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

Assigned to: Kapnick, J.

REPLY IN SUPPORT OF SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PROPOSED SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

The proposed Settlement ("Settlement") should not be approved because it provides inadequate compensation to Certificateholders for the valuable claims that are released by the Settlement. This is nowhere more obvious than with regard to the release of claims against Bank of America ("BofA") for the failure to repurchase modified loans, and Master Servicer self-dealing. These claims, worth billions of dollars, were not even investigated by the Trustee, and it is both telling and deeply troubling that it is the Institutional Investors—who represent only their own interests—and not the Trustee, Bank of New York Mellon ("BNYM"), that responds to the supplemental objection by the Triaxx entities ("Triaxx") and the Federal Home Loan Banks of Boston, Indianapolis and Chicago ("FHLBs"). The Trustee has nothing of substance to say in response because it did not do anything to investigate or obtain any compensation for the claims, and, instead, hastily dismissed them in the heap of other claims bound up in the Settlement of all repurchase claims of the 530 Covered Trusts. But, these claims are too valuable to be swept under the rug by a Trustee whose primary objective was to protect itself, and not the Trusts to which it owed duties of prudence and loyalty.

The basis of the duty to repurchase modified loans is a straightforward one. The Pooling and Servicing Agreements ("PSA"s) for 468 of the 530 Covered Trusts require it. Yet, to this straightforward claim, the Institutional Investors have a remarkable response – ignore the plain language of the PSAs, and approve a Settlement that amends the PSAs to allow modification without repurchase. The Court should do neither. Fundamental principles of contract interpretation require the Court to adhere to the plain and unambiguous language of the PSAs, and the PSAs themselves require notice and consent of Certificateholders in order to amend the PSAs. On these grounds alone, the Trustee's application should be summarily denied.

The Institutional Investors' response to the allegations of Master Servicer self-dealing with regard to second liens and balloon payments fares no better. Based on its review of the small set of loan files provided by BofA in these proceedings, Triaxx identified examples of Master Servicer self-dealing. Presumably, the Trustee could have identified the same had it actually reviewed any loan files, but, again, haste took the place of careful evaluation. In response to the concerns raised by Triaxx and the FHLBs, the Trustee reported that it was "looking into" the issues. Nonetheless its investigation—if any investigation even happened—came *after the claims already were released by the Trustee in the settlement.* Releasing first and asking questions later cannot possibly satisfy the Trustee's duty of care and prudence. At any rate, it does not appear that the Trustee has to this date appropriately investigated the claims, and it would be fundamentally unfair to the Certificateholders to release these claims without identifying the full extent of the harm caused to the Trusts by Master Servicer self-dealing and obtaining compensation for these harms. Not one dollar of compensation is provided by the Settlement for past servicing abuses. And yet, the Settlement releases all claims against the Master Servicer – past, present, and future. *See* Settlement Agreement, ¶ 9(a).

The Trustee's release of these highly valuable claims contravenes the Proposed Final Order and Judgment it asks the Court to enter. *See* PFOJ, ¶¶ (i), (j), and (k). Under these circumstances, Triaxx and the FHLBs respectfully submit that the Settlement cannot be approved as proposed.

II. DISCUSSION

A. The majority of the PSAs require repurchase of Modified Mortgage Loans.

It is a fundamental rule of contract interpretation that "agreements are construed in accord with the parties' intent." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).

The written contract is the best evidence of the parties' agreement, and "[t]hus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* Where the contract "is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Id.* at 569-70. "If the terms are ambiguous or contradictory, however, the [parol evidence] rule permits the consideration of such evidence not to alter the terms but solely to ascertain the true meaning of the terms." *See Wayland Investment Fund, LLC v. Millenium Seacarriers, Inc.*, 111 F.Supp.2d 450, 454 (S.D.N.Y. 200) (applying New York law).

Against the backdrop of these uncontroversial contractual principles, it is worth re-visiting the plain language of the PSAs for the 530 Covered Trusts subject to the Settlement. There are three basic categories of PSAs, each discussed in turn.

First, for 44 of the 530 Covered Trusts, the PSAs unambiguously require repurchase of any Modified Mortgage Loan.[1] For example, § 3.12(a) of the PSA for CWLT 2006-9 provides:

> The Master Servicer *may agree to a modification of any Mortgage Loan* (the "Modified Mortgage Loan") *if (i) CHL [[Countrywide)] purchases the Modified Mortgage Loan from the Trust Fund immediately following the modification* as described below and (ii) the Stated Principal Balance of such Mortgage Loan, when taken together with the aggregate of the Stated Principal Balance of all other Mortgage Loans in the same Loan Group that have been so modified since the Closing Date at the time of those modifications, does not exceed an amount equal to 5% of the aggregate Certificate Principal Balance of the related Certificates.[2]

---

[1] *See* Affirmation of Derek W. Loeser attached hereto, Exhibit A at pp. 1, 3, 10-26.

[2] *See* Loeser Affirmation in Support of Supplemental Brief in Opposition to the Proposed Settlement, Doc. No. 710, Ex. A (emphasis added). Bank of America and Bank of America Home Loans Servicing (collectively "BofA") took over as Master Servicer to the Covered Trusts for Countrywide Financial Corporation and Countrywide Home Loans, Inc. (collectively "Countrywide") when BofA acquired Countrywide in 2008.

There is nothing remotely unclear, ambiguous or complicated about the PSAs for these 44 trusts. If a loan is modified, it must be repurchased. For these 44 trusts, approximately $11.6 billion of loans were modified but there is no evidence to suggest they were repurchased.[3]

Second, for 424 of the 530 Covered Trusts, the PSAs unambiguously require repurchase of modified loans but may limit the ability to modify loans to those that satisfy certain conditions.[4] For instance, § 3.11(b) of the PSA for CWALT 2007-OA4 states as follows:

> Countrywide *may agree to a modification of any Mortgage Loan* (the "Modified Mortgage Loan") if (i) the modification is in lieu of a refinancing, (ii) the Mortgage Rate on the Modified Mortgage Loan is approximately a prevailing market rate for newly-originated mortgage loans having similar terms and (iii) *Countrywide purchases the Modified Mortgage Loan from the Trust Fund as described below.*[5]

The parties debate whether all three conditions in these PSAs must be present in order to modify any loan. The Institutional Investors say they must be, though, if true, loss mitigation modification – the type encouraged by HAMP in order to assist borrowers would not be allowed. This is because no other provision of the PSAs authorizes modifications. If not, as suggested by Triaxx and FHLBs, modification to assist borrowers can occur, provided the Master Servicer repurchases the loan. This is the more sensible interpretation – and, as shown below, the one confirmed by the applicable prospectuses. For this group of trusts, approximately $20.5 billion of loans were modified, but again, there is no evidence to suggest they were repurchased.[6]

Third, the remaining 62 PSAs permit the Master Servicer to modify freely without repurchasing the loans. For example, § 3.12(a) of the PSA for CWL 2007-10 provides:

---

[3] *See* Loeser Affirm., Ex. A at pp. 1, 3.

[4] *Id.*, Ex. A at pp. 1, 3, 10-26.

[5] *See* Doc. No. 710, Ex. B. To be clear, 390 of the 424 PSAs contain this identical language. The remaining 34 have slightly different conditions, but nonetheless require repurchase. *See* Loeser Affirm., Ex. A at p. 5.

[6] *See* Loeser Affirm., Ex. A at p. 1, 3.

> Nothing in this Section 3.12(a) restricts the ability of the Master Servicer to modify a Mortgage Loan in a manner that is consistent with the servicing standard set forth in Section 3.01; provided, however, that CHL [(Countrywide)] *shall have no obligation to purchase any such modified Mortgage Loan.*[7]

The significance of this third category is obvious. When Countrywide wanted to be able to modify loans without having to repurchase them, it said so. The presence of this language in PSAs for 62 of the Covered Trusts pulls the rug from under the Institutional Investors' argument that *all* of the PSAs allow the Master Servicer to modify loans without repurchasing them. On the face of the PSAs themselves, this is false. It defies logic and basic rules of construction to give the *same* meaning to *different* language. *See Donerail Corp. N.V. v. 405 Park LLC*, 30 Misc.3d 1221(A), at *9 (Sup. Ct. N.Y. Cnty. 2011) ("[D]ifferent terms . . . have distinct legal meanings.") (citing *NFL Enters. LLC v. Comcast Cable Comms., LLC*, 851 N.Y.S.2d 551, 60-61 (1st Dep't. 2008)).

B. The Institutional Investors' effort to rewrite the PSAs should be rejected.

Despite the clear contractual language contained in 468 of the 530 PSAs requiring repurchase of Modified Mortgage Loans—and notwithstanding the Institutional Investors' own recognition that the PSAs must be strictly construed (*see* Doc. No. 763 at 10) ('[T]he Court must enforce the PSAs as written . . .")—the Institutional Investors contend that (1) the general prudent servicing standards of § 3.01 of the PSAs somehow obviate the requirement that the Master Servicer must repurchase a Modified Mortgage Loan, and (2) the repurchase requirement is strictly limited to loan modifications made "in lieu of a refinancing." The Institutional Investors are wrong on both counts.

[7] *See* Loeser Affirm., Ex. B; *see also* Ex. A at pp. 9, 26 (emphasis added).

1. Section 3.01 does not and cannot trump the specific provisions of the PSAs specifically addressing loan modifications.

Section 3.01 of the PSAs merely states that the "Master Servicer shall service and administer the Mortgage Loans in accordance with the terms of this Agreement and customary and usual standards of practice of prudent mortgage loan servicers." *See* Doc. No. 763 at 23-24. There is *no language* in § 3.01 of the PSAs that allows the Master Servicer to conduct loan modifications without repurchase, or otherwise incorporates loan modifications without repurchase into the concept of the "customary" or "usual standards" of prudent mortgage loan servicers. Certificateholders purchased interests in the Covered Trusts with the expectation that the loans in the Trusts would be serviced according to the requirements of the PSAs. Some Covered Trusts allowed modification without repurchase (62 of them, in fact), but 468 did not.

Furthermore, it is well-established that specific provisions of a contract prevail over general ones. *See Brady v. Williams Capital Group, L.P.*, 878 N.Y.S.2d 693, 704 (1st Dep't 2009). Here, the specific provisions governing repurchase of Modified Mortgage Loans in §§ 3.11(b) and 3.12(a) of the PSAs prevail over the general provisions applicable to prudent loan servicing in § 3.01, which say not one word about loan modifications. The Institutional Investors' effort to impose implied terms in the PSAs that contradict the express terms is untenable. *See Greenfield, supra.*

Similarly off base is the Institutional Investors' citation to other portions of the PSAs that do not address loan modifications. *See* Doc. No. 763 at 24, n.15. In addition, the Institutional Investors' discussion of HAMP is obfuscation. *Id*. at 24-25 (discussing benefits of modification for distressed homeowners). It is not the position of Triaxx or the FHLBs that the modifications should not have occurred – it is simply that the Master Servicer must abide by the PSAs and

repurchase the modified loans. This is both sensible and fair in light of their promise to do so in the applicable PSAs.

The 62 PSAs that give the Master Servicer authority to modify delinquent loans without the obligation to repurchase them is a problem that does not go away just because the Institutional Investors ignore these PSAs. No doubt facing an avalanche of loan modification requests, and an obligation as Master Servicer to repurchase modified loans, it certainly is no surprise that Countrywide would change the language in new PSAs – that is permitted. But what is not permitted, and what this Court should reject, is the settlement proponents' effort to rewrite the other 468 PSAs *ex post facto*.

2. The obligation to repurchase Modified Mortgage Loans is not limited to modifications "in lieu of a refinancing."

For 44 of the Covered Trusts, the Institutional Investors' argument that the modification must be "in lieu of a refinancing" is dead on arrival because the PSAs for these trusts do not contain this language. It is remarkable, to say the least, that the Trustee is willing to release $11.6 billion of claims based on language that does not even exist. There is no need to search for extrinsic materials to explain what the repurchase obligation means for these Trusts. It could not be clearer. *See Reiff v. Reiff*, 40 A.D.3d 346, 347 (1st Dep't 2007) ("[E]xtrinsic evidence cannot be used to create an ambiguity when the contract itself is clear."); *Red Ball Interior Demolition Corp. v. Palmadessa*, 173 F.3d 481, 484 (2d Cir. 1999) "[i]f a contract is clear, courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself.").

For the other 424 Trusts that require repurchase, the relevant provisions contain additional details about loan modification. These trusts also unambiguously require repurchase of modified loans, but at best for the Trustee, there is a dispute about whether the PSAs limit

modification to those "in lieu of a refinancing," as discussed above. The Institutional Investors say that this provision only requires repurchase of loans modified "in lieu of a refinancing," and that, based on the implied powers discussed above, the Master Servicer is free to modify other loans as well without any obligation to repurchase them – notwithstanding the lack of any actual language in the PSAs saying that. A more reasonable interpretation is that condition (iii) in the applicable section—that "*Countrywide purchases the Modified Mortgage Loan from the Trust Fund as described below*" which is the only condition set off by an "and"[8]—applies to all modifications. It would make no sense for the PSAs to require repurchase of a loan modified "in lieu of a refinancing" while allowing a much more drastic modification, a principal write-down, without that requirement.[9]

Fortunately, even if the modification provisions of the other 424 PSAs requiring repurchase is considered ambiguous, a clear statement of the contracting parties intent can be found in the Prospectus Supplements prepared by Countrywide and delivered to Certificateholders. *See Wayland*, 111 F.Supp.2d 450 at 454 ("If the terms are ambiguous or contradictory, however, the [parol evidence] rule permits the consideration of such evidence not to alter the terms but solely to ascertain the true meaning of the terms."). While the Institutional Investors cite to the Prospectus Supplements as well, tellingly they ignore the provisions that actually address loan modification. For example, in the Prospectus Supplement for CWL 2006-13 and CWL 2006-15, both of which are cited by the Institutional Investors and apply to PSAs

---

[8] *See* Doc. No. 710, Ex. B.

[9] Notably, at a minimum, the Institutional Investors' position begs the question of whether the Trustee investigated or otherwise valued the loans that were indeed modified "in lieu of a refinancing." Even under the settlement proponents' one-side interpretation of the PSAs, it would be clear that those modified loans would need to be repurchased. In addition, since no other types of modifications are permitted under these PSAs, based on the Institutional Investors' interpretation, any modification *not* done in connection with a loan "in lieu of a refinancing" would constitute a breach of the PSAs. Yet once again, there is no evidence to suggest that the Trustee considered these claims or appreciated these clear distinctions in the PSAs.

that contain the "in lieu of a refinancing" language, the specific language speaking to loan modifications indicates:

> Countrywide Home Loans will be permitted under the pooling and servicing agreement to solicit borrowers for reductions to the mortgage rates of their respective mortgage loans. If a borrower requests such a reduction, *the master servicer will be permitted to agree to the rate reduction provided that Countrywide Home Loans purchases the mortgage loan from the issuing entity immediately following the modification.*[10]

What these Prospectus Supplements show is that for these 424 PSAs as well, the parties' intent was to require repurchase of modified loans. The Institutional Investors' effort to work the Trustee out of this jam through selective quotation to other provisions of the Prospectus Supplements that do not directly address loan modifications does not and cannot change the meaning of the PSAs.[11]

The consequence of the Master Servicer's failure to repurchase modified loans has cost the Trusts tremendously. As set forth above, all told, the principal balance of the modified loans that should have been repurchased under the applicable PSAs exceeds $32 billion. And unlike the repurchase claims based on the breach of representation and warranties in the PSAs, this figure is not subject to severity or other related discounts, nor a litigation discount based on successor liability risk. The claim runs directly against BofA as the Master Servicer. That the claims were not properly taken into account is beyond dispute. The Trustee's own senior managing director and chair of BNYM's Trust Committee testified that no portion of the settlement amount is for Modified Mortgage Loans. *See* Doc. No. 709 at 4. Likewise, the expert

---

[10] *See* Loeser Affirm., Exs. C and D (citing to Pro. Supp. for CWL 2006-13 at S-44 and Pro. Supp. for CWL 2006-15 at S-42); *see also* Loeser Affirm., Ex. A at 5.

[11] Significantly, the Institutional Investors wholly ignore the Prospectus Supplement cited in the supplemental objection and related to the 44 PSAs that unambiguously require repurchase. These Prospectus Supplements state: "The master servicer may modify any mortgage loan *provided that the master servicer purchases the mortgage loan from the trust fund immediately following the modification*." *See* Doc. No. 710, Ex. C (citing Pro. Supp. CWALT 2005-86CB).

hired by the Trustee to determine a "reasonable settlement range," Brian Lin, did not address losses to the Covered Trusts caused by the failure to repurchase modified loans – indeed, he did not even recognize that the PSAs for most of the Covered Trusts required repurchase of modified loans. Instead of valuing these claims, and requiring BofA to compensate the Covered Trusts for them, the Trustee and now the Institutional Investors deferred to BofA's self-serving and erroneous interpretation – an interpretation that allows BofA to walk away from over $32 billion of liability for free. The Trustee has not and cannot show that this give-away was in the best interests of the Covered Trusts.[12]

C. The Settlement Agreement improperly modifies the PSAs.

The Settlement Agreement states that "[n]othing in Paragraph 5 is, or shall be construed to be, an amendment of any Governing Agreement." *See* Settlement Agreement, ¶ 5(g).[13] Yet with respect to the modifications of Modified Mortgage Loans, the Settlement Agreement does exactly that, as it states "the modification and/or other loss mitigation strategy so implemented shall be deemed to be *permissible* under the terms of the applicable Governing Agreement." Settlement Agreement, ¶ 5(e) (emphasis added). This provision allowing

[12] The Institutional Investors (and the Trustee) continue to claim that the *Greenwich* case already decided these claims. As the Court is fully aware, *Greenwich* was decided on procedural grounds and the substantive arguments regarding whether the PSAs actually require repurchase were never decided. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3, LLC v. Countrywide Fin. Corp.*, Index No. 650474/2008 (Sup. Ct. N.Y. Cnty. Oct. 7, 2010). In any event, though ignored by the Trustee, it is no secret that Countrywide PSAs require repurchase of Modified Mortgage Loans. *See, e.g.*, "Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior," National Consumer Law Center, at 7 ("Some PSAs, primarily those involving loans originated by Countrywide prior to 2007, require the servicer to buy all modified loans out of the pool[.]") (October 2009); *see also* "What Do Subprime Securitization Contracts Actually Say About Loan Modifications: Preliminary Results and Implications," John P. Hunt, Berkeley Center for Law, Business, and the Economy, at 9-10 (Countrywide PSAs provide "unqualified authority" to modify "if a Countrywide entity purchases the loans from the pool.") (Mar. 25, 2009).

[13] Paragraph 5 of the Settlement Agreement addresses the purported servicing improvements of the Settlement, and the Governing Agreement refers to the PSA.

modification without repurchase ignores the plain terms of approximately 90% of the PSAs, which as set forth above, require repurchase of a Modified Mortgage Loan.

The only scenario in which amendment of the PSAs is permitted is found in § 10.01 of the PSAs. Under this provision, the PSAs may be modified "by the Depositor, each Seller, the Master Servicer and the Trustee *with the consent of the Holders of Majority in Interest of each Class of Certificates* affected thereby for the purpose of *adding any provisions to or changing in any manner or eliminating any of the provisions of this Agreement or of modifying in any manner the rights of the Holders of such Certificates* . . ."[14] There is no evidence to suggest that such consent was given. Given that the Settlement includes Trusts for which the Institutional Investors did not have any interest, and many others in which they lacked 25% or more of the Voting Rights, the lack of proper consent is not subject to debate.

Even HAMP—which the Institutional Investors cite to at great length to suggest that BofA's modification activities are permissible—recognizes the importance of deferring to the PSAs. For example, Supplement Directive 09-01 of HAMP indicates that "participating servicers are required to consider <u>all</u> eligible mortgage loans unless prohibited by the rules of the applicable PSA and/or other investor servicing agreements."[15] Courts have recognized similarly:

> HAMP . . . recognize[s] that loan servicers are bound by these pre-existing agreements with the investors . . . Therefore, HAMP Guidelines do not require servicers to consider loans for HAMP modification where prohibited by the rules of the applicable PSA and/or other investor servicing agreements.

Edwards v. Aurora Loan Servs., LLC, 791 F.Supp.2d 144, 148 (D.D.C. 2011); *see also JPMorgan Chase Bank, N.A. v. Ilardo*, 36 Misc. 3d 359, 367 (N.Y. Sup. Ct. Suffolk County 2012) (same).

---

[14] *See* Loeser Affirm., Ex. E (emphasis added).

[15] *See* Loeser Affirm., Ex. F (emphasis added).

While the Institutional Investors admit that the PSAs must be strictly construed, they nonetheless executed a settlement that on its face alters the terms of the PSAs by allowing modifications of Modified Mortgage Loans to occur without repurchase. This improper amendment is a stark example of the Trustee's failure to act in the best interests of the Certificateholders.

D. The Institutional Investors' responses to allegations of Master Servicer self-dealing provide no clarity for Certificateholders.

Remarkably, after several months in which the undersigned requested the Trustee to meet with them to address the issues raised by the undersigned's February 1 letter—including the Trustee's decision to inform the undersigned on the day before the objection deadline that they would be conducting further research in connection with BofA's retention of balloon payments—the Institutional Investors (and not the Trustee) substantively responded to these claims *for the very first time* in their opposition brief. *See* Doc. No. 763 at 29-31. This tardy response to a timely-raised issue precludes the undersigned from fully investigating potential self-dealing by BofA. The Trustee's unwillingness to directly address these claims further exacerbates the Trustee's continual refusal to act in the best interests of the Certificateholders.

Putting aside this failure, the Institutional Investors' citation to a Supplemental Directive in HAMP to suggest that second lien loans are required to be reduced in proportion to first lien loans provides no reassurance that the BofA is in fact complying with this directive. Indeed, as the Institutional Investors confirm, data on second lien loans is not publicly available. *See* Doc. No. 763 at 29, n. 26. Furthermore, the HAMP Supplemental Directive has no application to loans that were modified prior to the enactment of HAMP.

The Institutional Investors' response to allegations regarding BofA's retention of balloon payments fares no better. The Institutional Investors cite to Supplemental Directive 10-05.

See Doc. No. 763 at 30. However, this authority confirms that forborne principal is written off as a loss to the Covered Trusts. For instance, under the Supplemental Directive, the Master Servicer reports to the Trustee "any forborne principal as a realized loss, and in turn, the Trustee "must allocate any such reported forborne principal as *a realized loss to the trust*." *Id.* (citing Supp. Dir. 10-05 at 10) (emphasis added). Based on this language, the Institutional Investors contend that these losses will be reported and distributed to the Trusts under the PSAs as a "Subsequent Recovery." *Id.* at 31. There is no evidence, however, to suggest that the BofA is distributing a "Subsequent Recovery" to the Covered Trusts. Relatedly, the PSAs contain an "Optional Termination" clause by the Master Servicer where the strike price is based on "Stated Principal Balance" which does not include balloon payments or "Subsequent Recoveries" in the purchase price. *See* PSA § 9.01. This would mean a windfall to the Master Servicer upon exercise of the "Optional Termination" clause. Accordingly, that BofA may retain balloon payments in connection with a Modified Mortgage Loan remains a distinct possibility. More importantly, there is no indication that the Trustee evaluated or otherwise investigated this claim of Master Servicer self-dealing, and, at any rate, the Settlement release claims against BofA for past, present and future servicing abuses. *See* Settlement Agreement, ¶ 9(a).

Ultimately, the question for the Court is whether the Trustee properly evaluated these claims and, frankly, knows enough about them to release them. The Trustee has given Certificateholders and the Court no basis on which to conclude that these claims were properly investigated, and that a release of the claims without compensation is justified. Accordingly, the Trustee is not entitled to the broad and expansive relief it seeks in the PFOJ, and the Settlement should not be approved. Respectfully, it is not too late for the Trustee to obtain fair value for the claims that are being released, and it should be sent back to the bargaining table to do so.

III. CONCLUSION

For the reasons set forth herein and in the Supplemental Brief in Opposition to the Proposed Settlement, Triaxx and the FHLBs respectfully submit that the Settlement should not be approved by the Court.

DATED: May 20, 2013.

RESPECTFULLY SUBMITTED,

KELLER ROHRBACK LLP

By: *s/ Derek W. Loeser*
Derek W. Loeser
David J. Ko
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384
dloeser@kellerrohrback.com
dko@kellerrohrback.com

Attorneys for Federal Home Loan Banks of Boston, Chicago, and Indianapolis

MILLER & WRUBEL P.C.

By: *s/ John G. Moon*
John G. Moon
570 Lexington Avenue
New York, New York 10022
Telephone: (212) 336-3500
Fax: (212) 336-3555
jmoon@mw-law.com

Attorneys for the Triaxx Entities