SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of

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

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE INSTITUTIONAL INVESTORS' RESPONSES TO THE BANK OF NEW YORK'S MOTION REGARDING THE STANDARD OF REVIEW AND SCOPE OF DISCOVERY AND THE OBJECTORS' ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT CONVERT THIS SPECIAL PROCEEDING TO A PLENARY ACTION

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The Institutional Investors respond to: (i) The Bank of New York's Motion Regarding the Standard of Review and Scope of Discovery (the "Trustee's Motion"), and (ii) The Objectors' Order to Show Cause Why the Court Should Not Convert this Special Proceeding to a Plenary Action (the "Mtn."). The Institutional Investors support the Trustee's Motion, the relief it requests and the standard of review it urges the Court to adopt. For the reasons below, they oppose the Objectors' Motion.

I. INTRODUCTION

The Objectors' effort to convert this action to a plenary proceeding rests on the deeply flawed premise that certificateholders—rather than the Trustee—have the right to decide where and how to litigate and settle the Trusts' claims. The governing Pooling and Servicing Agreements and Indentures (PSAs) vest all such litigation decisions in the Trustee's discretion. So long as the Trustee's claim under Article 77 is within this Court's jurisdiction, the Trustee's choice of Article 77—rather than some other procedure, such as a class action—may not be disturbed. As this Court has already admonished counsel for Walnut Place, the Trustee's choice to proceed under Article 77 governs the Court's consideration of the issue.

> It's not, it's not a Class Action. There aren't provisions in there to opt out that you are talking about. That's not what this is. If you started it, maybe that's what you would have done, but they started it and that's what they did. I have to work, at least now, within the confines of the proceeding that is before me.[1]

The Objectors attempt to raise only one jurisdictional issue: their false claim that these securitized trusts fall outside the ambit of Article 77, because they are allegedly "trusts for the benefit of creditors" or do not involve "trust administration." As is set forth in Part II, the Covered Trusts are investment vehicles, not trusts for the benefit of creditors. None of the Trusts

[1] Transcript of Proceedings, Aug. 5, 2011 at pp. 18-19.

involved a pre-existing debtor creditor relationship. The Trusts plainly evidence a *sale* of assets, not an agreement to repay money borrowed previously. None of the Trusts evidences an assignment by Countrywide of all of its property for the purpose of paying pre-existing creditors. All of the Trusts contemplate *ongoing* activity, rather than the liquidating activity required to establish a trust for the benefit of creditors. The Objectors do not cite any of these required elements, or even *one* of the scores of New York cases establishing the required elements of a trust for the benefit of creditors, in their motion to convert. Instead, they resort to a purely semantic argument that disregards plain language of these Trusts, the nature of the transactions they effect and the relief the Trustee has sought. That the Objectors chose to raise this obviously insubstantial argument for the first time, ten months after this action was originally filed, speaks volumes about its lack of merit.

The Objectors' argument that the Trustee's action does not fall within "the core subjects of Article 77, that is, accounting, administration, and construction of express trusts," Mtn. at 1, is equally specious. As we explain in Part III, the *entirety* of the relief the Trustee seeks is a request that the Court construe the PSAs, determine the scope of the authority they vest in the Trustee, and decide whether the Trustee's decision to settle falls *within* its reasonable discretion.[2] It is difficult to imagine a *more* core Article 77 proceeding than a Trustee's request that the Court confirm the Trustee's authority to settle *before* the Trustee subjects itself to potential liability by doing so. The Second Circuit recognized this was a core Article 77 matter. *See BlackRock Fin. Mgmt., Inc. v. The Segregated Account of Ambac Assurance Corp.*, No. 11-5309, 2012 WL 611401, at *5 (2d Cir. Feb. 27, 2012). This Court should now so rule.

The Objectors' remaining argument is that this case is simply "too big" for Article 77. This is an impermissible invitation for the Court to substitute the Objectors' preferred procedural

[2] *See* Trustee's Mem. of Law Re: Standard of Review, Doc. No. 228, April 3, 2012, at 1.

mechanism (whatever it might be) for the Trustee's choice of Article 77. As we explain in Part IV, this Court cannot substitute its judgment for that of the Trustee on an issue at the heart of the Trustee's discretionary authority to pursue and settle the Covered Trusts' litigation claims: the choice of what procedure will best serve the common benefit of all Certificateholders. The PSAs vest in the Trustee (and only the Trustee) the discretion to choose *among* procedural mechanisms to seek the relief necessary to finalize the settlement. With one exception that does not apply, Part IV, the PSAs preclude the Objectors' effort to displace the Trustee's discretionary decision to proceed under Article 77.

For all of these reasons, the Court should reject the Objectors' effort to usurp the Trustee's right to elect to proceed under Article 77. The motion to convert should be denied.

II. THE COVERED TRUSTS ARE NOT "TRUSTS FOR THE BENEFIT OF CREDITORS" AND ARE NOT EXCLUDED FROM THE SCOPE OF ARTICLE 77.

For the first time, after nearly ten months of serial objections to this Article 77 proceeding,[3] the Objectors assert that the 530 Covered Trusts are "trust[s] for the benefit of creditors" that fall within an express exception to Article 77.[4] This assertion is frivolous. Ample authority — none of which the Objectors cite — makes clear that a "trust for the benefit of creditors," which results from an "assignment for the benefit of creditors," bears no relationship whatsoever to the securitization trusts at issue here.[5] It is thus unsurprising that this Court

[3] The Objectors have engaged in repeated machinations to avoid the Court's consideration of the underlying settlement on its merits. The Objectors' new "benefit of creditors" argument is as specious as all of the others and just as futile.

[4] Article 77 provides that "[a] special proceeding may be brought to determine a matter relating to any express trust, except . . . *a trust for the benefit of creditors* . . . ." CPLR 7701 (hereinafter, emphasis added unless otherwise noted).

[5] *See, e.g.*, 30 N.Y. Jur. 2d Creditors' Rights § 212 ("A general *assignment for the benefit of creditors* is understood to mean an assignment by a debtor transferring *all his or her property* in general terms to an assignee *in trust* for the debtor's creditors . . . *The presence of a trust is basic to a general assignment for benefit of creditors*."); 3 Austin Wakeman Scott et al., SCOTT & ASCHER ON TRUSTS § 12.13.1 (5th ed. 2007) ("When a debtor makes a general assignment of property for the benefit of

previously has provided judicial instructions regarding settlement of claims to a trustee of a securitization trust pursuant to Article 77.[6]

More than a century of case law and other authorities make clear that a "trust for the benefit of creditors" is a "state law counter-part to Chapter 7 liquidation in bankruptcy, without all the requisite formalities."[7] Specifically, "[a] *trust for the benefit of creditors* as a class is recognized in equity under the theory that a failing or insolvent debtor may assign all or a portion of his property to a third party as trustee for the purpose of paying the creditors from a distribution of the proceeds received upon sale of the res. *Trusts of this nature are commonly known as assignments for the benefit of creditors*."[8] Under long-standing New York law, "a general assignment for the benefit of creditors" comprises "a transfer by a debtor of his property to another in trust to sell and convert into money and distribute the proceeds among his creditors," which mechanism "implies a trust and contemplates the intervention of a trustee."[9] This right to make an assignment for the benefit of creditors "was known at the common law," and in New York "it has become a well-known statutory proceeding."[10] By following the

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creditors, the *debtor creates a trust*, of which the creditors are beneficiaries."); 30 N.Y. Jur. 2d Creditors' Rights § 214 ("The right to make a general *assignment for creditors* existed at common law. However, the common law assignment or deed of *trust for the benefit of creditors* has been displaced in New York by the statutory assignment under N.Y. Debt. & Cred. Law art. 2 which now makes general assignments thereunder the only kind permissible."); 23A Carmody-Wait 2d New York Practice § 142:30 (same).

[6] *See In re IBJ Schroder Bank*, No. 101530/1998, Slip Op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000).

[7] Jonathon T. Edwards, The Crossroads: The Intersection of State Law Remedies and Bankruptcy, 18 J. Bankr. L. & Prac. 2 Art. 4 (April 2009) ("In an [assignment for the benefit of creditors], the debtor (assignor) voluntarily transfers all of his or her assets by formal deed to another person (assignee), who holds the property in *trust for the benefit of creditors*."). *Accord* 23A Carmody-Wait 2d New York Practice § 142:1 ("A general assignment for the benefit of creditors is an assignment by a debtor transferring all of his or her property. . . *to a trustee* of his or her own selection, for administration, liquidation, and equitable distribution among his or her creditors . . . In practical effect, assignment proceedings under state law may be a useful alternative to bankruptcy."); BLACK'S LAW DICTIONARY (9th ed. 2009) (describing this procedure "as a state-law substitute for federal bankruptcy proceedings").

[8] *Illinois Bell Tele. Co. v. Wolf Furniture House, Inc.* 509 N.E.2d 1289, 1295 (Ill. App. Ct. 1987).

[9] *Young v. Stone*, 61 A.D. 364, 370 (3d Dep't 1901).

[10] *Paddell v. Janes*, 145 N.Y.S. 868, 874 (Sup. Ct. N.Y. Cty. 1914).

statutory procedures (and only by doing so), a "trust for the benefit of creditors" is created:

> One of the chief requisites of such an assignment is that the assignor shall place *all his property*, both real and personal, *in the possession of his trustee.* The failure to do so makes the assignment under the statute absolutely void. *The material and essential characteristic of a general assignment is the presence of a trust.* The assignee is merely a trustee, and not the absolute owner. . . . *In this state an assignment for the benefit of creditors is one of the enumerated express trusts*.[11]

The procedures governing trusts for the benefit of creditors (otherwise known as assignments for the benefit of creditors) are set out in detail in Article 2 of the New York Debtor and Creditor Law.[12] The Debtor and Creditor Law even sets forth separate judicial procedures for proceedings involving such trusts, providing any court acting in relation to such a trust "[g]eneral powers" and "full jurisdiction to do . . . every act" relative to the trust, including equity.[13]

It is a settled principle of statutory construction that "[w]hen a statutory term is undefined, it must be given its precise and well settled legal meaning in the jurisprudence of the state."[14] Indeed, "it is presumed that in drafting the statute, the Legislature understood and adopted that well-settled meaning."[15] The words "trust for the benefit of creditors" have just such a precise and well settled meaning in the jurisprudence of the State of New York.[16] New

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[11] *Id.* at 874-75, 877. *Accord Compagnia Distribuzione Calzature, S.R.L. v. PSF Shoes, Ltd.*, 206 A.D.2d at 343, 344 (2d Dep't 1994) ("A general assignment for the benefit of creditors is an assignment by a debtor transferring *all* of his or her property in general terms to an assignee *in trust* for all creditors of the debtor, … … for administration, liquidation, and equitable distribution among his creditors.").

[12] N.Y. Debt. & Cred. Law Art. 2, § 2, *et seq.* ("General Assignments for the Benefit of Creditors").

[13] N.Y. Debt. & Cred. Law §§ 20-21.

[14] *In re N.Y. Const. Materials Assoc., Inc.*, 83 A.D.3d 1323, 1326 (3d Dep't 2011); *see also Perkins v. Smith*, 116 N.Y. 441, 448-49 (1889).

[15] *People v. Reed*, 265 A.D.2d 56, 66 (2d Dep't 2000).

[16] This understanding of the meaning of a "trust for the benefit of creditors" is consistent with the use of the term or similar terms elsewhere throughout New York statutory law. *See, e.g.*, N.Y. Penal Law §185.00 (misdemeanor crime of "[f]raud in insolvency" against one who makes certain misrepresentations or fraudulent conveyances in respect to a "debtor's estate" and defining "administrator" as "an assignee or trustee for the benefit of creditors,…"); N.Y. Banking Law § 246 (providing that no one may be a trustee of a savings bank who, within fifteen years prior, has "been adjudicated a bankrupt or … has made a general assignment for the benefit of creditors"); N.Y. Gen. City

York courts (including the Court of Appeals) have used the term "trust for the benefit of creditors" to refer to an insolvent debtor's assignment of all of its assets to a trustee for liquidation and distribution to creditors for over 100 years, in over 100 reported cases, since well before Article 77 was enacted.[17] When Article 77's predecessor statute (Article 79) was enacted in 1943, it contained the same exception—and the leading authorities uniformly reflected that such trusts, which were "[a]mong the active trusts which [we]re quite frequent in this country,"

Law § 38 (referring to "[e]very receiver, trustee in bankruptcy, assignee for benefit of creditors, or other like fiduciary").

[17] *See, e.g.*, *Gerseta Corp. v. Equitable Trust Co. of N.Y.*, 241 N.Y. 418, 425 (1926) (describing situation where an "estate has passed upon a trust to hold for and distribute among creditors" as a "trust for the benefit of creditors"); *In re Price*, 171 N.Y. 15, 19 (1902) (describing stockbroker's "assignment of all property of the firm to the assignee" as a "trust for the benefit of creditors"); *People v. Mercantile Credit Guarantee Co. of N.Y.*, 166 N.Y. 416, 421 (1901) (describing situation where one "transfers to a trustee named all of his stock of goods, including fixtures and furniture of all kinds in his store . . . [where] [t]he trustee is directed to sell the property, and after deducting expenses of executing the trust, to distribute the proceeds among a list of creditors named" as a "trust for the benefit of creditors"); *Carpenter v. Taylor*, 164 N.Y. 171, 174 (1900) (describing plaintiff's "general assignment of all his property . . . for the conversion of the property into money, and the distribution of the same among the creditors" as a "trust for the benefit of creditors"); *First Nat'l Bank of Amsterdam v. Shuler*, 153 N.Y. 163, 166, 169 (1897) (describing a "general assignment for the benefit of creditors" as a "trust for the benefit of creditors"); *Short v. Bacon*, 99 N.Y. 275, 279 (1885) (noting that assignment of property to trustee for the benefit of creditors "created a trust for the benefit of creditors"); *Lowenstein v. Flauraud*, 82 N.Y. 494, 495, 497 (1880) (describing an "assignment made by a debtor, of his estate, in trust for creditors" as a "trust for the benefit of creditors"); *In re Vogue Pleating & Embroidery Co.*, 11 A.D.2d 358, 360 (1st Dep't 1960) (assignment for the benefit of creditors creates "a trust fund for the benefit of creditors"); *James H. Dunham & Co. v. McCann*, 110 A.D. 157 (1st Dep't 1905) (Laughlin, J., dissenting on other grounds) (describing assignment for benefit of creditors as a "trust for the benefit of creditors"); *In re Gallaudet*, 222 N.Y.S. 565, 567, 570 (N.Y. Sup. Ct. 1927) (noting that "an instrument in writing, duly executed, [which] assigned all of their individual and firm property to one C. Elliot Minor in trust for the benefit of their creditors" created "a trust for the benefit of creditors [which] is regulated by the same rules that appertain to other trusts"); *Paddell*, 145 N.Y.S. 868, 877 (describing an "assignment for the benefit of creditors" as a "trust for the benefit of creditors"); *New Jersey Steel & Iron Co. v. Robinson*, 68 N.Y.S. 577, 578 (N.Y. Sup. Ct. 1900), *aff'd* 60 A.D. 69 (1st Dep't 1901) (describing assignment for the benefit of creditors as a "trust for the benefit of creditors"); *Tompkins v. Hunter*, 24 N.Y.S. 8, 11 (N.Y. Sup. Ct. 1893), *aff'd* 28 N.Y.S. 1132 (3d Dep't 1894), *aff'd* 149 N.Y. 117 (1896) (describing "assignments of estates of debtors for the benefit of creditors" as creating a "trust for the benefit of creditors").

constituted "voluntary and general assignments by failing debtors of their property to trustees upon trust to pay the creditors of the assignor."[18]

This abundant law concerning "trust[s] for the benefit of creditors" makes clear that the Covered Trusts are not such trusts. They must meet all of the following, well-defined requirements of such trusts. They do not, so they are not excluded from Article 77.

A. The Requirement of Pre-Existing Creditors and Pre-Existing Debts.

In a "trust for the benefit of creditors," an insolvent debtor assigns its assets to a trustee for the benefit of its existing creditors.[19] The liquidation of the debtor's assets to pay *pre-existing* creditors is the sole and animating purpose of a trust for the benefit of creditors. There must, therefore, be a *pre-existing* debtor/creditor relationship, between the assignor and the trust beneficiaries, that *pre-dates* the creation of the trust.[20] The trustee's duty is then "simply to convert the estate and pay the debts" to the debtor's pre-existing creditors.[21] In other words, a

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[18] 3 John N. Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE § 993 (5th ed. 1941); *see also* RESTATEMENT (FIRST) OF TRUSTS § 330 cmt. g (1935) ("If a debtor makes a general assignment of his property for the benefit of his creditors, the inference is that a trust for the creditors is created. . . . "); BLACK'S LAW DICTIONARY (3d ed. 1933) (defining "[a]ssignment for benefit of creditors" as "[a]n assignment in trust made by insolvent and other debtors for the payment of their debts"); 2 Jairus Ware Perry, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 585 (6th ed. 1911) (in chapter addressing "trusts under assignments for creditors," noting that "[a] debtor may convey or assign both his real and personal estate to trustees for the payment of his debts").

[19] *See, e.g. Carpenter*, 164 N.Y. at 174 (trust for benefit of creditors involves assignment by a debtor to trustee "for the conversion of the property into money, and the distribution of the same among the creditors"); *Browning* v. *Hart*, 6 Barb. 91 (Sup. Ct. N.Y. Cnty. 1849) ("[a] man in embarrassed or insolvent circumstances" may "make[] an assignment of his property, in trust for the payment of his creditors"); Edwards, 18 J. Bankr. L. & Prac. 2 Art. 4 ("the debtor (assignor) voluntarily transfers all of his or her assets by formal deed to another person (assignee), who holds the property in *trust for the benefit of creditors*").

[20] *See, e.g., Mercantile Credit Guarantee*, 166 N.Y. at 416 (trustee for trust for the benefit of creditors "is directed to sell the property, and after deducting expenses of executing the trust, to distribute the proceeds among a list of creditors named"); *Compagnia Distribuzione Calzature*, 206 A.D.2d at 344 (purpose of debtor's transfer of assets to trust for the benefit of creditors is "administration, liquidation, and equitable distribution among his creditors").

[21] *Ogden v. Peters*, 21 N.Y. 23, 24 (1860).

"trust for the benefit of creditors" is not a financing vehicle that creates creditors, it is entirely — and only — a vehicle for the repayment of existing creditors.

The Covered Trusts did not involve a pre-existing debtor/creditor relationship between the "Depositor" (the entity that assigned the mortgages to the Covered Trusts)[22] and either the Covered Trusts or the Certificateholders (who became beneficiaries of the trusts when they purchased certificates).[23] The Depositor had no creditors and did not owe either the Trusts or the Certificateholders any money *ex ante*.[24] Instead, the Depositor assigned the mortgages into the Covered Trusts, not to satisfy pre-existing debts, but rather "in return for the Certificates," which were later sold to investors.[25] This was a *sale* of the mortgages to the Trusts *in exchange for* certificates issued by the Trusts.[26] Far from being a one-way assignment of all assets by an insolvent debtor to an assignee for the purpose of liquidating those assets to pay the debtor's creditors, the creation of the Covered Trusts involved a new *exchange* of value — the mortgages

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[22] *See* PSA at Preliminary Statement ("The Depositor is the owner of the Trust Fund that is hereby conveyed to the Trustee . . . ."). Excerpts of a representative sample of the Pooling and Servicing Agreements ("PSAs") at issue in this case (the PSA for CWALT 2006-OA-19) is attached as Exhibit A to the Warner Affirmation filed contemporaneously herewith (the "Warner Aff.").

[23] Not only were the Certificateholders not creditors of the Depositor prior to the creation of the Covered Trusts, they were not made creditors of the Depositor by purchasing the certificates, which entitle Certificateholders to payments of principal and interest from the trusts, not the Depositor.

[24] *See, e.g.*, Talcott J. Franklin and Thomas F. Nealon, III, MORTGAGE AND ASSET BACKED SECURITIES HANDBOOK § 1:4 (2011) ("As a first step in effecting the securitization, the loans created or purchased by the originator are sold to a 'Depositor' pursuant to a Loan Purchase Agreement. . . . The Depositor is an entity established for this sole purpose, *has no creditors*, and is interposed between the Originator and what will be the ultimate securitization entity … to minimize the chances that subsequent avoidance or other actions involving the Originator could claw back the loans from the securitization entity.").

[25] *See* Ex. A to Warner Aff. (PSA) at Preliminary Statement, Definition of "Trust Fund" (stating that mortgages assigned to trusts by Depositor are "in return for the Certificates").

[26] The purpose of securitization transactions backed by notes, such as the mortgage backed Covered Trusts, is to "to *sell* the underlying loans as securities to the public markets as a means of *raising capital*." *Orix Capital Markets v. GMAC Commercial Mortg. Corp.*, 2007 WL 137677 at *7 (Cal. App. 2007). *See also* SEC Guidance on Dodd-Frank Rulemaking, "Asset-Backed Securities," available on the SEC Website, Dodd-Frank Spotlight Home, at http://www.sec.gov/spotlight/dodd-frank/assetbackedsecurities.shtml ("Asset-backed securities (ABS) are created by *buying and selling loans*—such as residential mortgage loans, commercial loans or student loans—and creating securities backed by those assets, which are then *sold* to investors.").

in the Trust Fund in exchange for the Trusts' certificates. This facilitated a *second* series of transactions between the Depositor and third parties, the eventual Certificateholders. The Covered Trusts were financing vehicles, used to sell interests in the mortgages being assigned, not a quasi-bankruptcy mechanism for dividing the proceeds of the Depositor's assets among existing creditors. That is precisely why the Covered Trusts are considered to be REMICs: they are Real Estate Mortgage *INVESTMENT* Conduits, created to permit investors to invest in underlying mortgages.[27] The Covered Trusts bear no resemblance to the well-established, bankruptcy-equivalent of a "trust for the benefit of creditors," so they are not excluded from the scope of Article 77.

B. The Requirement of Assignment of All of the Debtor's Property.

Even if the Depositor and the Certificateholders were parties to a pre-existing debtor/creditor relationship (and they were not) the Covered Trusts fail to satisfy a second required element of a "trust for the benefit of creditors": the assignment of *all* of the debtor's property. New York law is clear: an assignment for the benefit of creditors must include all of the debtor's property.[28] Here, the Depositor — as assignor of the Covered Trusts — did not

[27] *See* Ex. A to Warner Aff. (PSA) at Preliminary Statement ("For federal income tax purposes, the Trust Fund (excluding the Carryover Shortfall Reserve Fund) will consist of two *real estate mortgage investment conduits* (each a '*REMIC*' or, in the alternative, the 'Lower Tier REMIC' and the 'Master Remic'").

[28] *Compagnia Distribuzione Calzature*, 206 A.D.2d at 344 (trust for benefit of creditors involves "assignment by a debtor transferring *all of his or her property* in general terms to an assignee in trust for all creditors"); *Matter of 40 Wall St. Corp.*, 258 A.D. 108, 109 (1st Dep't 1939) ("It is so well settled that a general assignment for the benefit of creditors is void unless it complies with the provisions of Article 2 [of the Debtor and Creditor Law] as not to require the citation of authorities. By its very terms and provisions the assignment herein is on its face not a general but a partial assignment. No such partial assignment is provided for or permitted by the statute . . . ."); *Paddell*, 145 N.Y.S. at 874-75 ("[o]ne of the chief requisites of such an assignment is that the assignor shall place *all his property*, both real and personal, in the possession of his trustee"); *Century Factors v. Everything New, Inc.*, 122 Misc.2d 89, 90 (N.Y.C. Civ. Ct. 1983) (such an assignment "has been defined as a voluntary transfer by a debtor of *all his property*, to a trustee of his own selection, for administration, liquidation and equitable distribution among his creditors" (internal quotation marks omitted)); *Freeman v. Marine Midland Bank New York*, 419 F.Supp. 440, 447 (E.D.N.Y. 1976) (under New York law, trust for benefit of creditors involves "a

assign all of its assets to the Covered Trusts. After the assignment of the mortgages to the trusts, the Depositor held Certificates that were later to be sold to investors. These certificates were *assets*. Because these assets were not conveyed to the Trusts, *all* of the Depositor's property was not conveyed to the Trusts. The Covered Trusts thus are not "trust for the benefit of creditors."

The Objectors make no attempt to demonstrate that the Covered Trusts meet the elements of a "trust for the benefit of creditors" as that term has been used and understood by New York courts for over 100 years. The clear and traditional use of this term was plainly understood and intended by the New York legislature when it drafted Article 77, and sensibly so: Article 77 is not intended to sweep in trusts subject to "other special procedures."[29] New York's century-old Debtor and Creditor Law has long provided alternative judicial procedures for traditional "trust[s] for the benefit of creditors"[30] — procedures that would not apply to (or be appropriate for) the trusts at issue here.

Ignoring over a century of precedent, the Objectors offer only a syllogism that ignores the underlying reality of the trusts. They begin with the *ipse dixit* that the certificates issued by the Trusts are akin to debt so, of course, the beneficiaries of the Covered Trusts must be "creditors."[31] As a result, they claim, the Covered Trusts must be "trust[s] for the benefit of

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voluntary transfer by a debtor of *all of his property*, to a trustee of his own selection, for administration, liquidation, and equitable distribution among his creditors"); *see also* BLACK'S LAW DICTIONARY (5th ed. 1979) ("transfer of *all or substantially all* of debtor's property to another person in trust to collect any money owing to the debtor, to sell property, and to distribute the proceeds to his creditors").

[29] The "trusts excepted from the provisions of [CPLR] Section 7701" are so excepted "because the law provides for other special procedures in these instances." NYLS Governor's Bill Jacket, L. 1964, c. 322 at 6; *see also Reed*, 265 A.D.2d at 66 ("[I]t is presumed that in drafting the statute, the Legislature understood and adopted that well-settled meaning.").

[30] N.Y. Debt. & Cred. Law §§ 20-21.

[31] The conclusion that the certificates in the covered trusts represent "debt," and that Certificateholders are therefore "creditors" of the trusts, is subject to significant doubt. *See, e.g.*, Frank Fabozzi, *Accessing Capital Markets Through Securitization* 238 (2001) (noting that "trust certificates" "are considered 'equity interests' under state law and, therefore, notwithstanding credit ratings of up to AAA/Aaa, are considered not to be 'debt'"). The Court need not resolve that issue here, however,

creditors." The law and facts prove the contrary. Because there was (and is) neither a pre-existing debtor-creditor relationship nor an assignment of *all* of the claimed debtors' property for the benefit of creditors, the Covered Trusts are not "trust[s] for the benefit of creditors."

III. THE TRUSTEE'S CLAIM FALLS SQUARELY WITHIN ARTICLE 77

The Trustee's Article 77 claim asks this fundamental question: do the PSAs that govern its conduct permit it to consummate a settlement involving an $8.5 billion cash payment, servicing improvements experts estimate to be worth more than $10 billion, [32] and a document cure that will protect the Covered Trusts against future losses due to unrecorded liens? The Trustee seeks an instruction concerns the specific *meaning* of key administrative provisions of the PSAs. It asks the Court to advise it on an issue at the core of its administrative duties as trustee: whether the Settlement falls within the reasonable bounds of its discretion under the PSAs. As the Second Circuit recognized, such determinations are at the core of the Article 77 procedure:

> The first step is to determine what claims were asserted in the state court, an inquiry complicated somewhat by the nature of an Article 77 proceeding. Ultimately, we conclude that The Bank of New York Mellon is seeking a judicial determination [i] that it has the authority to assert and settle claims on behalf of the trusts and [ii] that it "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." Joint Appendix at 165–166, 169; Walnut Place Br. at 25 ("[The Bank of New York Mellon] is affirmatively and unambiguously seeking a declaration that it complied with its duties under New York common law."). ***Thus it asks for a construction of the PSA and an instruction that its planned course of action complies with its obligations under that document and the law of trusts—consistent with other proceedings brought under Article 77***.[33]

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because the Covered Trusts fail in every respect to meet the required elements of a "trust for the benefit of creditors."

[32] *See* L. Goodman, "Bank of America Settlement—Impact on Securities Valuation," Amherst Mortgage Insight, July 28, 2011, Amherst Securities Group LP at pp. 8-10 and Ex. 3, Aggregate Report on Valuation Impact. A copy of this report is attached as Exhibit B to the Warner Aff.

[33] *BlackRock Fin. Mgmt.*, 2012 WL 611401 at *5 (citing *In re Gilbert*, 39 N.Y.2d 663, 666, 385 N.Y.S.2d 278, 350 N.E.2d 609 (providing construction of trust documents) and *In re Scarborough Props.*

As explained below, the Objectors' assertion that this action does not "relate directly to the administration of and accounting for express trusts," Mtn. at 1, collapses in the face of the PSAs, the relief the Trustee has sought, and the scope of Article 77.

A. Article 77 Authorizes the Trustee to Seek Construction of the PSAs and Confirmation that It Has Not Exceeded the Scope of its Contract Discretion.

Though long on rhetoric, the Objectors' argument is short on the one thing that matters here: an analyis of how the *actual provisions* of the PSAs compare to the Trustee's Article 77 claim. Not once do the Objectors' cite, much less quote, the relevant provisions of the PSAs the Trustee asks the Court to construe. Not once do the Objectors acknowledge that a PSA does not create a parliamentary democracy: instead, it vests broad discretion in a Trustee, who holds the Trust Fund[34] "for the exclusive use and benefit of *all* present and future Certificateholders," PSA §2.02, and must enforce its rights for their "common benefit." PSA §10.08.

1. The Trustee's Right to a Construction of its Exercise of Discretion.

The authority of the Trustee to act—to the exclusion of individual Certificateholders—is central to the PSAs that govern securitized trusts. When they purchased these securities, each Certificateholder not only "agreed to" these provisions,[35] they became "contractually obligated to speak with one voice."[36] That voice is the voice of the Trustee. This principle is so clear that the PSAs permit *both* the Trustee *and* individual Certificateholders to enforce this "one voice" requirement *against* other Certificateholders. "For the protection and enforcement of this

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Corp., 25 N.Y.2d 553, 559-60, 307 N.Y.S.2d 641, 255 N.E.2d 761 (1969) (approving sale of trust assets to trustee after adversarial proceeding).

[34] The Trust Fund is defined to include (i) "the Mortgage Loans" . . . (iv) property that secured a Mortgage Loan and has been acquired by foreclosure, deed-in-lieu of foreclosure or otherwise; and (v) all proceeds of the conversion, voluntary or involuntary, or any of the foregoing." *See* Ex. A to Warner Aff. (PSA) at §1.01.

[35] *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, Index No. 650474/2008 (Sup. Ct. N.Y. Cty. Oct. 7, 2010) at 7 (*Greenwich*).

[36] *In re Innkeepers USA Trust*, 448 B.R. 131, 145 (Bankr. S.D.N.Y. 2011).

Section 10.08, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity."[37]

The Trustee's voice is (and must be) dispositive on this issue. The PSAs vest broad discretion in the Trustee concerning whether and how to act with regard to mortgage repurchase claims. Those claims belong to the Trustee, *id.* §§2.01(b), 2.04, and only the Trustee has the power to pursue them. *Id.* §§ 2.03(c), 2.04, and 3.03. The Trustee has the preemptive right to file, pursue or settle the claims that belong to it, to the exclusion of Certificateholders that have differing views,[38] *id.* §10.08, so long as its decision to do so is within the reasonable bounds of its discretion under the PSAs. *Id.* §§8.01, 8.02. The PSAs vest similarly broad discretion in the Trustee concerning violations of the Master Servicer's prudent servicing obligations. *See* PSA §7.01 ("If (a) an Event of [Servicer] Default . . . shall occur . . . the Trustee *may* . . . terminate all of the rights . . . of the Master Servicer . . .").

The Court's Order dismissing the claim of Walnut Place[39] vindicated this one voice principal. It should do so again, by rejecting the Objectors' effort to usurp the Trustee's judgment to proceed under Article 77. The ruling in *Walnut Place* is entirely apt: "[T]he Trustee did, in fact, act upon [the Walnut] plaintiffs' complaints, as demonstrated by the settlement agreement reached with the defendants and submitted to this Court in the proceeding filed under CPLR 7701."[40] The Trustee's decision to invoke Article 77 was an action squarely

[37] *See* Ex. A to Warner Aff. (PSA) at §10.08.

[38] This was the core of the Court's holding in *Walnut*: that, unless the Trustee *refuses* to act, or is *conflicted*, with regard to the action contemplated, Certificateholders cannot displace the Trustee's litigation and settlement judgment.

[39] *Walnut Place LLC v. Countrywide Home Loans, Inc.*, Index No. 650497/11 (Sup. Ct. N.Y. Cnty. Mar. 28, 2012), slip op. at 15-16 (*Walnut Place*).

[40] *Id.* at 15.

within its litigation discretion, so the Objectors are bound under PSA §10.08 to adhere to it.[41] The Objectors' motion to convert the proceeding must be denied.

2. Construction of the Trustee's Rights to Rely on Experts and Inform Itself.

Multiple provisions of the PSAs *require* that the Trustee's good faith administrative and discretionary judgments be vindicated for the benefit of *all* Certificateholders. The Trustee's claim for relief asks the Court to construe several of them. One request concerns the Trustee's right to rely on experts in discharging its duties. A second concerns construction of provisions specifying how the Trustee informs itself prior to making decisions.

When they purchased securities, all Certificateholders agreed that the Trustee's good faith reliance on the opinion of these experts "shall be *full and complete authorization* and protection in any action taken or suffered or omitted by it hereunder." *Id.* §8.02(ii). The Trustee retained experts to advise it on key aspects of the settlement, including the value of the repurchase claims (Lin Opinion), the benefits of the servicing improvements (RRMS Opinion), the risks that the obligated Countrywide mortgage sellers lacked sufficient assets to respond to the repurchase claims (Capstone Opinion), the risks associated with an effort to prove successor liability or de facto merger (Daines Opinion), and the burden of proof needed to succeed on the repurchase claims at trial (Adler Opinion). In its Article 77 petition, and the Proposed Order and Judgment, the Trustee asks the Court to construe these provisions to determine that, in relying on these experts, the Trustee did not exceed the bounds of its discretion under the PSAs. *Compare* Proposed Final Order at ¶ (f) ("The Trustee has the authority . . . to enter into the Settlement

[41] *Compare Walnut Place* at 15-16 (where the Trustee has acted, Certificateholders may not displace Trustee's litigation judgment by pursuing purported derivative claims).

Agreement . . . .") *with* PSA §8.02(ii).1 (Trustee's reliance in good faith on expert advice "shall be full and complete authorization … in respect of any action taken . . .").

All Certificateholders also agreed that the Trustee would not be liable for actions, within its discretion, unless it was negligent in ascertaining the pertinent facts, failed to act in good faith, or committed willful misconduct. *See id.* §8.01 (Trustee not relieved of liability for "its own negligent failures to act or willful misconduct") and §8.01(ii) ("Trustee shall not be liable for an error of judgment made in good faith . . . unless it shall be finally proven that the Trustee was negligent in ascertaining the pertinent facts."). Construction of these provisions, which are found in the PSAs under the heading "Duties of Trustee," *id.* §8.01, is at the heart of the relief the Trustee seeks. *Compare* Final Order at ¶¶ (g) (The Trustee's "decision whether to enter into the Settlement Agreement . . . is a matter within the Trustee's discretion."), (i) ("The Trustee appropriately evaluated . . . the strengths and weaknesses of the claims being settled.") *and* (j) ("[T]he Trustee's deliberations appropriately focused on . . . the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries . . . ."), *with* PSA §§8.01 and 8.02.

Construction of these adminsitrative provisions of the PSAs falls squarely within Article 77. The Trustee was therefore entitled to ask the Court to construe them *before* it subjected itself to potential liability by consummating the settlement.

3. The Trustee's Discretion to Use Article 77 Is a Pivotal Protection Against Poor Judgment by Dissident Certificateholders.

Since 1932, New York courts have recognized the right of investment trusts—like the securitized investment trusts at issue here—to impose significant limitations on the rights of Certificateholders to institute litigation on behalf of the Trusts. Beginning with *Greene v. New York United Hotels, Inc.*, 236 A.D. 647, 260 N.Y.S. 405 (1st Dep't. 1932), New York courts have

ruled that holders of securitized instruments hold their securities "subject to the condition of [the] underlying trust agreement and can maintain an action only upon the conditions specified in the trust agreement." A pivotal, and much-litigated, condition of these and other trust agreements is the "no-action" clause. "No action" clauses bar certificateholders from filing suit to enforce claims that belong to the trusts unless the certificateholders comply strictly with the conditions precedent contained in the clause.[42] This Court has considered the import of the Covered Trusts' no action clauses at least twice. In *Greenwich*, the Court dismissed a purported "class action" of certificateholders that sought to pursue mortgage repurchase claims that belonged to Countrywide RMBS trusts because the certificateholders "agreed to" the restrictions of the "no action clause" when they buy the securities.[43] In *Walnut*, the Court dismissed Objector Walnut's effort to file suit derivatively on claims belonging to three Countrywide trusts because BNY, as Trustee, acted decisively on Walnut's complaints by reaching a comprehensive settlement.[44]

This Court is not alone in its consistent vindication of the right and authority of the Trustee to act *independently* of the idiosyncratic preferences of certificateholders. Because certificateholders are "contractually obligated to speak with one voice" under the PSAs,[45] no action clauses have been enforced to "prevent[] individual bondholders from pursuing an individual course of action."[46] These clauses "protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit … that

[42] *See generally Cruden v. Bank of N.Y.*, 956 F.2d 961, 968 (2d Cir. 1992) (applying New York law and holding that no-action clauses are to be "strictly construed").
[43] *Greenwich* at 6-7.
[44] *Walnut* at 15-16.
[45] *In re Innkeepers*, 448 B.R. at 145.
[46] *Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1982).

most bondholders would consider not to be in their collective economic interest."[47] "The purpose of no-action clauses … is to protect the securitizations—and in turn *other certificateholders*—from the expense of litigating an action brought by a small group of certificateholders that most investors would consider not to be in their *collective* economic interest."[48] No action clauses ensure that "the *judgment* of the Trustee concerning whether to resort to the courts is *controlling upon all of the bondholders*."[49] The Court of Appeals of New York, considering the issue in the context of a lender participation agreement, recently reiterated the importance of both a no-action clause and the *exclusive* litigation discretion such a clause vests in the Trustee.[50] Such clauses, it held, exist "to protect all Lenders in the consortium from a disaffected Lender seeking financial benefit perhaps at the expense of other debtholders."[51]

The import of these cases for the Article 77 proceeding is obvious: the Trustee has obtained a settlement, worth more than $8.5 billion, that it concluded was reasonable and would achieve the common benefit of all Certificateholders. The Trustee's settlement decision falls squarely within the discretion the PSAs vest in the Trustee under §§8.01, 8.02. The Trustee chose to seek confirmation of its authority to settle under Article 77. The Trustee's choice to proceed under Article 77 is a matter vested in its judgment. PSA §10.08 (the no-action clause). The PSAs do not *permit* the Objectors to urge this Court to *disregard* the Trustee's choice of Article 77—and they certainly do not permit it where the Objectors have failed to establish their

[47] *Feldbaum v. McCrory*, 1992 WL 119095 at *6 (Del. Ch., June 2, 1992) (applying New York law); *accord Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09-C-6904, 2010 WL 3324705, at * 4 (N.D. Ill. Aug. 20, 2010).

[48] *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, No. 08-cv-2437, 2011 WL 6034310, at *9 (S.D.N.Y. Dec. 5, 2011).

[49] *Campbell v. Hudson & Manhattan R.R. Co.*, 277 A.D. 731, 734 (N.Y. App. Div. 1951), *aff'd*, 302 N.Y. 902 (1951).

[50] *Beal Savs. Bank v. Sommer*, 8 N.Y.3d 318, 834 N.Y.S.2d 44, 865 N.E.2d 1210, 1213-14 (N.Y. 2007).

[51] *Id.* at 1219.

right to *preempt* the Trustee's litigation judgment under PSA §10.08. Were the Court to permit the Objectors to disregard PSA §10.08, it would have catastrophic consequences for investors in the Covered Trusts and, indeed, all securitized RMBS Trusts.

4. Disregard of the Trustee's Right to Seek an Article 77 Instruction Will Have Profound Consequences for Certificateholders and Trustees.

Though the Objectors cite cases acknowledging Article 77 was enacted "to deal with matters that directly involve administration of a trust,"[52] their argument never leaves the realm of academic debate. Nearly one and a half trillion dollars are invested in private securitized mortgage-backed trusts.[53] These securitization trusts were designed to permit certificateholders to invest *passively* in real estate mortgages. The Trusts thus vest decision-making authority *not* in the certificateholders, but instead in a Trustee.[54]

The Objectors are manifestly unreasonable to suggest that Trustees should be *prevented* from seeking judicial instructions under Article 77 concerning the scope of their authority, their potential liability, or whether their actions are for the common benefit for thousands of certificateholders. The proof of this principle is in the pudding investors in RMBS trusts eat every day: though it is widely understood that ineligible mortgages are endemic in securitized pools, few trustees have bestirred themselves to try to redress the injuries and losses certificateholders suffer as a result. To its credit, BNY stepped forward to try to achieve a global

[52] Mtn. at 14 (quoting *In re Roberts v. Galbraeth*, 18 Misc. 2d 599, 601-02 (N.Y. Sup. 1959)).

[53] *See* SIFMA Statistics, "US Mortgage Related Securities Outstanding – USD Billions," February 1, 2012, published by SIFMA (The Securities Industry and Financial Markets Association), available for download at http://www.sifma.org/research/statistics.aspx, attached as Ex. C to the Warner Aff.

[54] Investors have always had the option of investing directly in home mortgages, through so called "whole loan" purchases, which give them the ability to make decisions for themselves concerning whether to demand the repurchase of ineligible mortgages. *See* D. Haidar, "Should Investors Worry AIG is Investing in Riskier Mortgage Businesses?" Wall Street Cheat Sheet, April 9, 2012, available online at http://wallstcheatsheet.com/stocks/should-investors-worry-aig-is-investing-in-riskier-mortgage-businesses.html/

resolution for investors. It achieved a "landmark" settlement widely hailed as beneficial to all certificateholders. The vast majority of certificateholders supports the settlement BNY achieved and want to see it approved swiftly.[55] Yet now, a handful of dissidents—pursuing their own agendas—seek to prevent BNY from consummating an enormously beneficial settlement that will confer more than $8.5 billion in benefits on the Covered Trusts. Resort to Article 77 is essential to ensure the Trustee's decision is reviewed swiftly and, if appropriate, vindicated promptly. Other Trustees must also be assured that, if necessary, they can invoke Article 77 to seek an instruction concerning the scope of their obligations.[56]

The Objectors also neglect to inform the court of a potentially devastating consequence for Certificateholders in the Covered Trusts if the Objectors succeed in their effort to thwart the Trustee's use of Article 77 to confirm its settlement decision: the settlement may collapse entirely. If the settlement collapses, the vast majority of Trusts will be left without *any* remedy at all. The Institutional Investors hold 25% Voting Rights (and thus can direct the trustee to act) for only 189 Trusts. There are 341 *other* Trusts for which no 25% voting group exists. In a very real sense, the Certificateholders in these Trusts face a stark reality: if the Objectors succeed in usurping the Trustee's judgment or destroying the settlement, their Trusts will get *nothing*.

[55] *See infra* Part D(2)(a).

[56] The Court need not look very far to anticipate the calamitous results if certificateholders are able to preclude Trustees from invoking Article 77 to obtain instructions concerning the scope of their authority. The example of Wells Fargo is illuminating. Wells Fargo serves not only as trustee for securitized trusts, it functions as a mortgage servicer and a mortgage originator. Wells Fargo has been instructed by multiple certificateholders to take *action* to enforce Pooling and Servicing Agreements. Rather than do so, Wells Fargo recently filed a court proceeding seeking appointment of a *substitute* litigation trustee, so as to avoid making *any* decisions itself, for fear it would be accused of a conflict of interest. While that action is pending, *nothing* is apparently being done to prosecute or preserve the claims that belong to the Trusts for which Wells Fargo serves as Trustee. *See* Jody Shenn, *Wells Fargo Seeks to End Mortgage-Repurchase Duties as Trustee*, Bloomberg News, Feb. 24, 2012. Ex. D, Warner Aff.

Neither the PSAs nor applicable law requires the Court to accede to such a catastrophic, paralyzing result. A ruling upholding the Trustee's discretion to proceed under Article 77 is precisely what the PSAs mandate. Such a ruling will ensure not only that these PSAs are enforced, a ruling vindicating the Trustee's litigation discretion is also essential for the market. Private PSAs that vest litigation discretion in trustees govern over a trillion dollars in mortgage-backed trusts. If issues of ineligible mortgages and poor servicing in RMBS Trusts are to be remedied, they must be remedied by Trustees. Only the Trustees own the claims that arise under the PSAs. Only they (with narrow exceptions the Objectors have not met) can enforce the PSAs. The barriers to enforcement of the litigation claims of RMBS Trusts are significant. The likelihood that these claims *will* be enforced will become vanishingly small if Trustees are barred from invoking Article 77 to obtain judicial assistance to construe the highly technical language of PSAs and delineate the scope of trustee discretion.

IV. THE NO ACTION CLAUSES BAR THE OBJECTORS' EFFORTS TO DISPLACE THE TRUSTEE'S DECISION TO PROCEED UNDER ARTICLE 77

Under the PSAs, the authority to commence litigation "is committed *solely* to the trustee of the pooled loans . . . ."[57] PSAs vest broad litigation discretion in Trustees precisely in order to "protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest."[58] The entire purpose of PSA §10.08 is to ensure that "the *judgment* of the Trustee concerning whether to resort to the courts is controlling upon *all of the bondholders.*"[59]

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[57] *Asset Secur. Corp. v. Orix Capital Markets LLC*, 12 A.D. 3d 215, 784 N.Y.S.2d 513 (1st Dep't. 2004).

[58] *Sterling Fed. Bank*, 2010 WL 3324705 at * 4.

[59] *Campbell*, 277 A.D. at 734.

A. The Objectors Cannot Preempt the Trustee's Choice of Article 77

Just as the Objectors are not entitled to dictate *whether* the Trustee will resort to the courts, the Objectors are not entitled to dictate *how* the Trustee resorts to the courts. "No Certificateholder shall have the right by virtue of availing itself of any provision of this Agreement to institute any suit, action or proceeding in equity or in law upon or under or with respect to this Agreement, unless such holder [complies with the no-action clause]." PSA §10.08. Numerous courts have held that similar provisions bar Certificateholders from dictating to the Trustee *how* it will litigate or settle Trust claims *unless* they comply with the strict requirements of the provision. There is no possibility of reading this provision otherwise: the PSAs go on to state it is "expressly understood and intended, and being expressly covenanted by each Certificateholder *with every other Certificateholder* and *with the Trustee*, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself . . . of any provisions of this Agreement to *affect, disturb or prejudice the rights of the Holders of any other Certificates*, . . . or to enforce any right under the Agreement, except in the manner provided in this Agreement and *for the common benefit of all Certificateholders.*" *Id.*

The Objectors' motion violates §10.08. They want to disturb and prejudice the important protections the Trustee obtained for all Certificateholders by proceeding under Article 77, presumably so they can pursue their own, individual agendas. Yet PSA §10.08 states plainly that they *cannot* displace the Trustee's litigation judgment *unless* they comply with the no-action clause. They have not done so, so their motion to convert this proceeding must be denied.

B. The Trustee's Choice of Article 77 Was Within Its Reasonable Discretion and Protects All Certificateholders.

The Trustee was plainly entitled to choose to proceed under Article 77. *Id.* Article 77 is tailor-made for a trustee that faces a dispute among beneficiaries concerning what it should do

with disputed litigation claims. Article 77 also provides important protections for *all* certificateholders, protections *not* available in other procedures. For example, Article 77 ensures that the views of all certificateholders, not just those with the requisite 25% stake, can appear before the court to be heard on the issues presented. An Article 77 judgment is also binding on all certificateholders, in the same manner mandated by the New York Court of Appeals more than half a century ago.[60] Because it is not a class action, Article 77 also protects all of the Certificateholders against the risk that a dissident or disaffected minority might try to use litigation of the Trusts' claims to pursue an individual advantage.[61]

The experience of Walnut Place is an object lesson in the wisdom of the Trustee's decision to proceed under Article 77. Walnut Place argued vociferously that this court should treat this matter as a class action. Yet, to date, Walnut Place's litigation judgments have proved to be spectacularly wrong. Its removal of this proceeding to federal court was rejected by the Second Circuit. The claims Walnut Place *sought* to pursue on behalf of three of the Covered Trusts were recently dismissed by this Court. Had the Trustee proceeded through an "opt out" mechanism—and had Walnut been permitted to remove three Trusts from the settlement—innocent Certificateholders would have been hostage to the vicissitudes of Walnut Place's poor litigation judgments. As of now, they would have a massive loss and no settlement.

The PSAs do not require Certificateholders who *want* the benefits of the settlement to be forced—involuntarily—to assume the risks of poor litigation judgment by Walnut Place (or any other Objector). The PSAs protect Certificateholder against this risk by vesting in the Trustee the authority to decide that an $8.5 billion bird in the hand is worth far more than the prospect of a bird (that may not even exist) in a bush. When seen in this light, the Objectors' effort to

[60] *Campbell*, 277 A.D. at 734.

[61] *Compare* Ex. A to Warner Aff. (PSA) §10.08 and *Batchelder*, 131 N.Y. at 46 (considering no action clause).

disturb the Trustee's resort to Article 77 is, without question, a prohibited attempt by the Objectors to "affect, disturb [and] prejudice the rights of the Holders . . . ." PSA §10.08. The other Certificateholders are the beneficiaries of the Objectors' express covenant that they would not disturb the common right of *all* Certificateholders to have the *Trustee* make litigation judgments for the Covered Trusts *unless* the Trustee *refused* to act *and* the Objectors complied with the no-action clause. PSA §10.08. The Trustee acted. It decided to use Article 77, because it protected *all* Certificateholders. The PSAs require the Court to uphold the Trustee's judgment and permit it to proceed under Article 77.

Protection of all Certificateholders against the imprudent actions of this small, disaffected minority is required by the PSAs. Permitting the Objectors to displace the Trustee's litigation discretion *without* requiring them to demonstrate compliance with PSA §10.08, would upset the settled contract expectations that bind all Certificateholders and leave them at the mercy of dissidents who seek "financial benefit perhaps at the expense of other debtholders."[62] Converting the proceeding over the objection of the Trustee would also "override the terms of the [PSAs] and alter the bargained-for terms and risks investors undertook when they bought certificated interests."[63] Finally, acceptance of the Objectors' argument would deprive other Certificateholders of the benefit of the Trustee's decision to seek approval through a summary Article 77 proceeding. Many key provisions of the Settlement Agreement do not go into effect until final approval;[64] every day of delay costs Certificateholders more than $1 million in lost value that can never be recovered. Relegating the Certificateholders to the uncertain mercies of plenary litigation pursued by the Objectors—over the Trustee's objection—cannot be reconciled

[62] *Beal Savs. Bank*, 865 N.E.2d at 1219.

[63] *In re Innkeepers USA Trust*, 448 B.R. at 145.

[64] The $8.5 billion settlement payment and the monetary servicing penalties do not go into effect until the settlement is finally approved.

with the PSAs. As the Court held in *Walnut*, the Trustee has acted. Under §10.08, the Objectors therefore are not entitled to displace the Trustee's judgment to proceed under Article 77. The Objectors' motion should be denied.

C. The Vast Majority of Certificateholders Support the Trustee's Decision to Proceed Under Article 77.

Though a PSA is not a parliamentary democracy, the views of other parties confirm the propriety of the Trustee's decision to invoke Article 77. First, the vast majority of Certificateholders *supports* this settlement and does *not* contest the Trustee's to proceed under Article 77. Following an extensive, world-wide notice process authorized by this court, only 41 investors—out of tens of thousands—chose to intervene to seek additional information concerning the settlement. Of those objecting investors, counsel for *only four* actually signed the motion to convert this proceeding: AIG, Walnut Place, certain Federal Home Loan Banks and the Triaxx entities. Other than this handful of objectors, no one has stepped forward to object to the Trustee's invocation of Article 77.

Second, many of the certificates issued by the Covered Trusts are held by fiduciaries that must exercise independent judgment and discretion on behalf of those whose funds they manage. Their decision not to object cannot be construed as indolence or indifference, it was a decision to accept the Trustee's judgment. Courts routinely hold that investors' choice *not* to object to an announced settlement must be considered to be a vote in favor of its consummation.[65]

Third, a number of very large investors who *are* parties in this action *also* chose *not* to

[65] "[W]here the objectors represent only a small percentage of the class, the likelihood of the court granting their discovery requests decreases because the court will give great weight to the interests of the majority of the class members." *Hemphill v. San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 620 (S.D.Cal. 2005). *See also* 4 Newberg on Class Actions § 11:57 (4th ed. 2011) ("All circumstances being equal, the courts are more likely to grant requests for discovery, adjournments, or continuances if the objectors have a substantial interest in the litigation than if their relative interests are small, because the court will give great weight to the interests of the majority of the class members.").

join the motion to displace the Trustee's decision to proceed under Article 77. Those who did not join the Objectors' pleading include: a) the Federal Housing Finance Administration (FHFA), b) the Maine Retirement Intervenors,[66] and c) the Institutional Investors. FHFA is the conservator of Freddie Mac and Fannie Mae, each of which holds billions of dollars of securities issued by the Covered Trusts.[67] The Maine Retirement Intervenors include two large state pension funds and two union pension funds, which act as fiduciaries for their members and are class plaintiffs in a massive investor securities class action against Countrywide.[68] The Institutional Investors—22 of the world's largest investors, who hold more than $40 billion of securities issued by the Covered Trusts—support the Trustee's decision to use Article 77 to confirm its authority to consummate the settlement.[69] The interests of these Certificateholders—all of whom chose to abide by the terms of their contract and honor the right of the Trustee to make the discretionary judgment to proceed under Article 77—cannot be displaced at the behest of a rogue minority of Certificateholders who seek to pursue their own, self-interested agenda.

V. CONCLUSION

For all the foregoing reasons, the Institutional Investors respectfully request that: (i) The Bank of New York's Motion Regarding the Standard of Review and Scope of Discovery be granted; and (ii) The Objectors' Motion to Show Cause Why the Court Should Not Convert this Special Proceeding to a Plenary Action should be denied.

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[66] The Maine Retirement Intervenors include: the Maine State Retirement System, Pension Trust Fund for Operating Engineers, Vermont Pension Investment Committee and Washington State Plumbing & Pipefitting Pension Trust. *See* Mtn. to Convert at 1 n.1.

[67] FHFA issued a press release emphasizing that its intervention was filed solely "to obtain any additional pertinent information developed in the matter. [FHFA] is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time." Warner Aff., Ex. E.

[68] *See Maine State Retirement System v. Countrywide Fin. Corp.*, No. 2:10-cv-00302 (C.D. Cal.).

[69] *See* Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections, Federal Doc. No. 124 (filed Oct. 31, 2011). A copy of this brief is attached as Exhibit F to the Warner Aff.

Dated: New York, New York
April 13, 2012

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