurisdiction over the Petitioner, the Covered Trusts, and all certificateholders and noteholders of the Covered Trusts (the "Trust Beneficiaries") with respect to the matters determined herein. (As used herein, "Trust Beneficiaries" shall have the same meaning as "Investors" under the Settlement Agreement.)[2]

c) The form and the method of dissemination of notice (the "Notice"), as described in and as previously approved by the Court's Order dated [June 29], 2011 (the "Preliminary Order"), provided the best notice practicable under the circumstances and was reasonably calculated to put interested parties on notice of this action. The Preliminary Order provided, *inter alia*, for the Notice to be provided by a combination of individual notice, notice by publication in specified publications, notice through the Depository Trust Company, advertising on the internet, and notice through a website created and maintained by the Trustee for the Article 77 Proceeding. The Petitioner has submitted evidence establishing its compliance with reasonable diligence with the Preliminary

[2] There is no dispute as to the Court's jurisdiction in this matter.

Order. The Court finds that the Notice was provided in accordance with the provisions of the Preliminary Order.

d) The Notice provided due and adequate notice of these proceedings and the matters set forth herein, including the Settlement and the Court's consideration of the actions of the Trustee in entering into the Settlement Agreement, to all persons entitled to such notice, including the Potentially Interested Persons identified in paragraph 6 of the Ingber Affirmation, including the Trust Beneficiaries, and the Notice fully satisfied the requirements of New York law, federal and state due process requirements and the requirements of other applicable law.[3]

e) A full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon. Accordingly, the Covered Trusts, all Trust Beneficiaries, and their successors-in-interest and assigns, and any Persons claiming by, through, or on behalf of any of the

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[3] The Court need not address paragraphs (c) and (d) further, since it previously approved the Notice Program in its Order to Show Cause signed on June 29, 2011 (motion sequence no. 001).

Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements are bound by this Final Order and Judgment.

f) The Trustee has the authority, pursuant to the Governing Agreements and applicable law: (i) to assert, abandon, or compromise the Trust Released Claims, and (ii) to enter into the Settlement Agreement on behalf of all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements.

g) Pursuant to the Governing Agreements and applicable law, the decision whether to enter into the Settlement Agreement on behalf of all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements is a matter within the Trustee's discretion.

h) The Settlement Agreement is the result of factual and legal investigation by the Trustee, and is supported by the Institutional Investors.

i) The Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled. In that regard,

the Trustee appropriately considered the claims made and positions presented by the Institutional Investors, Bank of America, and Countrywide relating to the Trust Released Claims in considering whether to enter into the Settlement Agreement.

j) The arm's-length negotiations that led to the Settlement Agreement and the Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the Settlement.

k) The Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts.

l) Pursuant to CPLR § 7701, the Court hereby approves the actions of the Trustee in entering into the Settlement Agreement in all respects.

m) The Parties are directed to consummate the Settlement in accordance with its terms and conditions, and the Settlement is hereby approved by the Court in all respects.

n) The Settlement Agreement is hereby approved in all

respects, and is fully enforceable in all respects. The release in the Settlement Agreement provides as follows:

> 9. **Release**.
>
> (a) Effective as of the Approval Date, except as set forth in Paragraph 10 [of the Settlement Agreement], the Trustee on behalf of itself and all Investors, the Covered Trusts, and/or any Persons claiming by, through, or on behalf of any of the Trustee, the Investors, or the Covered Trusts or under the Governing Agreements (collectively, the Trustee, Investors, Covered Trusts, and such Persons being defined together as the "Precluded Persons"), irrevocably and unconditionally grants a full, final, and complete release, waiver, and discharge of all alleged or actual claims, counterclaims, defenses, rights of setoff, rights of rescission, liens, disputes, liabilities, Losses, debts, costs, expenses, obligations, demands, claims for accountings or audits, alleged Events of Default, damages, rights, and causes of action of any kind or nature whatsoever, whether asserted or unasserted, known or unknown, suspected or unsuspected, fixed or contingent, in contract, tort, or otherwise, secured or unsecured, accrued or unaccrued, whether direct, derivative, or brought in any other capacity that the Precluded Persons may now or may hereafter have against any or all of the Bank of America Parties and/or Countrywide Parties arising out of or relating to (i) the origination, sale, or delivery of Mortgage Loans to the Covered Trusts, including the representations and warranties in connection with the origination, sale, or delivery of Mortgage Loans to the Covered Trusts or any alleged obligation of any Bank of America Party and/or Countrywide Party to repurchase or otherwise compensate the Covered Trusts for any Mortgage Loan on the basis of any representations or warranties or otherwise or failure to cure any alleged breaches of representations and warranties, including all claims arising in any way from or under Section 2.03 ("Representations, Warranties and Covenants of the Sellers and Master Servicer")[4] of the Governing Agreements, (ii) the documentation of the Mortgage Loans held by the Covered Trusts (including the documents and instruments covered in Sections 2.01

[4] Which provision is numbered 2.04 in the Sale and Servicing Agreements relating to CWHEQ 2006-A and CWHEQ 2007-G.

("Conveyance of Mortgage Loans") and 2.02 ("Acceptance by the Trustee of the Mortgage Loans") of the Governing Agreements and the Mortgage Files) including with respect to alleged defective, incomplete or non-existent documentation, as well as issues arising out of or relating to recordation, title, assignment, or any other matter relating to legal enforceability of a Mortgage or Mortgage Note, and (iii) the servicing of the Mortgage Loans held by the Covered Trusts (including any claim relating to the timing of collection efforts or foreclosure efforts, loss mitigation, transfers to subservicers, Advances, Servicing Advances, or that servicing includes an obligation to take any action or provide any notice towards, or with respect to, the possible repurchase of Mortgage Loans by the Master Servicer, Seller, or any other Person), in all cases prior to or after the Approval Date (collectively, all such claims being defined as the "Trust Released Claims").

(b) The Trust Released Claims shall also be deemed to have been released as of the Approval Date to the full and same extent by the Master Servicer of the Covered Trusts (including the current Master Servicer, BAC HLS, and any subsequent servicer who may in the future be substituted for the current Master Servicer with respect to one or more of the Covered Trusts or any loans therein) and the Master Servicer shall be deemed to be a Precluded Person.

(c) The release and waiver in Subparagraphs 9(a) and 9(b) [of the Settlement Agreement] is intended to include, and upon its effectiveness shall include, any claims or contentions that Bank of America or any non-Countrywide affiliate, division, or subsidiary of Bank of America, and any of the predecessors or assigns thereof, is liable on any theory of successor liability, vicarious liability, veil piercing, de facto merger, fraudulent conveyance, or other similar claim or theory for the obligations, exposure, or liability of Countrywide or any of its affiliates, divisions, or subsidiaries, and any of the predecessors or assigns thereof concerning any of the Covered Trusts, with respect to the Trust Released Claims.

10. Claims Not Released.

(a) Administration of the Mortgage Loans. The release

and waiver in Paragraph 9 [of the Settlement Agreement] does not include claims based solely on the action, inaction, or practices of the Master Servicer in its aggregation and remittance of Mortgage Loan payments, accounting for principal and interest, and preparation of tax-related information in connection with the Mortgage Loans and the ministerial operation and administration of the Covered Trusts and of the Mortgage Loans held by the Covered Trusts for which the Master Servicer receives servicing fees unless, as of the Signing Date, the Trustee has or should have knowledge of the actions, inactions or practices of the Master Servicer in connection with such matters.

(b) Servicing of the Mortgage Loans. Except as provided in Subparagraph 10(a) [of the Settlement Agreement], the release and waiver in Paragraph 9 [of the Settlement Agreement] includes: (i) all claims based in whole or in part on any actions, inactions, or practices of the Master Servicer prior to the Approval Date as to the servicing of the Mortgage Loans held by the Covered Trusts; and (ii) as to all actions, inactions, or practices by the Master Servicer after the Approval Date, only (A) actions, inactions, and practices that relate to the aspects of servicing addressed in whole or in part by the provisions of Paragraph 5 [of the Settlement Agreement] (material compliance with which shall satisfy the Master Servicer's obligation to service the Mortgage Loans prudently in accordance with all relevant sections of the Governing Agreements) and (B) actions, inactions, or practices that relate to the aspects of servicing not addressed by the provisions of Paragraph 5 [of the Settlement Agreement] that are consistent with (or improvements over) the Master Servicer's course of conduct prior to the Signing Date. It is further understood and agreed that Investors may pursue such remedies as are available under Section 10.08 ("Limitations on Rights of Certificateholders") of the Governing Agreements with respect to an Event of Default as to any servicing claims not released by this Settlement.

(c) Certain Individual Investor Claims. The release and waiver in Paragraph 9 [of the Settlement Agreement] does not include any direct claims held by Investors or their clients that do not seek to enforce any rights under the terms of the Governing Agreements but rather are based on disclosures made (or failed to be made) in connection

with their decision to purchase, sell, or hold securities issued by any Covered Trust, including claims under the securities or anti-fraud laws of the United States or of any state; provided, however, that the question of the extent to which any payment made or benefit conferred pursuant to this Settlement Agreement may constitute an offset or credit against, or a reduction in the gross amount of, any such claim shall be determined in the action in which such claim is raised, and the Parties reserve all rights with respect to the position they may take on that question in those actions and acknowledge that all other Persons similarly reserve such rights.

(d) Financial-Guaranty Provider Rights and Obligations. To the extent that any third-party guarantor or financial-guaranty provider with respect to any Covered Trust has rights or obligations independent of the rights or obligations of the Investors, the Trustee, or the Covered Trusts, the release and waiver in Paragraph 9 [of the Settlement Agreement] is not intended to and shall not release such rights, or impair or diminish in any respect such obligations or any insurance or indemnity obligations owed by or to such Person.

(e) Indemnification Rights. The Parties do not release any rights to indemnification under the Governing Agreements including the Trustee's right to indemnification by the Master Servicer of the Covered Trusts.

(f) Settlement Agreement Rights. The Parties do not release any rights or claims against each other to enforce the terms of this Settlement Agreement.

(g) Excluded Covered Trusts. The release and waiver in Paragraph 9 [of the Settlement Agreement] does not include claims with respect to any Excluded Covered Trust.

o) The Trustee, all Trust Beneficiaries, the Covered Trusts, and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements, and each of

their heirs, executors, administrators, successors-in-interest, and assigns, are hereby: (i) permanently barred and enjoined from instituting, commencing, or prosecuting, either directly, derivatively, or in any other capacity, any suit, proceeding, or other action asserting any of the Trust Released Claims, against any or all of the Bank of America Parties and/or the Countrywide Parties; (ii) conclusively determined to have fully, finally, and forever compromised, settled, released, relinquished, discharged, and dismissed with prejudice and on the merits the Trust Released Claims; and (iii) permanently barred and enjoined from knowingly assisting in any way any third party in instituting, commencing, or prosecuting any suit against any or all of the Bank of America Parties and/or the Countrywide Parties asserting any of the Trust Released Claims. These provisions shall also be deemed to apply to the full and same extent to the Master Servicer of the Covered Trusts (including the current Master Servicer, BAC HLS, and any subsequent servicer who may in the future be substituted for the current Master Servicer with respect to one or more of the Covered Trusts or any loans therein).

p) All Trust Beneficiaries and each of their heirs, executors, administrators, successors-in-interest, and

assigns, and the Bank of America Parties and the Countrywide Parties and each of their respective heirs, executors, administrators, successors-in-interest, and assigns, are hereby permanently barred and enjoined from instituting, commencing, or prosecuting, either directly, derivatively, or in any other capacity, any suit, proceeding, or other action asserting against the Trustee any claims arising from or in connection with the Trustee's entry into the Settlement, including but not limited to the Trustee's participation in negotiations regarding the Settlement, the Trustee's analysis of the Settlement, the filing by the Trustee of any petition in connection with the Settlement, the provision of notices concerning the Settlement to Potentially Interested Persons, and any further actions by the Trustee in support of the Settlement, including the response by the Trustee to any objections to the Settlement and any implementation of the Settlement by the Trustee; provided, however, that nothing herein precludes any Party from asserting any claims arising out of a breach of the Settlement Agreement.

q) With the exception of prosecuting any appeals directly from this Final Order and Judgment, all Trust Beneficiaries, the Covered Trusts, and any Persons

claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts or under the Governing Agreements, and each of their heirs, executors, administrators, successors-in-interest, and assigns, are hereby permanently barred and enjoined from instituting, commencing, asserting, or prosecuting, either directly, derivatively, or in any other capacity, any claim or objection challenging this Final Order and Judgment, the actions of the Trustee in entering into the Settlement Agreement or this Article 77 Proceeding.

r) The Trustee will not, by virtue of actions taken in seeking, or pursuant to, any orders in this proceeding or this Final Order and Judgment, impair the rights it has under the applicable Governing Agreements to be compensated for the fees and expenses it incurs in discharging its duties as Trustee.

s) None of the Bank of America Parties, the Countrywide Parties, the Institutional Investors, or the Trustee shall have any liability (including under any indemnification obligation provided for in any Governing Agreement, including as clarified by the side-letter that is Exhibit C to the Settlement Agreement) to each other, the Trust Beneficiaries, the Covered Trusts, or any other Person arising out of the determination, administration,

or distribution (including distribution within each Covered Trust) of the Allocable Shares pursuant to the Settlement or incurred by reason of any tax consequences of the Settlement.

t) All objections to the Settlement have been considered and are overruled and denied in all respects.

u) Without affecting the finality of this Final Order and Judgment in any respect, the Court hereby retains exclusive jurisdiction over the Petitioner, the Covered Trusts, and all Trust Beneficiaries (whether past, present, or future) for all matters relating to the Settlement and this Article 77 Proceeding, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Final Order and Judgment.

v) There is no just reason for delay in the entry of this Final Order and Judgment and immediate entry by the Clerk of the Court is expressly directed.[5]

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[5] The PFOJ appears to be based on the assumption that this Court would render its decision on the Petition first, after which it would be asked to make these twenty-two delineated findings. (NYSCEF No. 7 at 2.) However, this is not in fact how this proceeding has evolved. Indeed, the factual findings that the Petitioners ask this Court to adopt are just that, factual findings, not appropriate to be included in the body of an Order and Judgment.

The Court thus, throughout this decision, adopts some of the factual findings, in whole or in part, in the context of

Background

The following facts are taken from the Petition, unless otherwise noted.

Here, as in the typical residential mortgage-backed securitization, a loan originator, or "Seller," sold portfolios of loans secured by mortgages on residential properties ("Mortgage Loans") to another entity, known as a "Depositor." The Depositor conveyed the Mortgage Loans to petitioner The Bank of New York Mellon ("BNY Mellon" or the "Trustee"), as Trustee, to hold in Trust. Certificates or notes evidencing various categories of ownership interests in the Trusts were then sold through an underwriter to investors. The investors are called "Certificateholders" or "Noteholders" (referred to herein as "Certificateholders" or "Trust Beneficiaries"). A "Master Servicer" was charged with responsibility for, among other things, collecting debt service payments on the Mortgage Loans, taking any necessary enforcement action against borrowers, and distributing payments on a monthly basis to the Trustee for distribution to the Certificateholders.

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discussing particular issues, but will not ultimately convert these findings into a Final Order and Judgment. This Court believes it has made the appropriate determinations required of it by this Article 77 proceeding.

At issue here are 530 of these Trusts (the "Covered Trusts"), all but seventeen of which are evidenced by separate contracts known as "Pooling and Servicing Agreements" (the "PSAs") under which BNY Mellon is the Trustee. The remainder are evidenced by indentures and related Sale and Servicing Agreements (the "SSAs") under which BNY Mellon is the indenture trustee. The PSAs, indentures, and SSAs are collectively referred to as the "Governing Agreements."

Although each of the Governing Agreements are separate agreements that were individually negotiated and are not entirely identical, the Petition asserts that the terms that are pertinent here are substantively similar. The Governing Agreements each contain a series of representations and warranties made by each Seller for the benefit of the Trust. These include a representation that the Mortgage Loans were underwritten in all material respects in accordance with certain underwriting guidelines; that the origination, underwriting and collection practices of the Seller and Master Servicer have been legal, prudent and customary in the mortgage lending and servicing business; that the Mortgage Loans conform in all material respects to their descriptions in the investor disclosure documents; and that the Mortgage Loans were originated in accordance with all applicable laws.

The Governing Agreements also impose servicing obligations on the Master Servicer, requiring, among other things, that the Master Servicer administer the Mortgage Loans in accordance with the terms of the Governing Agreements and the customary and usual standards of practice of prudent mortgage loan servicers.

Here, a substantial dispute arose concerning the Sellers' alleged breaches of representations and warranties in the Governing Agreements, and the Master Servicers' alleged violations of prudent servicing obligations.

These allegations were set forth in a letter dated October 18, 2010, (the "Notice of Non-Performance") (PTX 108)[6] by a group of Certificateholders that included Blackrock Financial Management, Inc. and its affiliates; Pacific Investment Management Company LLC; Federal Home Loan Mortgage Corporation ("Freddie Mac"); Goldman Sachs Asset Management L.P.; Maiden Lane LLC; Maiden Lane II LLC; Maiden Lane III LLC;[7] Kore Advisors, L.P.; Neuberger Berman Europe Limited; Western Asset Management Company; Metropolitan Life Insurance Company; Trust Company of the West and the affiliated

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[6] PTX refers to Petitioners' hearing exhibits.

[7] The Maiden Lane entities were formed by the Federal Reserve Bank of New York, pursuant to Section 13(3) of the Federal Reserve Act, to support lending to financial institutions severely affected by the 2007-2008 economic crisis.

companies controlled by The TCW Group, Inc.; Teachers Insurance and Annuity Association of America; Invesco Advisers, Inc.; Thrivent Financial for Lutherans; Landesbank Baden-Wuerttemberg and LBBW Asset Management (Ireland) PLC, Dublin; ING Capital LLC; ING Bank fsb; ING Investment Management LLC; New York Life Investment Management LLC; certain Nationwide Insurance entities; certain AEGON entities; Federal Home Loan Bank of Atlanta; Bayerische Landesbank; and Prudential Investment Management, Inc. (collectively, the "Institutional Investors"), who, at the time of the Notice of Non-Performance, held certificates in approximately 117 of the Covered Trusts (PTX 108.14).

The Sellers in each of the Covered Trusts are any or all of Countrywide Home Loans, Inc. ("CHL"), Park Granada LLC, Park Monaco, Inc., Park Sienna LLC and Countrywide LFT LLC. The Master Servicer is BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP ("BAC HLS"). CHL and its parent, Countrywide Financial Corporation ("CFC"), will be referred to collectively as "Countrywide." BAC HLS and its parent, Bank of America Corporation ("BAC"), will be referred to collectively as "Bank of America." The Institutional Investors took the position that BAC was liable for the obligations of Countrywide with respect

to the alleged breaches of the Governing Agreements.[8]

Beginning in November 2010, the Institutional Investors, with the participation of the Trustee, engaged in negotiations with Countrywide and Bank of America in an attempt to reach a settlement for the benefit of the Trusts and to avoid litigation. These negotiations culminated in a settlement memorialized by an agreement, dated June 28, 2011 (the "Settlement Agreement") (NYSCEF No. 3), entered into by BNY Mellon and BAC (the "Settlement").

The Settlement Agreement requires Bank of America and/or Countrywide to pay $8.5 billion (the "Settlement Payment") into the Trusts, allocated pursuant to an agreed-upon methodology that accounts for past and expected future losses associated with the Mortgage Loans in each Trust. It also requires BAC HLS to implement, among other things, servicing improvements that are intended to provide for servicing performance by BAC HLS that is at or above industry standards and will provide a mechanism for BAC HLS to transfer high-risk loans to sub-servicers for more individualized attention.

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[8] BAC acquired Countrywide in July 2008, months after the last of the mortgage-securitizations had closed and the last of the representations and warranties were made. At the time of the filing of the Petition, it asserted that Countrywide was maintained as a separate subsidiary of Bank of America and appeared to have limited remaining assets.

The Trustee filed this Petition to give Certificateholders an opportunity to be heard in opposition or in support of the Settlement, and to seek an order, among other things, (1) approving the Settlement, and (2) declaring that the Settlement is binding on all Trust Beneficiaries and their successors and assigns.

By Order to Show Cause (motion sequence no. 001) signed on June 29, 2011, this Court ordered that notice of the commencement of this special proceeding be disseminated to all Potentially Interested Persons within forty-five (45) days via nine different domestic and international methods or channels of communication.[9] (NYSCEF No. 13.)

By Decision/Order dated July 8, 2011 (motion sequence no. 002), the Institutional Investors intervened in this action as intervenor-petitioners to support the Settlement. (NYSCEF No. 39.)

By Order dated August 5, 2011, this Court stated the following in relevant part:

> 1. Any Potentially Interested Person who wishes to object to the Settlement may file with the Court, on or before August 30, 2011,

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[9] One of these methods included a website, http://www.cwrmbssettlement.com, created by the Trustee to provide Potentially Interested Persons with notice of this proceeding and subsequent notice of relevant documents and information.

> a written notice of intention to appear and object as provided in the Initial Order, except that they need not provide a detailed statement of their objection, but may just state the grounds for their objection, one of which may be that such Potentially Interested Person does not have enough information to evaluate the Settlement. The filing of a written notice by a Potentially Interested Person as described above shall preserve all rights of such Potentially Interested Person to seek discovery and to supplement its objection to the Settlement as need be.

(NYSCEF No. 107.)

On August 26, 2011, the Walnut Place Respondents[10] removed this

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[10] The number of parties who can be considered "Respondents" has changed dramatically over the course of this litigation as parties filed objections and withdrew them, or otherwise ceased participating in this proceeding. By the time of closing arguments, the remaining Respondents fell into the following categories: (1) the AIG entities; (2) the Triaxx entities; (3) United States Debt Recovery, LLC VIII, L.P. and United States Debt Recovery X, L.P.; (4) CIFG Assurance North America, Inc.; (5) Sterling Federal Bank, F.S.B., Bankers Insurance Company, Bankers Life Insurance Company, First Community Insurance Company and Bankers Specialty Insurance Company; (6) Counsel of Federal Home Loan Bank of Pittsburgh; (7) American Fidelity Assurance Company; (8) the Knights of Columbus (the "Knights"); and (9) the Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago and other members of the Public Pension Fund Committee (the "Chicago Funds"). For purposes of this decision the term "Respondents" will refer to the parties listed above, although the last two Respondents submitted separate briefs in opposition and did not sign the Respondents' Joint Brief in Opposition to Approval of Proposed Settlement and Entry of Proposed Final Order and Judgment ("Resp'ts' J.Br. Opp'n").

The Chicago Funds have brought a case against the Trustee alleging misconduct, which is currently pending before the Hon. William H. Pauley III in the United States District Court for the Southern District of New York (the "Federal Action"). The Chicago Funds take issue with paragraphs o, p, and q of the PFOJ,

action to the United States District Court for the Southern District of New York (NYSCEF No. 164) where the case was presided over by the Hon. William H. Pauley III, who denied the Trustee's motion to remand, in *Bank of New York Mellon v. Walnut Place LLC*, 819 F.Supp.2d 354 (SDNY 2011), which was later reversed by the United States Court of Appeals, Second Circuit on February 27, 2012 in *BlackRock Financial Mgmt. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169 (2d Cir. 2012).

Upon remand of this action to this Court, the Trustee, the Institutional Investors and the Respondents (collectively referred to herein as the "parties") began to engage in discovery, as well as motion practice concerning a variety of legal issues.[11] On February 26, 2013, this Court entered an Amended Scheduling Order,

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which they construe as orders that could preclude the adjudication of their claims in the Federal Action and argue that those particular portions of the PFOJ should not be entered.

The Knights specifically argue that it was unreasonable for the Trustee to release the servicing claims without first valuing them, especially because the Trustee was aware of multiple alleged servicing violations when the Knights filed an action against the Trustee for an accounting to address the servicing problems.

[11] For example, by Decision/Order dated June 6, 2012 (motion sequence nos. 026 and 027), this Court granted motions to intervene brought by the Delaware Department of Justice and the Attorney General of the State of New York pursuant to the *parens patriae* doctrine. (NYSCEF No. 319.) (By Notice dated May 3, 2013, both entities stated that they would not object to or endorse the Settlement.) (NYSCEF No. 734.)

which set out the final discovery and briefing schedule and set a final evidentiary hearing date of May 30, 2013. (NYSCEF No. 526.) The hearing, which included live testimony from twenty-two witnesses, actually commenced on June 3, 2013 and continued for thirty-six non-consecutive days, ending on November 21, 2013.[12] As such, the Court determines that a full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon. (NYSCEF No. 7 at ¶ e.)

Discussion

I. Standard of Review[13]

Under the Governing Agreements, the Trustee holds all right, title and interest in the mortgage loans for the benefit of the Certificateholders. Section 2.01(b) of a representative PSA states the following:

> Immediately upon the conveyance of the

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[12] The Court notes that this hearing was held in accordance with CPLR § 409(a), which allows the Court to "require the submission of additional proof," *i.e.* a hearing on a petition in a special proceeding. *See* Vincent C. Alexander, Practice Commentaries, CPLR § 409 (McKinney 2013).

[13] This issue was specifically addressed in motion sequence no. 024, therefore, the findings in this section decide that motion.

> Mortgage Loans referred to in clause (a), the Depositor sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund together with the Depositor's right to require each Seller to cure any breach of a representation or warranty made in this Agreement by such Seller or to repurchase or substitute for any affected Mortgage Loan in accordance herewith.

(PTX 71.54.) This provision effectively grants the Trustee the power and authority to commence litigation. *See, e.g., LaSalle Bank Nat'l Assoc. v. Nomura Asset Capital Corp.*, 180 F.Supp.2d 465, 471 (SDNY 2001) (holding that the plain meaning of the phrase "conveys . . . all [] right, title and interest" ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted).

Inherent in the Trustee's power to commence litigation is the power to settle litigation. RESTATEMENT (SECOND) OF TRUSTS: POWER TO COMPROMISE, ARBITRATE AND ABANDON CLAIMS § 192 cmt. a (1959); *see also IBJ Schroder Bank & Trust Co.*, 271 AD2d 322, 322 (1st Dep't 2000). These powers are discretionary, RESTATEMENT (SECOND) OF TRUSTS § 192 cmt. a, and must be exercised with "reasonable prudence." *Id.* at § 192. When reviewing a Trustee's exercise of discretion, the Court's role is limited to preventing an abuse of discretion. RESTATEMENT (SECOND) OF TRUSTS: CONTROL OF DISCRETIONARY POWERS § 187, cmt. e (1959).

> If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.

Id. at cmt. e; *see also Matter of Stillman,* 107 Misc.2d 102, 110 (Sur. Ct. NY Co. 1980).

It is clear then that judicial intervention is warranted only when there is an abuse of discretionary authority. *Haynes v. Haynes,* 72 AD3d 535, 536 (1st Dep't 2010). "What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty." RESTATEMENT (THIRD) OF TRUSTS: JUDICIAL CONTROL OF DISCRETIONARY POWERS § 87, cmt. b (2007). Some examples of abuse of discretion include: when a trustee (1) acts in bad faith and receives an improper inducement for exercising the power in question, (2) acts in good faith but for a reason other than to further the purpose of the trust or the purpose for which the power was granted, *i.e.* using trust funds to make well-intentioned, reasonable distributions when those distributions are

not related to the stated purpose of the trust and (3) in exercising a power, acts unreasonably or beyond the bounds of reasonable judgment. *Id.* at cmt. c. Accordingly, paragraphs (f) and (g) of the PFOJ are approved.

The Respondents principally contend that the Trustee abused its discretion by acting in bad faith (self-interested), outside its discretion and unreasonably.

Accordingly, this Court must determine whether there was any such abuse of discretion which would warrant judicial interference with the Trustee's decision to enter into the Settlement.

II. Burden of Proof

CPLR § 409(b) "makes clear that the special proceeding is to be adjudicated in the same manner as a motion for summary judgment." Vincent C. Alexander, Practice Commentaries, CPLR § 409 (McKinney 2013) ("Thus, if the papers fail to raise a triable issue of fact, the court is to grant judgment as a matter of law in favor of the appropriate party. If a triable issue of fact is raised, reference must be made to CPLR 410.") Therefore, the Court will apply the summary judgment standard in making its determination on the papers and proof submitted. *See Matter of Friends World College v. Nicklin,* 249 AD2d 393, 394 (2d Dep't 1998).

III. Analysis

It is clear that to decide whether the Trustee abused its discretion, the Court must consider the Trustee's conduct in exercising its power and whether its discretionary power was exercised with "absolute singleness of purpose."[14] *See Dabney v. Chase Nat. Bank of City of New York*, 196 F.2d 668, 671 (2d Cir. 1952).

Petitioners argue that the Trustee's decision to accept $8.5 billion, along with document cures and servicing improvements worth billions more, as opposed to pursuing costly and uncertain litigation, was not an abuse of its discretion. (Pet'rs' Br. Supp. 45.) Petitioners contend that the Trustee's good faith is supported by the testimony of several witnesses who testified that the Trustee entered into the Settlement because it believed it was in the best interest of the Certificateholders. (*Id.* at 41.)

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[14] As this Court has previously held, the Trustee's duties to Certificateholders, although defined by the Governing Agreements, also include the duty to avoid conflicts of interest with the beneficiaries or, in other words, act with a singleness of purpose. *See Ambac Indem. Corp. v. Bankers Trust Co.*, 151 Misc.2d. 334, 338-341 (Sup. Ct. N.Y. Co. 1991); *see also US Trust Co. of New York v. First Nat. City Bank*, 57 AD2d 285, 295-297 (1st Dep't 1977), *aff'd*, 45 NY2d 869 (1978); *Hoopes v. Carota*, 142 AD2d 906, 910 (3d Dep't 1988), *aff'd*, 74 NY2d 716 (1989); *Elliot Associates v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988); *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F.Supp.2d 162, 192 (SDNY 2011).

The uncertainty and risk associated with litigation played a large role in the Trustee's decision. According to one of the Trustee's witnesses, Robert Bailey ("Bailey"), the Trustee was prepared for litigation, but decided that the litigation alternative was not reasonable in light of the results that were achieved in the Settlement. (Hr'g Tr. 2482:4-6, July 18, 2013.)

It is also clear that the Trustee placed considerable weight on the fact that the Settlement was supported by twenty-two (22) institutional investors, including arms of the federal government, prominent investment managers acting as fiduciaries for their clients, and institutions managing their own money. (Pet'rs' Br. Supp. 17, 31-32.) The Trustee saw this support as a sign that the Settlement was "market tested." (Hr'g Tr. 3128:7-12, July 25, 2013.)

The Respondents contend that the Trustee acted in bad faith and unreasonably both in its actions while the Settlement was being negotiated and in accepting the terms of the Settlement and the amount of the Settlement Payment.

A. Trustee's Conduct During Settlement Negotiations

Mayer Brown Conflict Waiver

At the time the Trustee retained Mayer Brown LLP ("Mayer

Brown"), Bank of America and ten to twelve of the Institutional Investors were among the firm's clients. (Hr'g Tr. 1561:8-24, 1575:2-24, July 9, 2013.) As a result, Mayer Brown had to obtain conflict waivers before it could represent the Trustee. The conflict waiver executed by Bank of America (R-1072)[15] did not allow Mayer Brown to represent the Trustee in a lawsuit against Bank of America. (Hr'g Tr. 1574:19-26, July 9, 2013.)

Respondents argue that the Trustee "failed [] to represent certificateholder interests," when it hired a law firm that was "ethically barred from zealously representing the interests of all certificateholders," because it could not commence a lawsuit on behalf of the Trustee against Bank of America. (Resp'ts' J.Br. Opp'n 35.)

The Trustee asserts that simply because the law firm it hired was not authorized to commence litigation on its behalf, does not mean Mayer Brown could not meet its ethical duty to represent its client zealously. (Pet'rs' Br. Reply 7.) Moreover, there is no evidence that Mayer Brown violated any duties under the NY Rules of Professional Conduct.

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[15] "R" refers to Respondents' hearing exhibits.

Forbearance Agreement

It is not disputed that by letter dated December 9, 2010, the Trustee, the Institutional Investors and Bank of America entered into an agreement to, *inter alia*, toll any time period that might have been commenced by the issuance of the Notice of Non-Performance under the PSAs, such as the time to cure an event of default (the "Forbearance Agreement"). (PTX 38.3-9.) The Forbearance Agreement also tolled any statutes of limitation, repose or laches applicable to the claims asserted in the Notice of Non-Performance. (*Id.* at 38.3-4.)

The Respondents argue that "[n]owhere is the Trustee's conflict more clear than in the Trustee's decision to enter the Forbearance Agreement." (Resp'ts' J.Br. Opp'n 36.) The Respondents argue that the Forbearance Agreement tolled the triggering of an event of default under the PSAs, which, if not tolled, would have triggered the Trustee's duty to act under a higher standard of care (prudent person standard) (Hr'g Tr. 1336:8-15, July 8, 2013), would have required the Trustee to make a decision as to whether or not to replace the Master Servicer (*id.* at 1335:24-1336:4), and would have required the Trustee to give notice of the event of default to all Certificateholders. (Resp'ts' J.Br. Opp'n 36.) Respondents claim that they also would have benefitted from the occurrence of an event of default because

if the Trustee failed to cure any such event of default within the cure period, then any group of Certificateholders could sue the Master Servicer directly under the PSAs. (*Id.*)[16]

The Trustee argues that the evidence shows that the real reason it entered into the Forbearance Agreement was to avoid litigation over the question of whether or not an event of default had occurred as a matter of law, which litigation ultimately would have delayed any prospect of settlement. (Hr'g Tr. 1333:17-24, 1335:22-1336:7, July 8, 2013; Pet'rs' Br. Reply 8.) The Trustee further points out that absent Certificateholders were not harmed by the Forbearance Agreement because any group that met the requirements of the Governing Agreements (*see, e.g.*, PTX 71.136-137 at § 10.08), could have declared their own separate event of default and triggered the subsequent remedies. (Pet'rs' Br. Reply 9.)

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[16] The Court notes that the Respondents also argue that the Forbearance Agreement, as well as other portions of the Settlement Agreement discussed *infra*, alter the terms of the Governing Agreements without following the amendment procedures set forth therein. (Resp'ts' J.Br. Opp'n 47-49.)

Petitioners reply that any agreement it made to accept consideration that differs from what the Governing Agreements provide does not constitute an "amendment," because if it were to be construed as an "amendment" then no trustee would ever be able to settle trust claims. (Pet'rs' Br. Reply 19-20.)

Notice to Certificateholders and Indemnification

Next, Respondents argue that the Trustee acted in bad faith when it chose not to give notice of the settlement negotiations to Certificateholders. (Resp'ts' J.Br. Opp'n 37.) Respondents also contend that the Trustee's decision not to give notice was influenced, at least in part, by the fact that it received an indemnification from Bank of America for its conduct surrounding the negotiations and activities taken pursuant to the Notice of Non-Performance (the "December Indemnity Agreement"). (Hr'g Tr. 1764:20-1765:9, July 11, 2013.) In an e-mail dated December 1, 2010 from counsel for the Trustee, Jason H.P. Kravitt ("Kravitt"), to counsel for Bank of America, Kravitt stated that "[i]t would help us considerably in our decision making process to put aside such notice [to Certificateholders] if indeed we received the very narrow liability indemnity that we discussed with you this afternoon." (R-53.) Respondents argue that the Trustee's request for indemnity shows that it knew it was acting in ways not prescribed by the Governing Agreements. (Resp'ts' J.Br. Opp'n 37.)

The Trustee points out that it was entitled to broad indemnification under the Governing Agreements (*see, e.g.*, PTX 71.115-116 at § 8.05) and that it also had the right to seek assurances that it would be indemnified for certain risks or liabilities. (PTX 71.114 at § 8.02(vi)). Therefore, the Trustee

argues that the December Indemnity Agreement cannot be construed as a conflict of interest. Moreover, this Court previously found in its Decision/Order dated May 20, 2013 (NYSCEF No. 825) (motion sequence no. 031) that the December Indemnity Agreement did not raise a "colorable claim of conflict or self-dealing" (*id.* at 16 n.3), and since issuing that Decision/Order the Court has not been persuaded otherwise.

Further Assurances Clause

Respondents further take issue with the following clause found in the Settlement Agreement:

> **30. Further Assurances.** The Parties agree (a) to use their reasonable best efforts and cooperate in good faith to fully effectuate the intent, terms, and conditions of this Settlement Agreement and the Settlement, including by executing and delivering all additional documents and instruments, doing all acts not specifically referred to herein that are reasonably necessary to fully effectuate the intent, terms, and conditions of this Settlement Agreement, and refraining from taking any action (or assisting others to take any action) contrary to or inconsistent with the intent, terms, and conditions of this Settlement Agreement; provided, however, that, as to the Trustee, seeking to obtain direction from the Settlement Court before taking any action in respect of a Covered Trust that is the subject matter of the Article 77 Proceeding, pursuant to Subparagraph 2(c) of this Settlement Agreement, shall not be deemed to be contrary to or inconsistent with the intent, terms, and conditions of this Settlement Agreement; (b) that any actions taken by the Master Servicer and/or any Subservicer prior to the Approval Date

> pursuant to or that are consistent with the provisions of Paragraph 5 herein shall be deemed to satisfy the Master Servicer's obligation to service the Mortgage Loans prudently in accordance with all relevant sections of the Governing Agreements; and **(c) in the absence of an intentional violation of a representation or warranty contained herein, to perform these obligations even if they discover facts that are additional to, inconsistent with, or different from those which they now know or believe to be true regarding the Covered Trusts.**

(PTX 1.45-46 (emphasis added).)

Respondents argue that by agreeing to this clause, the Trustee unreasonably agreed to put Bank of America's interests ahead of Certificateholders' interests by tying its hands to the Settlement regardless of any new information that might come to light. (Resp'ts' J.Br. Opp'n 38.)

The Trustee argues that the Further Assurances clause creates a benefit for the Covered Trusts because Bank of America is also locked into the Settlement, regardless of any potential changes, such as the fact that no court has found Bank of America liable on a successor liability theory to Countrywide. (Pet'rs' Br. Reply 9.)

B. Claims Released by the Settlement Agreement

Next, the Court will consider the actual claims released by

the Settlement Agreement: (1) claims arising out of the alleged failure to repurchase loans that breached representations and warranties ("loan repurchase claims"), (2) a claim against Bank of America based on its acquisition of Countrywide ("successor liability claim"), (3) claims arising out of Countrywide's failure to deliver all of the required mortgage documentation ("document exception claims"), (4) servicing claims against the Master Servicer ("servicing claims") (*see* PTX 108; Pet'rs' Br. Supp. 10-14) and (5) claims arising out of the failure to repurchase modified loans ("loan modification claims").

Loan Repurchase Claims and Successor Liability

With respect to the loan repurchase claims, the Trustee states that its decision to enter into the Settlement was largely influenced by three important factors: (1) its likely inability to collect more than $4.8 billion from Countrywide, the party with the contractual repurchase obligation; (2) the cost, uncertainty and delay of litigation; and (3) the fact that the expert's estimate of the range of damages recoverable in litigation did not overwhelmingly exceed $8.5 billion and did not account for any legal discounts. (Pet'rs' Br. Supp. 32-33, 35.)

It is clear that the Trustee was concerned that Countrywide would be unable to pay a future judgment that exceeded or even

approached $8.5 billion and thought it was reasonable to lock in a one-time, lump sum payment of $8.5 billion on behalf of the Covered Trusts. This was especially so given the fact that it was uncertain, at best, whether Bank of America would be subject to successor liability. (Pet'rs' Br. Supp. 33-34.)

As of February 2011, Bank of America represented that Countrywide had only about $4 billion of claim-paying ability, which raised the issue of whether Bank of America would be liable for Countrywide's debts under a successor liability theory. (Pet'rs' Br. Supp. 13.) The Trustee also considered the risk that Bank of America would put Countrywide into bankruptcy if its repurchase exposure grew too large. (*Id.*)

To investigate Countrywide's ability to pay claims, the Trustee hired Capstone Advisory Group ("Capstone") to opine on the maximum value that the Trustee could recover from Countrywide. (Pet'rs' Br. Supp. 26.) According to Capstone, Countrywide had, at most, $4.8 billion available to pay unsecured creditors. (PTX 444.5-17.)

Confronted with the possibility that Countrywide would not be able to pay the full amount of any judgment, the Trustee retained an expert, Professor Robert Daines ("Daines") of Stanford Law

School, to offer an opinion as to whether Bank of America would be obligated to pay the debts of Countrywide under theories of successor liability or veil piercing. Importantly, at the time of Daines' report, no court had found Bank of America liable on a successor liability theory to Countrywide, although this argument had been put forward in numerous other cases. (Pet'rs' Br. Supp. 28, 34.) Daines opined that a veil piercing claim would likely fail (PTX 444.22) and that a successor liability case would be difficult to win. (PTX 444.55).

Respondents take issue with the reports issued by both Capstone and Daines. First, they argue that Capstone's assignment was artificially limited in scope by the Trustee and it should have addressed potential asset-stripping claims against Bank of America. (Resp'ts' J.Br. Opp'n ¶¶ 83-84.) Next, Respondents contend that the Trustee failed to ask Daines to develop the best possible successor liability case against Bank of America. (*Id.* at ¶ 81.)

Petitioners reply that Capstone's and Daines' opinions remain unchallenged and the Respondents' criticism ignores the purpose of each of these experts' assignments. (Pet'rs' Br. Reply 16-18.)

Finally, the Trustee hired RRMS Advisors to provide an opinion on potential damages related to CHL's alleged breach of its loan

repurchase obligation. (Pet'rs' Br. Supp. 19, 35; Hr'g Tr. 1433:20-1434:13, July 8, 2013.) Without knowing that the parties had reached an $8.5 billion settlement amount[17], RRMS' lead expert Brian Lin ("Lin"), prepared his report and found that a settlement amount of approximately $8.8 to $11 billion was reasonable without applying any adjustments for litigation risks. (PTX 444.109.)

Lin's report was compiled using commercially sensitive data provided by Bank of America reflecting repurchases of Countrywide loans from Government-Sponsored Enterprises (*i.e.*, Fannie Mae and Freddie Mac) (the "GSEs"), including detailed breakdowns of the rates of and reasons for repurchase. (Pet'rs' Br. Supp. 12, 19-21; PTX 23; PTX 25.2; PTX 36.6.) Bank of America also provided its loss projection for each of the Trusts aggregated from loan-level information (Pet'rs' Br. Supp. 12; PTX 25.5-11; PTX 36.6) and its comparison of the loans in the Covered Trusts and those purchased by the GSEs. (PTX 31.)

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[17] The Trustee points out that the $8.5 billion figure was negotiated at arms-length, through several face-to-face meetings, conference calls, and thousands of email exchanges between counsel for all parties, business representatives from Bank of America and several Institutional Investors. (Pet'rs' Br. Supp. 6-7; PTX 613.) These meetings took place between November 2010 and June 2011, during which time the parties exchanged offers and demands ranging from $1.5 billion (from Bank of America) and $16 billion (from the Institutional Investors). (Pet'rs' Br. Supp. 7-9.)

There is no dispute that the GSE repurchase experience was central to the negotiations here. Petitioners argue that according to Lin, the GSE repurchase rate, adjusted upward to reflect differences between the GSE loans and the Covered Trusts, was a reasonable estimate of the defect rate in the Covered Trusts. (Pet'rs' Br. Supp. 20; PTX 444.106.) Petitioners further argue that because Countrywide had no significant repurchase experience with private-label securitizations, there was no established repurchase rate to use from other private-label trusts. (Pet'rs' Br. Supp. 20.) Petitioners point out that aside from the GSEs, monoline insurers had made significant repurchase demands. However, these demands were highly disputed and litigation was ongoing - meaning that they did not provide an actual repurchase rate that could be used as an indication of the level of breaches in a loan population. (*Id.*)

In addition, Petitioners assert that there are similarities between the loans sold to GSEs and those sold to private-label trusts, including the fact that they were originated on the same underwriting platforms (Hr'g Tr. 1005:17-20, June 11, 2013) and that when many of the loans were originated it was not known whether they would be sold to the GSEs or to the private label market. (Hr'g Tr. 1414:17-22, July 8, 2013; Pet'rs' Br. Supp. 20.) Petitioners concede that there are some differences between the GSE

loans and private label loans, however, they argue that the differences that correlated to breach rate (*i.e.*, loan type, documentation type and early default history) were accounted for by re-weighting the GSE repurchase data, leading to a higher repurchase rate. (Pet'rs' Br. Supp. 21.)

Respondents take issue with the fact that Lin accepted the GSE repurchase data as the basis for his analysis without having any personal knowledge of the GSE repurchase experience and without making any effort to quantify the correlation, if any, between breaches of representations and warranties and loan size, credit quality, loan-to-value ratio and documentation type - all credit risk attributes that are different in the GSE loans and the loans in the Covered Trusts. (Resp'ts' J.Br. Opp'n ¶¶ 66-67.)

Furthermore, Respondents argue that the GSE repurchase data is completely inapplicable to the Covered Trusts. To support this notion, Respondents point to the deposition testimony of Robert Bostrom ("Bostrom"), Freddie Mac's former General Counsel, who participated in the Settlement negotiations as part of the Institutional Investor group, and testified in relevant part as follows:

> Q: Sir, were you at the April 2011 meeting in which BoA presented its analysis relying on Freddie Mac's repurchase history?

* * *

A: I was at a meeting - it may have been April 2011 or not - where Bank of America put forth its belief that the appropriate number should be based upon GSE repurchase history which was absolutely - had no relevance whatsoever to the position that Freddie Mac had advanced with respect to what the appropriate numbers ought to be, which I think I mentioned earlier - I had heard were based upon data that was obtained from third parties about the quality and history of - of the PLS loans.

Q: And did you make that point at the meeting?

A: Which point?

Q: That Freddie's repurchase history had no relevance.

* * *

A: I - I did not, and I don't know whether anyone else did. But it was pretty clear - actually, I do - I do recall. I don't know who, but clearly the position was taken that the GSE experience was completely not relevant because the nature and type of loans that PLS pools was significantly different tha[n] the GSE purchase origination channels.

(R-4142 Bostrom Dep. 95:6-96:18, Dec. 18, 2012.) Respondents assert that the adjustments made to the data to account for the differences between GSE and private label loans (Hr'g Tr. 1102:15-26, June 13, 2013) were not adequate because they were based on assumptions and judgmental quantifications. (*Id.* at 1103:11-20.)

Respondents urge that instead of solely relying on the GSE

data, Lin should have at least accounted for the Institutional Investors' data, which showed repurchase exposure ranging from $32.3 to $52.5 billion. (Resp'ts' J.Br. Opp'n 42.) While the Trustee acknowledges that the Institutional Investors created a spreadsheet that projected losses for various subsets of loans in the trusts (PTX 562), this data was not ultimately relied on because the loan performance assumptions were aggressive (Pet'rs' Br. Supp. 22-23; Hr'g Tr. 835:12-16, June 10, 2013) and the numbers were not discounted for any sort of litigation risk. (Hr'g Tr. 392:12-17, June 6, 2013.)

Putting aside the Institutional Investor data, Respondents ultimately contend that to fulfill its duty, the Trustee should have obtained loan files and conducted a loan file review, which would have been at no cost to it under both the PSAs and the December Indemnity Agreement. (Resp'ts' J.Br. Opp'n at 39-40.)

Petitioners concede that the negotiating parties discussed the possibility of reviewing loan files from the Covered Trusts, but that the Trustee decided that a loan file review (*i.e.*, a reunderwriting exercise) was unnecessary in light of Countrywide's GSE repurchase experience, which was based on a loan-by-loan review of over 100,000 Countrywide loan files. (Pet'rs' Br. Supp. 24.) The Trustee also argues that it decided to forego loan file review

because it is too uncertain and subjective, often leads to protracted disputes over how to construct a sample and would not have ensured a conclusive or even favorable result to the Covered Trusts. (Pet'rs' Br. Supp. 24-25.)[18]

The Respondents also attack Lin's report on the basis that his analysis utilized flawed methodologies including: (1) only measuring losses from borrower non-payment data or default rates, thereby ignoring material and adverse effects of breaches of representations and warranties, other than borrower default; (2) multiplying the loss estimate by Bank of America's 36% breach rate instead of the Institutional Investors' higher 50-65% breach rate; and (3) multiplying the product of the preceding calculation by Bank of America's 40%, GSE-based success rate, which represents the percentage of loans submitted to Bank of America that would actually be repurchased. (Resp'ts' J.Br. Opp'n 40-42.)

In response, Petitioners contend that the Respondents' argument that payment default is the wrong metric for determining repurchase liability is a "bizarre theory" that is not supported by

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[18] As Petitioners point out, this Court ordered the production of 150 loan files during the course of discovery so that Respondents could do a small scale review and report their findings before trying to pursue a full statistical sampling. It appears, however, that the Respondents chose not to pursue a review of the produced loan files. (Pet'rs' Br. Supp. 25.)

the record. (Pet'rs' Br. Reply 12.)

With regard to the GSE data, the Petitioners argue that it was reliable, since it came from the same databases that support Bank of America's SEC filings (Pet'rs' Br. Reply 13) and that the repurchase rate employed by Lin's analysis was a reasonable proxy after he made the necessary adjustments to account for the differences between the GSE and private label pools. (*Id.* at 13-14.)

Finally, the Trustee considered the issue of whether section 2.03(c) of the PSAs, which states that a breach must "materially and adversely affect[]" Certificateholders' interest in a loan before repurchase is required, means, as Bank of America contended during the negotiations, that the Trustee would have to prove causation between each breach and the loan's non-performance to succeed on a loan repurchase claim. (Pet'rs' Br. Supp. 14.) To understand this issue better, the Trustee retained Professor Barry E. Adler ("Adler"), the Bernard Petrie Professor of Law and Business at New York University, to analyze the law and to provide his understanding of the competing interpretations of the "materially and adversely affects" language. (Pet'rs' Br. Supp. 30.) He concluded that Bank of America's interpretation was reasonable, but that there was no way to know which interpretation

would prevail in litigation. (PTX 444.88; Hr'g Tr. 4457:16-25, Sept. 17, 2013.)

Respondents argue that Adler is not an expert on PSAs (Resp'ts' J.Br. Opp'n ¶ 86) and that his opinion was flawed and unreasonably narrow. (*Id.* at 43-44.) Respondents also accuse the Trustee of dictating Adler's conclusion. (*Id.* at ¶ 87.)

Petitioners respond that there is limited and conflicting case law as to the meaning of the phrase "materially and adversely affects" and, as a result, it was appropriate to apply general principles of contract interpretation. (Pet'rs' Br. Reply 18.) Moreover, petitioners argue that there is no evidence to support the notion that Adler's report was not an independent assessment. (*Id.*)

Document Exception Claims

With respect to document exception claims, the Institutional Investors claimed that Section 2.02 of the PSAs required that certain mortgage documents, including the original mortgage notes, be maintained in the mortgage loan files and that missing documents were delaying or preventing foreclosures to the detriment of the Covered Trusts. (Pet'rs' Br. Supp. 13.)

The Trustee argues that to investigate this issue, it generated reports of loan-level data on missing documents and the negotiating parties settled on cure provisions that focused on document deficiencies that were most likely to harm the Covered Trusts. (Pet'rs' Br. Supp. 27.) The Trustee concluded that damages would be difficult to prove in litigation, and that by securing a remedy going forward, the Covered Trusts were able to recover the value of the claims they waived. (Pet'rs' Br. Supp. 40-41.)

Respondents argue that the Trustee never valued the potential document exception liability and that the Settlement's cure provisions eliminate the few protections that the Covered Trusts have against document exceptions. (Resp'ts' J.Br. Opp'n 46-47.) The Respondents claim that the Settlement (1) narrows the loans and defects subject to the cure provision, (2) requires a confluence of multiple document exceptions before triggering a cure, and (3) imposes new causation requirements. (*Id.* at 47.)

The Petitioners reply that the Respondents ignore the evidence supporting the Trustee's decision to accept the cure provisions, which provide a new value to the Covered Trusts, in that they obligate the Master Servicer (Bank of America) instead of Countrywide to reimburse for document related losses. (Pet'rs' Br.

Reply 23.)

Servicing Claims

With respect to the servicing claims, the Trustee decided that it was more valuable to focus on servicing remedies to create value going forward because of the difficulty of proving that the PSA servicing standard was violated or what damages were caused by any breach. (Pet'rs' Br. Supp. 39.)

Respondents argue that the servicing claims were released without an attempt to value the damages that were caused by past servicing failures. (Resp'ts' J.Br. Opp'n 46.) Respondents further contend that the Settlement's purported servicing improvements are not adequate consideration for releasing the servicing claims because the "new" provisions add little value given that the PSAs already required prudent loan servicing. (*Id.*)

The Petitioners reply that the Respondents' argument ignores undisputed evidence that the Settlement will require Bank of America to perform at a higher level than the PSAs require by, among other things, requiring sub-servicing of high-risk loans at the Master Servicer's expense and creating automatic financial penalties if Bank of America's servicing falls below quantified standards. (Pet'rs' Br. Reply 22-23; Hr'g Tr. 3038:16-26, July 23,

2013.) Petitioners rely on the expert testimony of Phillip Burnaman ("Burnaman"), who testified that "a reasonable expected monetary value of the servicing improvement as of June 2011, will be [$]2.51 to $3.07 billion." (Hr'g Tr. 2730:2-5, July 22, 2013.) Burnaman further testified that the transfer of high risk loans to speciality sub-servicers is valued at between $2.42 and $2.65 billion (Hr'g Tr. 2768:11-20, July 22, 2013) and that this provision ultimately benefits Certificateholders. (*Id.* at 2768:21-2769:12).

Loan Modification Claims

During the hearing and in its brief in support of motion sequence no. 042 (NYSCEF No. 947), the Triaxx entities ("Triaxx") specifically argue that the PSAs in forty-nine (49) of the Covered Trusts unambiguously require immediate repurchase of modified mortgage loans without regard to whether the modifications were "in lieu of refinance"[19] or "loss mitigation" modifications. (*Id.* at 5-7.) Triaxx also argues that the PSAs in approximately 392 of the Covered Trusts contain unambiguous language that requires the repurchase of loans modified in lieu of refinance. (*Id.* at 6.) Further, Triaxx asserts that only the PSAs in 62 of the Covered

[19] Although this does not bear on the issue at hand, the Court notes that there was testimony that Bank of America and Countrywide are not in the practice of making in lieu of refinance modifications. (Hr'g Tr. 1201:12-17, June 14, 2013.)

Trusts allow the Master Servicer to modify mortgage loans without repurchasing them. (*Id.* at 7.)

In addition, Triaxx argues that the Trustee failed to investigate modified mortgage repurchase claims worth approximately $31 billion. (*Id.* at 11.) It is clear that the Trustee was aware of the issue and did include it in a list of settlement issues to discuss with Bank of America. (Hr'g Tr. 1927:4-1928:13, July 12, 2013.) Despite this, however, Kravitt testified that the Trustee chose not to evaluate the potential loan modification claims:

> Q: Now, the Trustee's position is that loan modification repurchase provisions are not materially different in any of the 530 governing documents; is that right?
>
> A: No.
>
> Q: So the trustee recognizes that the Loan Modification Repurchase Agreements are, in fact, materially different in the 530 PSAs?
>
> A: They are worded differently.
>
> Q: I understand that you think they are worded differently, but do you believe that they all mean materially the same thing?
>
> A: Well, let me think about that. I don't think they all are materially the same.
>
> Q: Now, in your settlement negotiations with Bank of America, you treated all 530 trusts the same with regard to the loan modification repurchase provisions; isn't that correct?
>
> A: I did.
>
> Q: And you did not seek a recovery,

specifically, for the failure to repurchase modified loans for any of the 530 Trusts; isn't that correct?

A: That is correct.

Q: That was not the subject of your negotiations with Bank of America; is that correct?

A: That's correct.

Q: Prior to entry of the settlement, the trustee did not calculate the unpaid principal balance at the time of modification of loans in the Covered Trust that had been modified; is that correct?

A: That's correct.

Q: And prior to entry of the settlement, the trustee did not calculate the unpaid principal balance at the time of modification of the loans that had been modified in lieu of refinance either, did it?

A: No, it did not.

Q: And you didn't direct anyone to do that analysis, did you?

A: I did not, but to -

Q: That is enough. That is enough, Mr. Kravitt.

A: I want to make sure I answered the question. I think you said to calculate the principal balance. Is that - that what you said?

Q: At the time of modification, yes?

A: Yes, that's right.

Q: And the trustee didn't undertake any efforts to determine if all loans that had been modified in lieu of refinancing had been

repurchased by Countrywide or the Master Servicer, did it?

A: I did not.

Q: And you don't know of anyone else who did; is that correct?

A: I don't know of anyone else who -

Q: Prior to the entry of the settlement?

A: - at Mayer Brown or the trustee who did, or I don't know if the Institutional Investors did either.

(Hr'g Tr. 1922:18-1924:21, July 12, 2013; *see also* Hr'g Tr. 2170:19-2172:18, July 16, 2013.) Kravitt further testified on cross examination:

Q: Now, when calculating Bank of America's total potential liability, the bondholders group did not include potential liability for the failure to repurchase modified loans, did it?

A: We did not because we didn't think it was a strong argument.

(Hr'g Tr. 1925:25-1926:5, July 12, 2013.) Two witnesses for the Trustee, Bailey and Richard Stanley ("Stanley"), also conceded that there was no discussion of the loan modification issue at the trust committee meeting in which the Settlement was approved. (Hr'g Tr. 2408:2-5, 2412:5-11, July 18, 2013; Hr'g Tr. 3195:10-16, 3195:23-3196:13, July 25, 2013.) In fact, Stanley testified he did not recall being updated during settlement negotiations on the topic of loan modifications or the issue of repurchasing modified loans. (Hr'g Tr. 3195:17-22, July 25, 2013.) Also, it is clear that the

Institutional Investors did not evaluate Bank of America's potential exposure for loan modification claims. (Hr'g Tr. 972:2-973:2, June 11, 2013.)

Despite the apparent failure to evaluate the potential loan modification claims or to include them in the total liability calculations, these claims are released by the Settlement Agreement. (Hr'g Tr. 1928:14-1930:10, July 12, 2013; PTX 1.33-34 at § 9(a)(iii).) Moreover, Triaxx argues that to the extent that any of the PSAs contained language that supported the notion that loans modified for any reason, including loss mitigation modifications, had to be repurchased, that language will be extinguished by the Settlement Agreement. (Hr'g Tr. 1931:10-1935:22, July 12, 2013.)

On redirect, Kravitt simply concluded that the Trustee did "consider the issue of loan modifications during the negotiations," without offering any explanation whatsoever as to what the Trustee actually did to evaluate the claims. (Hr'g Tr. 2138:19-21, July 15, 2013.) Rather, Kravitt stated that the Trustee did not seek a specific recovery for loan modifications because it decided that (1) Bank of America had the better legal argument, namely, that the language in the PSAs did not require it to repurchase loans modified for loss mitigation purposes; (2) since loss mitigation

modifications were favored by both state and federal governments, it did not think Bank of America would agree to repurchase the loans that were modified on that basis; and (3) it wanted to focus on strong arguments. (Hr'g Tr. 2138:22-2140:13, July 15, 2013.)

Despite Kravitt's testimony that Bank of America had the stronger legal argument on this issue, there is no evidence to suggest that the Trustee evaluated Bank of America's legal argument that the language in the PSAs do not require repurchase of modified loans. Certainly, as the Trustee did with the "materially and adversely affects" language, it could have retained an expert to opine on the contract interpretation of the various provisions of the PSAs that address the repurchase of modified loans. It appears, however, that the Trustee did not do so. Also, the fact that loss mitigation loan modifications may have occurred as a result of certain policy decisions has no bearing on whether or not the PSAs required the repurchase of such modified loans.

IV. Conclusion

After reviewing the voluminous record and carefully considering the arguments presented by all counsel, this Court finds that, except for the finding below regarding the loan modification claims, the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith

or outside the bounds of reasonable judgment.

With respect to the loan modification claims, as stated by Petitioners in footnote seven (7) of their reply brief, the issue of whether any of the PSAs mandate the repurchase of modified loans is not before this Court. What is before this Court, however, is the issue of whether the Trustee abused its discretion in settling the loan modification claims. On this issue only, the Court finds that the Trustee acted "unreasonably or beyond the bounds of reasonable judgment," (*supra* at 25), in exercising its power to settle the loan modification claims without investigating their potential worth or strength. (*See* Hr'g Tr. 2684:10-19, July 19, 2013 (Trustee's corporate trust law expert states that a Trustee cannot release a claim without understanding its value).) As a result, paragraphs (h), (i), (j), (k) and (t) of the PFOJ are approved to the extent that they do not apply to the loan modification claims.

Accordingly, it is hereby ORDERED and ADJUDGED that the Settlement Agreement is approved except to the extent that it releases the loan modification claims. Entry of judgment is hereby stayed for a period of five (5) business days until February 7, 2014.

Dated: January 31, 2014

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

Norman Goodman
Clerk

FILED as Judgment
FEB 21 2014
COUNTY CLERK'S OFFICE
NEW YORK

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) et. al.,

Petitioners,

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

Index No. 651786-2011

Order and

JUDGMENT

FILED as a judgment

FEB 21 2014

AT 2:15 P M

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