*To be Argued by:*
MATTHEW D. INGBER

New York County Clerk's Index No. 651786/11

# New York Supreme Court

## Appellate Division—First Department

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.

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THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

*Petitioner-Appellant-Cross-Respondent,*

– and –

BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY,

*(For Continuation of Caption See Inside Cover)*

# REPLY BRIEF FOR PETITIONER-APPELLANT-CROSS-RESPONDENT THE BANK OF NEW YORK MELLON


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*Intervenors-Petitioners-Appellants-Cross-Respondents*,

– against –

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, CHARTIS PROPERTY CASUALTY COMPANY, CHARTIS SELECT INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, FIRST SUNAMERICA LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, SUNAMERICA ANNUITY AND LIFE ASSURANCE COMPANY, SUNAMERICA LIFE INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, WESTERN NATIONAL LIFE INSURANCE, UNITED STATES DEBT RECOVERY VIII, LP, UNITED STATES DEBT RECOVERY X, LP and AMERICAN FIDELITY ASSURANCE COMPANY,

*Respondents-Respondents-Cross-Appellants*,

– and –

STERLING FEDERAL BANK, F.S.B., BANKERS INSURANCE COMPANY, BANKERS LIFE INSURANCE COMPANY, FIRST COMMUNITY INSURANCE COMPANY, BANKERS SPECIALTY INSURANCE COMPANY, FEDERAL HOME LOAN OF PITTSBURGH, AMICI ASSOCIATES, LP, AMICI FUND INTERNATIONAL LTD., AMICI QUALIFIED ASSOCIATES, CEDAR HILL CAPITAL PARTNERS LLC, CEDAR HILL MORTGAGE FUND GP LLC, CEDAR HILL MORTGAGE OPPORTUNITY MASTER FUND LLP, DECLARATION MANAGEMENT & RESEARCH LLC, DOUBLELINE CAPITAL LP, FIRST BANK, FIRST FINANCIAL OF MARYLAND FEDERAL CREDIT UNION, FIRST NATIONAL BANK & TRUST CO. OF ROCHELLE, ILLINOIS, FIRST NATIONAL BANKING COMPANY, FIRST PENN-PACIFIC LIFE INSURANCE COMPANY, KERNDT BROTHERS SAVINGS BANK, LEA COUNTY STATE BANK, LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK, LINCOLN NATIONAL REINSURANCE COMPANY (BARBADOS) LIMITED, LL FUNDS LLC, MANICHAEAN CAPITAL, LLC, NEXBANK, SSB, PEOPLES INDEPENDENT BANK, RADIAN ASSET ASSURANCE INC., THE COLLECTORS' FUND LP, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, THOMASTON SAVINGS BANK, VALLEY NATIONAL BANK, MORTGAGE BOND PORTFOLIO LLC, FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY, LIBERTY VIEW, PLATINUM UNDERWRITERS BERMUDA, LTD., PLATINUM UNDERWRITERS REINSURANCE, INC., RELIANCE STANDARD LIFE INSURANCE COMPANY, SAFETY NATIONAL CASUALTY CORPORATION, SUN LIFE INSURANCE COMPANY OF CANADA, CA CORE FIXED INCOME FUND, LLC, CA CORE FIXED INCOME FUND, LTD., CA HIGH YIELD FUND, LLC, CA HIGH YIELD FUND, LTD., STRATEGIC EQUITY FUND, LLC, STRATEGIC EQUITY FUND, LTD., SAND SPRING CAPITAL III MASTER FUND, LLC, CIFG ASSURANCE NORTH AMERICA, INC., BANKERS TRUST COMPANY, PINE RIVER FIXED INCOME MASTER FUND LTD., PINE RIVER MASTER FUND LTD, SILVER SANDS FUND LLC, TWO HARBORS ASSET I LLC, GOOD HILL PARTNERS LP, and BALLANTYNE RE PLACE,

*Respondents-Respondents*,

– and –

THE KNIGHTS OF COLUMBUS,

*Intervenor-Respondent-Respondent.*

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## INTRODUCTION

In 2011, BNYM entered into the largest private civil settlement in history. The settlement was supported by 22 of the largest and most sophisticated investors in the world, many of whom owed fiduciary duties to their own investor clients. The settlement amount to be paid by BofA, $8.5 billion, is nearly $4 billion *more* than the responsible party, Countrywide, could ever have paid in the best-case scenario. The settlement included improvements to loan servicing (valued at an additional $3 billion) that no litigation could ever achieve. It avoided many years of uncertain and costly litigation, providing a solution to a massive problem arising out of the financial crisis, and serving as a model for future global RMBS settlements. And it was the product of hard-fought and often hostile negotiations by the parties with the greatest economic interest in maximizing recovery, and by a trustee that at all times acted in good faith and for the benefit of certificateholders.

Given these uncontested facts, the Objectors' brief reads as though it were filed in the wrong case. They claim that BNYM conducted a meager investigation of the trusts' potential claims, half-heartedly represented the investors' interests during settlement negotiations, and thereby left billions of easily-had dollars on the negotiating table. According to them,

the trustee gave up a titanic $31-billion claim for peanuts, seeking only to protect its own hide, following the advice of a conflicted law firm that had only BofA's interests at heart.

The case Objectors describe bears no resemblance to the trial evidence, which established beyond question that BNYM conducted a searching investigation of the trusts' claims and vigorously and effectively pressed the investors' interests in lengthy and contentious negotiations with BofA. That investigation yielded three principal conclusions: (1) the likely amount of recoverable damages was just above the $8.5 billion settlement amount, *without* taking into account the risks and costs of litigation; (2) BNYM likely would have been able to collect, at most, *$4.8 billion* from Countrywide (and nothing from BofA); and (3) the settlement's servicing and documentation improvements were more beneficial to investors than any lawsuit possibly could have been. Objectors presented no evidence to call into question any of these conclusions—let alone BNYM's good faith in reaching them.

After securing its landmark settlement, BNYM filed this Article 77 proceeding, which gave all certificateholders an opportunity to appear and be heard. The Objectors, while now describing themselves as "absent non-parties," participated in the entirety of that proceeding. After two years of

discovery and a nine-week evidentiary hearing, Supreme Court issued a 54-page opinion, which discussed and carefully weighed the parties' positions and the "voluminous record." Supreme Court approved BNYM's conduct as trustee in every respect but one.

Objectors' arguments for overturning that decision are most notable for what they do *not* say. They point to no evidence that the settled claims were worth more than the settlement consideration. They do not contend that the settlement was substantively unreasonable. They muster zero evidence that Mayer Brown's alleged conflict of interest—which was *expressly waived* by the relevant sophisticated parties—had any effect on the outcome of the negotiations. And most remarkably, they do not even expressly draw the ultimate legal *conclusion* that the trustee abused its discretion.

Instead, in a classic example of Monday-morning quarterbacking, Objectors offer vague, scattershot complaints that BNYM could have done more or taken a different approach. But the question is not whether, in hindsight, BNYM's conduct was beyond all criticism; the question is whether BNYM's acted reasonably and in good faith. It assuredly did.

The record compels a finding that BNYM acted reasonably and in good faith, including with respect to its release of the loan-modification

claims. As our opening brief explained, BNYM determined that the loan modification claims were weak and unlikely to increase the overall settlement value, and that pressing them would diminish its overall negotiating position. BNYM decided that the best strategy was to focus on the strong claims—a strategy that was both eminently reasonable and resoundingly successful.

## COUNTERSTATEMENT OF QUESTIONS PRESENTED ON THE CROSS-APPEAL

1. Did BNYM possess the authority and discretion to settle and release claims that are based on contracts to which it is a party?

*Supreme Court's answer:* Yes.

2. Did BNYM act reasonably and in good faith in negotiating, evaluating, and entering into the $8.5 billion settlement?

*Supreme Court's answer:* Yes, except that the record did not show adequate consideration of the loan-modification claims.

## COUNTERSTATEMENT OF THE FACTS AND THE CASE

### A. The Governing Agreements Established BNYM's Authority And Discretion As Trustee

As we previously explained (OB5-6), BNYM serves as the corporate trustee for 530 residential mortgage-backed securitization trusts. The

terms of those trusts, and the rights and duties of the various parties, are primarily set forth in the PSAs. *See* OB6 n.2.[1]

Under the governing agreements, a Countrywide entity (the "seller") aggregated and sold portfolios of mortgage loans to another Countrywide entity (the "depositor"). The depositor then conveyed the mortgage loans to BNYM to hold in trust for the benefit of investors. Those investors purchased "certificates" from the depositor through an underwriter; the certificates entitled investors to a stream of interest and principal payments from the mortgagors. A "servicer" (originally Countrywide, and now BofA) collected loan payments, turned them over to BNYM for distribution to the investors (or "certificateholders"), and took any necessary enforcement action against borrowers.[2]

As seller, Countrywide made various representations and warranties regarding the quality of each mortgage loan—for example, the ratio of the loan amount to the value of the borrower's home. PSA §2.03. These representations and warranties were made to both the trustee and the

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[1] "OB__" refers to BNYM's opening brief. "R.__" refers to the record on appeal. All citations to "R.__a" are to Supreme Court's decision below. "PB__" refers to the Policemen's Fund's opening/answering brief on cross-appeal. Unless the context requires specificity, we refer to the Pooling and Servicing Agreements, the Sale and Servicing Agreements, and the Indentures collectively as the "PSAs," and cite to provisions in one sample PSA found at R.6404-6550 (PTX-71). *See also* R.20499.

[2] The PSAs define "Seller," "Depositor," "Certificates," "Servicer," "Certificateholders," and other terms. PSA §1.01.

depositor. *Id.* §2.03(b). The agreements also require that certain documents be maintained in the mortgage loan files. *See id.* §2.01.

The PSAs provide a remedy for breaches of representations and warranties: "[u]pon discovery" of such a breach "that materially and adversely affects the interests of the Certificateholders," the seller must either cure the breach within 90 days or repurchase the loan at its unpaid principal balance. PSA §2.03(c).

The PSAs also define the servicer's duty: "to service and administer the Mortgage Loans in accordance with customary and usual standards of practice of prudent mortgage loan lenders." PSA §3.01. The agreements specify, however, that a servicer can be *liable* only for "willful malfeasance, bad faith or gross negligence or by reason of reckless disregard of obligations and duties" under the PSAs. *Id.* §6.03.

The PSAs transferred to the trustee all of the depositor's "right, title and interest in" the mortgage loans. PSA §2.01(b). That includes the authority to enforce the seller's repurchase obligations upon breach of a representation and warranty, and to pursue remedies arising out of any breach of the servicer's obligations—through litigation if appropriate. *See infra* Argument §A.1; R.90a (Supreme Court finding that PSAs "effectively grant[] the Trustee the power and authority to commence litigation"). The

PSAs require the servicer to indemnify the trustee against any losses or expenses resulting from its exercise of these powers. PSA §8.05; *see also* R.98a-99a. This indemnity ensures that the trustee can pursue the investors' interests without concern for its own financial risk. R.2555-57.

Section 10.08 of the PSA provides that "[n]o Certificateholder shall have any right" to commence its *own* "suit" under the PSA unless certain specific conditions occur. A certificateholder must first submit to the trustee "written notice" of a continuing "Event of Default" (*id.*), which occurs when the *servicer* fails to take certain enumerated actions or becomes insolvent (*see* PSA §7.01). An Event of Default, however, does not occur just because a certificateholder says so. The trustee must assess whether one has occurred based on, *inter alia*, the certificateholder's obligation to satisfy the predicate conditions, or disagreement or uncertainty about whether a triggering event, such as a material breach by the servicer, has occurred. If the certificateholders and the trustee are unable to resolve whether an Event of Default occurred (and if so, when), the issue must be resolved in an action for declaratory relief. *See, e.g.*, R.13062 (only such an action can "provide certainty").

If an Event of Default has occurred, the trustee has the duty to give notice of the Event to all certificateholders, to decide whether to replace

the servicer, and generally to "exercise … the rights and powers vested in it by [the PSAs]" that a "prudent person would exercise … under the circumstances in the conduct of such person's own affairs." PSA §§7.01, 7.03, 8.01. At that point, investors holding at least "25% of the Voting Rights" in a given trust may make a written request to the trustee to commence a lawsuit against the servicer and offer to indemnify the trustee against the costs and liabilities of the lawsuit. PSA §10.08. If (and only if) the trustee "neglect[s] or refuse[s] to institute any such action" within 60 days of the request and offer of indemnification, the certificateholders that made the request and offer (and *only* those certificateholders) may bring their own lawsuit "for the common benefit of all Certificateholders." *Id.*

The certificateholders that sent the notice of an Event of Default control the notice. PSA §10.08. Other certificateholders may not "piggyback" off of the notice to bring their own lawsuit, but nothing prevents investors who meet the requisite ownership threshold from sending their own notice of an Event of Default. *See id.*

### B. The Institutional Investors Approached BNYM And Contentious Negotiations Ensued

In October 2010, the Institutional Investors sent Countrywide and BNYM a purported "Notice of Non-Performance," alleging primarily that Countrywide and BofA had (1) failed to repurchase loans that breached

representations and warranties, (2) violated servicing obligations, and (3) failed to deliver certain loan documents to the trusts. *See* OB9-10.

1. *Retention of Mayer Brown.* The next day, BNYM retained legal counsel, led by Jason Kravitt of Mayer Brown LLP. *See* OB12; R.1321. Because BofA and several of the Institutional Investors were Mayer Brown's clients in wholly unrelated matters, the firm sought and obtained express conflict waivers before finalizing the retention. R.1572-78. Although BofA's waiver did not permit Mayer Brown *itself* to commence litigation against BofA on behalf of BNYM (*see* R.1572, 1574), the waiver did not prohibit Mayer Brown from advising BNYM regarding the litigation option. There was no question, moreover, that BNYM could always hire other counsel for litigation. R.1751-52. Mayer Brown promptly began advising BNYM, including on the option of suing BofA. *See, e.g.*, R.1454, R.1458, R.1467, R.2138-40; *see also* R.95a.

2. *The Negotiations Were Contentious From The Outset.* After several weeks of discussions between BNYM and the Institutional Investors over the best way to obtain a remedy from Countrywide, BNYM organized a meeting with Countrywide, BofA, and the Institutional Investors on November 18, 2010. *See* R.6750. That meeting was marked by hostility and confrontation; the parties were in a "standoff." R.695; *see*

R.1344-1345. Countrywide and BofA hotly disputed the Institutional Investors' allegations and said they were "prepared" to "fight." R.694-95; *see also* R.1334. The Institutional Investors—the parties with an enormous economic interest in maximizing recovery for the trusts—made clear that they would pursue their claims forcefully. *See* R.696-97.

Though antagonistic, that first meeting provided an important starting point for settlement discussions. From November 2010 through June 2011, the parties engaged in productive but hard-fought negotiations endeavoring "to reach a settlement for the benefit of the Trusts and to avoid litigation" (R.85a; *see* R.706, 807, 826, 1388, 1429), including several face-to-face meetings, nearly daily conference calls, thousands of emails, and more than 80 drafts of terms and provisions of a potential settlement agreement (*see* R.1388-90, 6334-40, 6349-67, 6371-79, 6385-90, 10036-37, 10118-27). BNYM actively participated in all aspects of the discussions and often took the lead.[3] R.318, 411-12 ("from the design to the implementation, all the way throughout, [the Trustee] has been very involved"); R.809; *see also* R.1388-90, 1399-1400, 1421, 1862, 2189, 2197, 2203, 2205.

[3] Objectors incorrectly assert that "BNYM and its counsel did not even attend" the negotiations. PB10. Kravitt attended all but one out of the dozens of negotiating sessions, and as he testified, it was strategically advantageous to absent himself during that single session. R.1496-1501, 1849-52.

3. *The Forbearance Agreement Avoided the Dispute Over Whether an Event of Default Had Occurred*. The parties disagreed whether (as the Institutional Investors contended) the Notice of Non-Performance triggered the running of a 60-day cure period under the PSAs after which an Event of Default could be declared. *See* R.1366, 1698. That disagreement, the parties understood, could cause them to "get bogged down in very hostile litigation" over the threshold question of *whether* an Event of Default had occurred, needlessly delaying efforts to address the substantive issues and recovery for certificateholders. R.1333, 1335-36, 13000-03.

Thus, as Objectors emphasize (PB2, 12, 19), BNYM "work[ed] hard" to avoid a dispute over whether an Event of Default had occurred, and thereby keep the parties focused on negotiating constructive issues. *See* R.1361, 1366-67. Rather than filing a distracting declaratory judgment action, the parties entered into a "forbearance agreement," which temporarily suspended the running of any time period under the PSAs "to the extent" that it was commenced by the "Notice." It had the added benefit of tolling the statute of limitations for any claims by BNYM against BofA. R.6394-6402, 6914-18. The forbearance agreement was extended several times over the course of negotiations, and was often used

by the investors as leverage over BofA to induce it to move more expeditiously. *See id.*; R.335, 1361, 1367, 2194, 2310, 2546-47, 2548. No objector submitted a similar notice.

4. *The Parties Vigorously Negotiated the Settlement Amount Over the Course of Many Months.* BofA initially offered $1.5 billion, later raising its offer to $4.5-$5 billion. R.714. The investors rejected both offers, demanding $12-$16 billion. *Id.*; R.2199, 2203. BofA responded that it might consider paying as much as $6.5 billion, but only if the investors dropped their demand to under $10 billion. *See* R.398, 714. In response, the investors lowered their demand to $9.8 billion. *See* R.398. But the investors almost immediately "presented an $8.5 billion, take it or leave it, fill or kill" demand. R.398-99.

5. *Litigation Was Always The Alternative to Settlement.* Although BofA had "entered into negotiations never thinking [it] would pay an amount that high" (R.716), it was "very clear" that BofA would face aggressive litigation if it rejected this final offer (R.810-11; *see* R.714-17, 816, 5023). The Institutional Investors were unambiguous that they were "committed … [to] pursuing the claims" and "would pursue all means available to them to bring a lawsuit." R.699, 810-11, 816.

Contrary to Objectors' assertion (PB4-5), BNYM repeatedly emphasized that it would sue if an acceptable settlement were not reached. R.816-17. As Supreme Court found, "the Trustee was prepared for litigation" at all times. R.94a. Indeed, BNYM's then-head of litigation testified that there was "no doubt … that Bank of America understood that [BNYM was] … in a position to commence litigation." R.5023. He even "took substantial steps to retain [separate litigation] counsel to" "pursue litigation of certificate holders' repurchase rights." R.5035-36; *see also* R.2468 (BNYM considered "a number of options" if the parties could not settle, and "[l]itigation was one of those options").

### C. The Negotiations Helped Crystallize The Main Points Of Disagreement About The Claims' Merits

During the negotiations, the parties exchanged significant information, data, and discussion bearing on the merits of their positions.

1. *Alleged Breaches of Representations and Warranties.* The Institutional Investors presented a spreadsheet projecting aggregated losses for various groups of loans in the trusts. *See* R.357-58, 671. Several of the investors' own witnesses described these estimates as "aggressive" and they have not been borne out by the trusts' subsequent performance. *See infra* Counterstatement §D.1 .

BofA provided commercially sensitive data about repurchases of Countrywide loans from Government Sponsored Entities ("GSEs") Fannie Mae and Freddie Mac, including detailed breakdowns of repurchase rates, the reasons for repurchase, and BofA's loss projections for each of the trusts based on that information. R.984-87, 1017-19. BofA also argued that even if particular loans breached the seller's representations and warranties, BofA would have to repurchase them only if BNYM could prove, on a loan-by-loan basis, that the breach itself caused a loss. *See* R.390, 1111. BofA based that position on §2.03(c) of the PSAs, which requires repurchase only if a breach "materially and adversely affects the interests of the Certificateholders in *that* Mortgage Loan" (emphasis added). The investors disagreed, arguing that a breach has a "material and adverse" effect if it would have affected their investment decision at the time of purchase. *See* R.917-18, 1128.

2. *Alleged Servicing Breaches and Defects in Loan Documents.* BofA argued that no evidence existed that its servicing had caused cognizable damages (R.6377-78) and emphasized the vagueness of the contractual servicing standard, the corresponding difficulty of proving a breach, and the provisions that limit the servicer's liability to negligence or (in many PSAs) gross negligence. *See supra* Counterstatement §A; R.6371-79.

Similarly, BofA argued that damages from Countrywide's alleged failure to deliver certain mortgage documents would be practically impossible to quantify.

3. *Ability to Collect Any Damages.* Additional questions lurked behind each of these claims, including (1) whether BNYM would be able to collect any judgment that it might obtain against Countrywide—the party with the contractual repurchase obligation (*see* PSA §2.03)—and (2) if not, whether BofA could be subjected to successor liability based on its acquisition of Countrywide. *See* OB6 n.3. BofA provided documents showing that Countrywide had only about $4 billion available to pay *all* claims—not just those on behalf of the BNYM trusts—and was prepared to put Countrywide into bankruptcy if its repurchase exposure became too large. *See* R.367, 373, 717-19. BofA also made a legal presentation arguing that successor liability was unlikely. *See* R.368, 941, 1424, 6371-79.

### D. BNYM Conducted A Robust Factual And Legal Investigation Before Deciding To Settle

As trustee, BNYM's job was to determine whether the proposed settlement was in the best interests of the certificateholders. It made that decision after a thorough factual and legal investigation, and in consultation with outside advisors—as expressly contemplated by the PSAs. *See* PSA §8.02(ii) ("The Trustee may consult with counsel, financial advisers or

accountants of its selection and the advice of any such counsel, financial advisors or accountants and any of Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel."); *see also* §8.05.

**1. BNYM Conducted a Thorough Factual Investigation**

In 2011, BNYM hired RRMS Advisors to provide an independent assessment of a possible claim related to alleged breaches of Countrywide's loan-repurchase obligation. R.1433-34. RRMS's lead expert was Brian Lin, who holds an MBA and had 16 years of experience in the RMBS industry. *See* R.3817-18, 3924; *see also* R.3832 (trial court agreeing, "he is an expert"). He provided his views *without* any knowledge of the tentative $8.5 billion agreed settlement amount. *See* R.2206, 4030-31.

a. *Repurchase Exposure.* Lin analyzed Countrywide's potential repurchase exposure. R.3863-66. To aid Lin's review, BofA provided data on, among other things, the performance of the loans in the covered trusts (R.6353-59, 6390), Countrywide's experience repurchasing loans from the GSEs (R.6341-48, 6350, 6368-70), and comparisons between loans purchased by the GSEs and the loans in the covered trusts (R.6380-84). *See also* R.104a.

Because Countrywide had limited repurchase experience with private investors, the parties determined that the repurchase rate from other "private-label" trusts would not be useful for determining the repurchase rate in the covered trusts. R.1085-86. By contrast, Countrywide had substantial repurchase experience with the GSEs—approximately 100,000 loans. And those loans had "a lot of common DNA[]" with loans in private-label trusts (R.4004) because they were originated by the same offices, personnel origination platform, and procedures (R.1169, 1005, 1414, 6349-67).

Although the parties acknowledged some differences between loans sold to the two types of purchasers (GSEs and private-label trusts), they concluded that those differences did not affect the repurchase rate. For example, although the GSE loans tended to be smaller, had higher average FICO scores and lower loan-to-value ratios, those variables were not correlated with the *rate of breaches* of the representations and warranties. R.1002, 1005-07, 1038, 3933-34, 4024-25. Differences that *could* matter to the breach rate—the type of loan (*e.g.*, prime or subprime), the available documentation, and the loan's payment history—were controlled for in the analysis. R.1008-09, 1035-38, 2741, 2936-37, 3048. The result was an

adjusted GSE repurchase rate that, in BNYM's view, provided a suitable proxy for the covered trusts. R.1033-34, 3923; *see also* R.105a-106a.

BNYM and its experts also considered the Institutional Investors' projection of losses for loans in the covered trusts. R.10036. Although Lin used the Institutional Investors' methodology in part when calculating his ultimate estimates, he viewed their methodology less reliable than BofA's. The Institutional Investors' estimated repurchase rates were not based on verifiable sources. R.3944 3949-50. They refused to provide detail on the loans from which they had derived their estimates—including whether the loans were even originated by Countrywide—instead simply asserting that these loans were "similar" to those in the covered trusts. *Id.*; *see also* R.2792-93.

The trial testimony also confirms that the Institutional Investors' analysis was intentionally aggressive. R.2859. A director of one of the Institutional Investors who participated "in all of the aspects of the negotiations" testified that their analysis was based on "the most aggressive numbers [they] could [use]," and that he would not have relied on those analyses "to project future severity in [his] day-to-day business." R.866-67; *see also* R.830 (90% default rate for certain loans was "very aggressive"); R.331, 358-59, 832 (similar). In other words, the

Institutional Investors' repurchase estimates were "a bit of posturing" that relied on "outliers in the context of the data." R. 2750-51, 3046.

b. *Usefulness of Loan File Review.* The parties discussed the possibility of reviewing individual loan files in the covered trusts. R.380-81; *see also* R.108a-109a. But they agreed that such a review, which would be a massive undertaking, would not yield more conclusive data than Countrywide's enormous real-world repurchase experience with GSEs. It was, as one witness observed, in "the [trusts'] best interests to try to come to an agreement without the potential cost, delay and potential for litigation that might arise if they were going to slug it out on a loan file basis." R.2738-41, 2762-63; *see also* R.381, 892-93.

Such a review would have been enormously expensive and time-consuming. R.380-81 (BofA's counsel warned that if BNYM pursued loan file review "our grandchildren would have grandchildren before the trusts saw a dollar of recovery"). Before any review could even occur, experts would have battled over how to construct a proper sample of the *1.6 million loans* at issue—assuming counterfactually that the parties could even agree that sampling was appropriate. R.3522. If such a sample were chosen, experts would have had to review the hundreds of documents comprising *each* loan file. Then the experts would have had to

conduct a "reunderwriting" process—an *ex-post*, subjective review of every loan file to determine whether it complied with the representations and warranties of the seller. And once *that* process was complete, there almost certainly would have been "continuing disagreement over what breached the reps and warranties or not." R.1446-47; *see also* R.3608, 4272-73, 4277.

That was the parties' experience in other cases (R.1753) and the results of reunderwriting in other litigation bear out the conclusion that loan file review would have been fruitless. For example, in the loan file review in the *MBIA v. Countrywide* litigation, MBIA's expert advanced a 91% breach rate, while Countrywide's expert estimated only 11%. *See* R.1753. In the *Residential Capital Litigation*, even after loan file review, the parties' estimates of the repurchase claims ranged from $811 million to $19.6 *billion*. *See* Dkt. 909 at 1, 3-4.

Indeed, despite Objectors' insistence before this Court that a loan-file review was necessary (PB26-29), they *themselves* declined to conduct such a review after receiving 150 loan files from BofA in response to their discovery request in this very case. *See* R.36. And no evidence exists that reviewing files from the covered trusts would have increased

the estimates of recovery—even supposing such a review had been practically feasible.

c. *Brian Lin's Expert Opinion: Settlement Range.* Based on his analysis, Lin estimated the amount of liability Countrywide might incur based on the repurchase claims. He employed "a mix of the methodologies." He opined that a "settlement range of approximately $8.8 to $11 billion [wa]s reasonable without applying any legal haircuts." R.7921. Specifically, Lin's range deliberately *disregarded* (1) the risk that the trusts would lose any litigation (including as a result of failure to prove loss causation); (2) the costs of litigation; (3) Countrywide's inability to pay damages even approaching that settlement range, and (4) the obstacles to subjecting BofA to successor liability for Countrywide's debts.

d. *Capstone's Opinion: Countrywide's Ability to Pay.* A key issue was how much actually could be recovered from Countrywide in a potential lawsuit. BNYM retained Capstone Advisory Group to provide its expert opinion on this issue. *See* R.1435, 2206, 4474, 4553, 7817-29. Capstone was instructed to make several optimistic assumptions, most notably that BNYM would hold 99.9% of any unsecured claims against Countrywide. *See* R.4553-54, 4562, 7819-20, 7825-26.

Capstone concluded that "the value of the assets of [Countrywide] would enable a maximum recovery of no more than $4.8 billion … , excluding any liquidation costs." R.7817; *see also* R.102a, 4555. Objectors have provided virtually nothing to dispute that valuation.

e. *A Negotiated Solution For Alleged Document Defects.* The Institutional Investors claimed that foreclosures had been delayed or prevented because of certain missing mortgage documents. *See* R.2216. In investigating the scope of this problem and evaluating possible remedies, BNYM analyzed loan-level data on missing documents. *See, e.g.*, R.1833-34, 2133, 2151. Based on that review, the negotiating parties added provisions to the settlement agreement providing for cures of document deficiencies that were most likely to harm the covered trusts, and indemnification of the trusts if foreclosure became impossible as a result of such deficiencies. *Id.* 2133; *see also* R.112a. Much of the alleged harm from missing documents would also be covered by various representations and warranties, and so repurchase claims for those document deficiencies were already reflected in the breach calculations.

**2. BNYM Conducted a Thorough Legal Analysis of All Relevant Issues**

a. *Professor Robert Daines' Expert Opinion: Successor Liability.* Another critical issue for BNYM's evaluation was whether, in the event

Countrywide was unable to pay the full amount of any judgment, BofA could be obligated to pay Countrywide's debts based on a theory of successor liability or veil piercing. *See* R.484a. BNYM retained Robert Daines, a professor of law and business at Stanford Law School. *See id.* ¶ 83; R.1279-80, 7830-87; *see also* R.102a-103a. BNYM asked Professor Daines to examine the relevant transactions between Countrywide and BofA, and determine whether BNYM could subject BofA to successor liability. R.1302-03, 7830-31; *see also* R.1302-03, 3305, 3344, 3339-40.

Professor Daines produced a comprehensive report. R.7813-7922. He opined that a veil-piercing claim against BofA "would likely fail" because veil piercing is a "rare exception to the general rule of limited liability" that applies only when "the debtor corporation is completely dominated or controlled by its shareholder," or "when failing to pierce would result in a fraud, injustice or a wrong." R.7844. He further opined that because an acquiring corporation is not "[g]enerally … liable for the seller's debts," "a successor liability case would be difficult to win unless the [transactions between BofA and Countrywide] materially reduced" Countrywide's value. R.7856-57, 7867. He found no indication that BofA had materially underpaid for Countrywide's assets. *Id.*, R.3333-34, 3432-33, 3395-96, 6295. Indeed, all efforts in other litigation to collect from

BofA on the basis of successor liability had failed as of the time of the settlement. *See* OB11 n.6. They have repeatedly failed since; more than three dozen court decisions have rejected the argument. *Id.*; *see also* R.103a.

b. *Professor Barry Adler's Expert Opinion: BofA's Causation Defense.* BNYM also investigated BofA's argument that causation was an essential element of any repurchase claim under §2.03 of the PSAs. It engaged Professor Barry E. Adler, a professor of law and business at NYU and a leading contract law scholar, to advise on this issue. *See* R.4458-49, 7888-7900; *see also* R.110a-111a.

Professor Adler considered it a "reasonable position that … whether a breach materially and adversely affects the interests of Certificate-holders should turn on the harm caused by the breach." R.7900. He later noted, however, that case law on the issue was conflicting and there was "no way to know" with certainty "which interpretation would prevail in any particular dispute." R.4457.

### E. BNYM Decided To Settle After A Thorough Evaluation Of All These Relevant Circumstances

Armed with this data and expert analyses, BNYM decided to settle. The trustee released all repurchase claims, servicing claims, and document-deficiency claims. In exchange for the finality thus provided,

BofA provided three main forms of consideration: $8.5 billion; improvements in servicing procedures valued at $3 billion; and indemnification against certain losses caused by alleged documentation defects. *See* OB16.

The settlement had the firm support of "22 of … the most sophisticated investors in the world" (R.3128) with substantial holdings in the covered trusts (R.3490, 8413), far exceeding those of Objectors (particularly those of the remaining Objectors, who hold only an infinitesimal fraction of the holdings). *See* R.94a (Supreme Court: "It is [ ] clear that the Trustee placed considerable weight on the fact that the Settlement was supported by twenty-two (22) institutional investors," and "saw this support as a sign that the Settlement was 'market tested'"). An officer of one Institutional Investor testified, for example, that the settlement was a "great deal for our clients" and was "the best deal that was available." R.403, 437. An officer of another investor testified that if the settlement were not approved, there was a "serious risk that [the Institutional Investors] would recover far, far less." R.850. Daniel Fischel, the former dean and a professor of law at the University of Chicago Law School, testified that even "if the Trustee had not done" its own investigation, and "had relied solely on the support of the

Institutional Investors,… that would be sufficient" to justify entering into the settlement. R.3483. But BNYM did not simply take the investors at their word.

### 1. BNYM Concluded That The Loan-Repurchase Claims Were Highly Unlikely To Permit Recovery Above The $8.5 Billion Settlement Amount

BNYM's own analysis was thorough and deliberate. In evaluating the repurchase claims, "[t]he uncertainty and risk associated with litigation played a large role in the Trustee's decision." R.94a. BNYM considered two main factors, among many others.

*First*, it considered the likely range of recovery if it litigated these claims. Lin's analysis, which covered a greater number of trusts than the number that ended up in the settlement, had found this range to be $8.8 to $11 billion *without* accounting for the risks and costs of litigation. *See supra* §D.1.C. BofA urged BNYM to reduce the settlement demand based on several "legal haircuts": a 25.8% "lesser representation discount" to account for the fact that contracts with GSEs generally have "more representations" than those with private purchasers (R.1958, 2141, 4009-10); a 24% "causation" haircut to account for BofA's view of the "material and adverse effect" clause in the PSAs; and a 19.8% "presentation" haircut to account for the possibility that investors would

not seek to have all claims pursued by the trustee (*see* R.6389-90). BNYM refused. *See, e.g.*, R.1968, 2017, 2020. BNYM saw no "need" to apply these haircuts because the settlement amount was "so close to what [Lin said] were the real damages." R.1785. Even using the *high* end of Lin's range, the settlement represented a 77% recovery.

*Second*, BNYM considered its ability to collect damages. As discussed above, its experts concluded that (1) Countrywide had, at most, $4.8 billion to pay unsecured creditors; and (2) BNYM would be unlikely to recover from BofA. *See supra* Counterstatement §§D.1.d, D.2; R.101a-102a (Supreme Court finding it "clear that the Trustee was concerned that Countrywide would be unable to pay a future judgment that exceeded or even approached $8.5 billion" and "that it was uncertain, at best, whether Bank of America would be subject to successor liability"). These realities were, in BNYM's view, alone sufficient to justify a cash settlement of *nearly $4 billion more* than what Countrywide could pay. *See, e.g.*, R.2212 ("If the sole asset that the Trustee and the Certificate Holders have to collect against … is Countrywide, … that would tend to indicate there was a fairly limited recovery available."); R.3124-26, 4626, 4634.

### 2. BNYM Concluded That It Was Better To Obtain Servicing Remedies Than Litigate Servicing Claims

BNYM also carefully evaluated the claim that BofA and Countrywide had failed adequately to service the loans in the trusts. BNYM's counsel Kravitt testified that the duty of the servicer—to follow "customary and usual standards of practice of prudent mortgage loan servicers" (PSA §3.01)—is "very amorphous" because "everybody has a different portfolio" (R.1450-51). Objectors' own expert shared that view. As he had written, "[w]hen default levels at all servicers surpass historical levels, it becomes *near impossible* to ascribe the relative percentage of losses to servicer behavior or to the innate character of the underlying mortgages in a pool." Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 68 (2011) (emphasis added); *see also id.* 81 ("It is impossible to separate out the quality of the servicing from the quality of the underlying loans."). And even if BNYM could prove a breach of the servicer's duty, that hardly guaranteed that it could establish servicer *liability*—contractually limited to "willful misfeasance, bad faith[,] gross negligence or [] reckless disregard of obligations and duties" (PSA §6.03)—or prove damages in any particular amount. *See* R.2101, 2103.

Thus, BNYM concluded that it would be "far more valuable" to focus on servicing remedies—to "create value going forward that would …

produce a higher standard of servicing than even the [PSAs] required"—than to try to recover damages for past violations. R.1450-51, 1760; *see also* R.113a, 944, 2101, 2134-35 (this was "the best servicing relief we could possibly get"—"the highest set of servicing standards that we could think of that would be effective"); R.3126-27 (BNYM witness testifying that servicing improvements would deliver "real value [] that all investors would get benefit of"). BNYM's expert estimated that a *subset* of the servicing improvements would provide up to $3 billion in value to the covered trusts. *See* R.2730. And Lin concluded that the servicing provisions were "an industry precedent setting, pro-active approach" that "exceed[ed] customary standards of practice." R-6263. Objectors have never provided a counter-analysis of that valuation.

**3. BNYM Considered the Loan Documentation Claims**

As with the servicing claims, BNYM and the Institutional Investors concluded that it would be extremely difficult as a practical matter to establish damages from document deficiencies, particularly for loans that had not yet entered into the foreclosure process. R.2056. The parties concluded that the best remedy was an agreement by BofA to indemnify the trusts (not BNYM) against any such losses, imposing on BofA *directly*

an obligation that would otherwise fall on Countrywide—which had limited ability to pay. *See* R.112a, 2056-57, 2124-26.

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In sum, all available information directed BNYM toward settlement. The 22 major Institutional Investors supported the settlement. The likely range of potential recovery for the repurchase claims was just above the $8.5 billion settlement amount. BNYM likely would have been able to collect, *at most*, $4.8 billion from Countrywide. The servicing improvements set a new standard for the industry and were worth (conservatively) $3 billion more. The documentation cure was more beneficial to the trusts than any litigation could have been, because it actually fixed the problem and substituted a highly solvent obligor for one in financial straits. And the litigation alternative likely would have lasted years or even decades, without a guarantee of success at the end of it. In BNYM's view, this was a no-brainer: as Supreme Court explained, BNYM "was prepared for litigation, but decided that the litigation alternative was not reasonable in light of the results that were achieved in the Settlement." R.94a. BNYM signed the agreement and began the Article 77 proceeding the next day.

### F. Supreme Court Largely Approved The Settlement After A Lengthy Proceeding And A Detailed Analysis

As we explained (OB17), Article 77 allows a trustee to seek judicial review of a proposed settlement and obtain a declaration that the settlement is binding on all certificateholders.[4] Pursuant to Supreme Court's order, BNYM gave notice of the Article 77 proceeding to all potentially interested parties. *See* R.86a, 126a-127a, 1456-59, 2226-27, R.3460. The court permitted "anyone having an interest in the mortgage-securitization trusts" covered by the settlement to participate in the Article 77 proceeding—even those who had not lodged a substantive objection. *See* June 29, 2011 Order; *see also* R.89a. The Institutional Investors intervened to support the settlement. Although the settlement affected many thousands of investors in the 530 trusts, just 44 objectors, initially appeared.

Fact and expert discovery lasted more than 18 months. It included 39 depositions, production of hundreds of thousands of pages of documents, and 15 expert reports. By the time discovery concluded, the number of objectors had dwindled to 17. *See* OB18.

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[4] Objectors decry the Article 77 proceeding as "unprecedented" (*e.g.* PB1), but this Court's own precedent belies that characterization. *See, e.g., In re IBJ Schroder Bank & R. Co.*, 271 A.D.2d 322, 322 (1st Dep't 2000) (Article 77 proceeding instituted by trustee to resolve authority to act in a securitization trust).

An evidentiary hearing before the trial court commenced on June 3, 2013. It lasted 36 non-consecutive days and included live testimony by 22 witnesses and the receipt into evidence of over 1300 exhibits. *Every* fact witness testified that BNYM entered into the settlement because it believed the settlement was in the best interests of certificateholders. *See, e.g.*, R.2488 ("potential settlement appeared to be the most potentially beneficial route to follow on behalf of all the Trusts and Certificate Holders"); R.3124.

Each of the Respondents-Cross-Appellants appeared through counsel for the hearing. Indeed, Scott+Scott, counsel for the Objectors who filed the principal brief on cross-appeal, questioned virtually every witness who testified. By the end of the hearing, 15 objectors remained, and only 9 (with holdings of less than 4% of the trusts' holdings as measured by unpaid principal balance) signed post-trial briefs.

Supreme Court largely approved BNYM's conduct as trustee in reaching the settlement. The court first recognized that "[w]hen reviewing a Trustee's exercise of discretion," its "role [wa]s limited to preventing an abuse of discretion" by the trustee. R.90a. The court then discussed and weighed the principal arguments advanced by the parties. R.94a-119a. "After reviewing the voluminous record and carefully considering the

arguments presented by all counsel," the court concluded that "the Trustee did not abuse its discretion in entering into the Settlement Agreement and did not act in bad faith or outside the bounds of reasonable judgment." R.119a-120a.

The only exception was with respect to the "loan modification" claims. Without addressing the merits of the claims, Supreme Court concluded that the trustee did not adequately evaluate the claims. It did not rule (or even suggest) that the trustee acted in bad faith. R.120a.

Both sides appealed. Only three Objectors remain, with trust holdings of less than 0.1%.

## ARGUMENT

### I. SUPREME COURT'S BROAD APPROVAL OF THE BULK OF THE TRUSTEE'S SETTLEMENT CONDUCT SHOULD BE UPHELD

Objectors devote page after page of their statement of the case to various complaints about BNYM's decision-making. But when the dust settles, Objectors assert only three legal theories in support of their cross-appeal: (1) BNYM lacked the authority to settle the trusts' claims (*see* PB40-46); (2) BNYM and its counsel violated their duties of loyalty and failed adequately to represent the interests of the trusts (*see* PB46-55); and (3) Supreme Court applied the wrong standard of review

(*see* PB55-58). Before we refute these theories, two clarifications are in order.

*First*, Objectors dedicate a substantial portion of their brief to the issue of *res judicata*. PB40-46. Apparently concerned that the final judgment in this action will preclude them from relitigating issues in their separately pending lawsuit against BNYM in federal court, Objectors claim that this proceeding fails to satisfy any of the six "exceptions" identified by the U.S. Supreme Court for when an *absent* "*nonparty* may be bound by a judgment" in subsequent litigation. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (emphasis added).

The suggestion that Objectors were somehow "absent" from this proceeding is baffling. True, Objectors did not participate in the *settlement negotiations*—a *choice* that they made (unlike the Institutional Investors) despite press releases announcing those discussions. But only the judgment entered in the *Article 77 proceeding* has preclusive effect in future litigation. And in that proceeding, all investors had a full and fair opportunity to appear individually, represented by their own counsel, and present their objections. That is just what Objectors did: their counsel appeared, filed briefs, made motions, participated in discovery, made an opening statement, cross-examined virtually every witness for the

settlement proponents, and made a closing argument. They were not absent "non-parties."

*Second*, Objectors also badly miss the mark when they invoke the principles governing class actions. *E.g.*, PB46. In class actions, the class representatives have no preexisting legal relationship with the often-unknowing class members they seek to bind. But here, the certificate-holders "delegat[ed] the right to bring a suit enforcing [their] rights … to the trustee," *Quadrant Structured Prods v. Vertin*, 2014 WL 2573378 (N.Y. June 10, 2014), granting BNYM "standing under the PSA to sue on [their] behalf," *Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 215 (1st Dep't. 2004). By virtue of that agreement, "the judgment of the Trustee concerning whether to resort to the courts is controlling upon all of the bondholders." *Campbell v. Hudson & Manhattan R.R. Co.*, 277 A.D. 731, 734 (1st Dep't 1951), *aff'd*, 302 N.Y. 902 (1951).

Likewise, because the trustee had the authority to settle these claims (*see infra* Argument §A.1), the standard of review governing class-action settlements is entirely inapplicable here. Although Objectors episodically acknowledge the abuse-of-discretion standard applicable to the review of a trustee's discretionary action (*see* PB9, 56-57), they also incorrectly suggest that the court's role is to approve or reject the settle-

ment itself, or to evaluate whether its terms are substantively "fair, reasonable and adequate." PB46. That is wrong: the question here is only whether BNYM's conduct in settling the claims was reasonable and in good faith. *See Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010) ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith."); *see also In re First Trust & Deposit Co.*, 280 N.Y. 155, 163 (1939) ("We find no abuse of discretion and no evidence of bad faith or that the trustee administered the trust in a careless or negligent manner"); RESTATEMENT (THIRD) OF TRUSTS §50, cmts. a, b (2007) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."); R. 89a-91a.[5] Although there is no room for doubt that the settlement *is* fair, reasonable, and adequate, those subjects are not open to review in this appeal.

With those issues clarified, we turn to Objectors' specific assignments of error, each of which is meritless.

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[5] Prior to an Event of Default, the trustee expressly has no duty *at all* to enforce the PSAs. That does not prevent the trustee from *choosing* do to so, as long as it acts reasonably and in good faith. This standard comes from the common law of trusts and is not modified by the PSAs.

### A. BNYM Had The Authority To Settle The Trust Claims

Objectors first argue that BNYM lacked the authority to settle the trust claims because (1) there was no Event of Default and (2) BNYM was not a fiduciary (or at minimum, disclaimed being a fiduciary). *See* PB40-46. Neither premise supports the conclusion.

#### 1. The PSAs Authorized BNYM To Sue And Settle For The Benefit Of The Trusts

Objectors assert that, absent an "Event of Default," BNYM lacked the authority to "to sue on (or settle)" the claims at issue. PB45-46. This position seems to be based principally on the notion that trust claims are the "certificateholders' claims" (PB 45), which is flatly false.

Under the PSAs, all trust claims belong to BNYM: the representations and warranties are made to the trustee (not the certificateholders), and the PSAs explicitly "sell[], assign[], transfer[], set[] over and otherwise convey[] to the Trustee" all of the depositor's interests in the mortgage loans. PSA §§2.01, 2.03. Supreme Court correctly concluded that these provisions vest ownership of the claims in the trustee and give it authority to sue for the benefit of certificateholders (R.90), consistent with numerous decisions of this Court and others. *See, e.g.*, *Asset Sec. Corp.*, 12 A.D.3d at 215 (trustee has the "authority" to "commence litigation on behalf of certificateholders"); *Walnut Place LLC v.*

*Countrywide Home Loans*, 96 A.D.3d 684, 684-85 (1st Dep't 2012); *LaSalle Bank N.A. v. Nomura Asset Capital Corp.,* 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001) (PSAs give trustee "the power to bring suit to protect and maximize the value of [trust assets]").

"[A]n incident to the right to sue or be sued is the power to compromise or settle suits." *Levine v. Behn*, 169 Misc. 601, 605 (Sup. Ct. N.Y. Cnty. 1938), *rev'd on other grounds*, 282 N.Y. 120 (1940); *see also In re Residential Capital, LLC*, 497 B.R. 720, 748 (Bankr. S.D.N.Y. 2013) (same). Thus, the "provision of the trust agreement which … gave the trustee power to commence the underlying action … includes the power to settle that action." *In re IBJ Schroder Bank & Trust Co.*, 271 A.D. 2d 322, 322 (1st Dep't 2000); *see also* RESTATEMENT (SECOND) OF TRUSTS §192 cmt. a ("If it is reasonably prudent to compromise [trust] claims or submit them to arbitration, the trustee can properly do so."). Supreme Court was absolutely right, therefore, that "the power to settle litigation" is "[i]nherent in the Trustee's power to commence litigation." R.90a (citing RESTATEMENT (SECOND) OF TRUSTS §192 cmt. a (1959)).

Nothing about the provisions relating to an Event of Default affects the trustee's control over the trust assets, including its discretion to sue on and settle claims. As discussed above (*see supra* Counterstatement §A),

Section 10.08 of the PSA precludes certificateholders from commencing litigation under the agreement unless specified conditions are met. By its terms, that provision limits *investors'* power to sue on behalf of the trusts; it has nothing to do with the *trustee's* power. The trustee has both the "power" to litigate on behalf of the trusts and the "discretion" to decide whether to do so, even "without any demand by the bondholders." *Prudence-Bonds Corp. v. State Street Trust Co.*, 202 F.2d 555, 562 (2d Cir. 1953) (L. Hand, J.). The decision whether to bring suit—for whatever reason, regardless of an Event of Default—is committed to the trustee's discretion. *See* RESTATEMENT (SECOND) OF TRUSTS §192 cmt. a (1959) ("trustee has discretion whether to sue or compromise claims"); *id.* §187 cmt a.; R.1524, 1554, 2115, 2117.[6] Objectors' view of the contract (at PB45-46) turns it upside down. By their logic, a trustee could *never* enforce trust rights unless an Event of Default and other conditions occurred. No language in the PSAs supports this conclusion and no investor would want a corporate trustee that was so paralyzed.

Objectors rely entirely on the Court of Appeals' recent *Quadrant* decision, a case that only underscores the flaw in their position. *Quadrant*

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[6] Even when it is clear that an Event of Default actually occurred (which was not the case here), the trustee is not required to litigate, but must only exercise those of its powers that a "prudent person" would employ. PSA §§8.01, 10.08.

involved an unusual indenture that made an Event of Default an *express condition precedent* to the trustee's authority to sue. As the trustee explained in a related case, it had "authority to initiate litigation … *only* [when] an Event of Default … ha[d] occurred." Opening Br. 11, *Quadrant Structured Prods. Co. v. Vertin*, No. 338-2012, 2013 WL 5962813 (Del. Oct. 23, 2013) (emphasis added) (quoting indenture language) (archived at perma.cc/8S5Y-BVJ3); *see also U.S. Bank, N.A. v. Timberlands Klamath Falls, LLC*, 2004 WL 1699057 (Del. Ch. 2004) (similar indenture stated that "*[i]f an Event of Default occurs and is continuing,* the Trustee may pursue any available remedy … to collect the payment of principal or interest" (emphasis added)). The PSAs here have no such restriction. Indeed, Objectors concede as much elsewhere in their brief: they admit that, while "the PSAs' 'no action' clause preclude[s] certificateholders from suing" on particular claims, "it is uncontested here that the Trustee [may] bring such claims." PB36.

### 2. The Fact That BNYM Was Not a Fiduciary Has Nothing To Do With Its Power To Sue And Settle

Objectors also suggest that BNYM owed them fiduciary duties throughout the settlement negotiations, and that the settlement is invalid and unenforceable because BNYM "denied" acting as the certificateholders' fiduciary. PB43. In their view, only a "full-fledged fiduciary" trustee

exercising "unflinching fiduciary duties" is capable of litigating and compromising trust claims. PB43-44. These phrases are rhetorical flourishes with no basis in law.

BNYM's conduct relating to the settlement negotiations was not guided by the niceties of the distinction between a fiduciary and a non-fiduciary—that distinction affects neither the trustee's power to sue nor the standard of judicial review of its discretionary actions. And regardless of which standard is used to measure BNYM's conduct—be it good faith and reasonableness or whether BNYM met unspecified fiduciary obligations—BNYM satisfied it.

In any event, non-fiduciary trustees may (and often *do*) litigate and compromise trust claims. The "rights and duties [of a corporate trustee are] defined, not by the fiduciary relationship, but exclusively by the terms of the [governing] agreement." *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (citation omitted).[7] And as discussed above, the governing agreements here vested the right to sue

[7] BNYM has never disputed the well-settled principle that corporate trustees owe implied duties of loyalty and due care when acting for the trusts' benefit. *AG Capital*, 11 N.Y.3d at 156-57. But "[u]nlike an ordinary trustee, an indenture trustee's duty is not undivided loyalty," but only the duty "not to profit at the possible expense of [its] beneficiary." *United Republic Ins. Co. v. Chase Manhattan Bank*, 168 F. Supp. 2d 8, 15 (N.D.N.Y. 2001) (citing *U.S. Trust Co. v. First Nat'l City Bank*, 57 A.D.2d 285, 296 (1st Dep't 1977)).

for the benefit of the trusts in the trustee. It is commonplace for corporate trustees (who, like BNYM, are not fiduciaries) to have this power. Accordingly, courts routinely treat corporate trustees "as a representative party in any lawsuit involving a trust." *Mfrs.' and Traders Trust Co. v. HSBC Bank USA*, 564 F. Supp. 2d 261, 263 (S.D.N.Y. 2008); *see also, e.g.*, *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 957 F. Supp. 2d 316, 322 (S.D.N.Y. 2013) (BNYM, as trustee, "represent[ed] the interests of the noteholders" in litigation). The trustee's authority to sue and bind its beneficiaries was thought so obvious in these cases that the binding effect of the resulting judgment or decree was assumed without question.

Objectors characterize our view on this score as "misplaced" (PB45), but they do not explain why. The *Taylor* decision (cited at PB42-44), which addresses the *res judicata* effect of judgments in subsequent lawsuits, lacks even the remotest relevance to this issue.

### B. BNYM's Representation Of The Trusts' Interests Was Vigorous And Adequate

Next, Objectors argue that BNYM and its counsel did not "adequately and vigorously" represent the interests of the trust and its beneficiaries. *See* PB47. They make a hodgepodge of fact-bound assertions: that BNYM (1) did not "engage[] in the necessary discovery" to con-

duct the negotiations adequately (PB47); (2) had conflicts of interest and "failed to retain counsel to represent *certificateholders*" (PB48-50) (emphasis in original); and (3) retained Mayer Brown, supposedly also conflicted, without giving notice or seeking investors' consent (PB50-53). None of these claims has any basis in fact or law.

### 1. BNYM Conducted A Thorough Investigation

Although Objectors' cross-appeal turns on whether BNYM abused its discretion by entering into the settlement, they do not even explicitly advance that *legal conclusion* in their brief. Their analysis of this issue—apart from various complaints scattered throughout their statement of facts—is limited to a single bald assertion: BNYM "clearly did not" "effectively represent[] the class's interests" in the negotiations and thereby "caused the Proposed Settlement amount to be artificially deflated, by billions of dollars." PB47-48. Of course, if that were so, there should be evidence somewhere in the record suggesting that the settlement was "deflated" relative to the value of the claims. But the evidence is just to the contrary. And it overwhelmingly demonstrates that BNYM thoroughly and effectively represented the certificateholders' interests during its robust decisionmaking process. *See supra* Counterstatement §§B-E.

### 2. BNYM Did Not Have A Conflict Of Interest

Objectors fault BNYM for "fail[ing] to retain counsel to represent the *certificateholders*." PB48. For one thing, this contention is impossible to reconcile with their view that, as a non-fiduciary, BNYM lacked authority to act *at all*. But more importantly, this complaint is nonsensical. The certificateholders (as explained above) do not own the trusts' claims and cannot pursue or control them; it is the *trustee* that represents the certificateholders' interests as the party contractually vested with legal ownership of the claims. The trustee was not even required to retain any counsel for this purpose, but here it did.

Objectors also complain that BNYM "repeatedly attempted to insert language that would bar certificateholders from suing BNYM regarding [certain] documentation problems." PB22; *see also* PB49-50, 54. Putting aside whether this even supports their conflict claim (it does not), Objectors admit that no such release is in the settlement agreement (PB22), making it difficult to understand how BNYM's decision to accept *that settlement agreement* was tainted by a conflict.[8]

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[8] Objectors also ignore the testimony about *why* the so-called "release"—which was actually a proposed judicial finding, *not* a proposed settlement term—is not there: After reviewing investor comments reacting negatively to the draft proposed order, BNYM's in-house counsel instructed Mayer Brown to strike it, because BNYM "did not need to include the broader language," and thus it was not even "an

Equally spurious is their complaint that BNYM "fail[ed] to even threaten to sue on behalf of the Trusts," and that this failure cost "the Trusts billions of dollars at the negotiating table." PB5, 51. For one thing, Objectors do not point to a shred of evidence for this claim, because there is none. Instead, there is an abundance of evidence that BNYM made it perfectly clear to BofA that the trustee could and would sue if a settlement was not reached, and that BofA *did* "underst[and] that" BNYM was "in a position to commence litigation" if settlement efforts failed. R.5023; *see also* R.816-18 (BofA witness testifying that he "certainly" had the impression that the trustee would consider suing BofA as "one of the options" if settlement efforts failed). It is entirely irrelevant that BNYM's negotiating counsel, Mayer Brown, had agreed that *it* would not file such litigation on behalf of BNYM, because BNYM had "t[aken] substantial steps to retain [separate litigation] counsel to" "pursue litigation of certificateholders' repurchase rights" if the need arose. R.5035-36. As Supreme Court recognized, "the Trustee was prepared for litigation" at all times. R.94a.

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issue that merited going up the legal chain to get approval for." R.2230. Objectors' also claim that BNYM "obtained some of the protections it had sought through the back door" (PB22). This claim is unelaborated and inexplicable.

### 3. Mayer Brown's Purported Conflict Of Interest Was Waived By All Parties And Had No Effect On The Settlement Negotiations

Objectors also accuse BNYM's negotiating counsel, Mayer Brown, of a conflict of interest because BofA was a Mayer Brown client with respect to unrelated matters. *See* PB50, 52, 54-55. This argument suffers from a very simple flaw: all relevant parties provided Mayer Brown *written conflict waivers*. As Supreme Court correctly recognized, "there is no evidence that Mayer Brown violated any duties under the NY Rules of Professional Conduct." R.95a. Nor is there evidence that Mayer Brown's other unrelated engagements with BofA biased Mayer Brown's—let alone the *trustee*'s—decisions during the negotiations.[9] In short, nothing in the record contradicts or even casts doubt on Kravitt's testimony that he

[9] Even assuming that Mayer Brown had a conflict of interest, there is no reason why that conflict of interest should be imputed to BNYM: BNYM does not share in any fee revenue that Mayer Brown derives from BofA. Nor do Objectors even attempt to argue that BNYM's *own* business relationships created a conflict. The trustee's only duty is "not to profit at the possible expense of [its] beneficiary." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952); *see also Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 73 (2d Cir. 1988) (trustee conflict occurs only when the trustee "benefit[s], directly or indirectly, from its decision"); *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1992) (same); *cf. CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010). BNYM unquestionably gained no such profit.

treated BofA no differently than he would have treated "the Bank of Mars." R.1647.[10]

Objectors nevertheless conjure a requirement that BNYM poll all certificateholders to obtain their collective "informed consent" before retaining Mayer Brown. PB53. This assertion is based on nothing, and is directly contrary to the PSAs, which expressly authorized BNYM to "consult with counsel … *of its selection*." PSA §8.02(ii). We cited Section 8.02(ii) in our briefs below, but Objectors again fail to acknowledge it.[11]

Against this backdrop, it comes as no surprise that Objectors cannot point to any evidence showing that the settlement agreement or amount was adversely affected by Mayer Brown's role as counsel for BNYM. They can only denigrate Mayer Brown's representation of BNYM as "toothless" (*e.g.*, PB54-55) and speculate that it "cost the Trusts billions of dollars at the negotiating table." PB51. This is pure make-believe: represented by

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[10] According to Kravitt, if BNYM "felt it [had] the responsibility to sue [it] would have sued," and he himself "had that relationship with [BNYM] in the past where [Mayer Brown] advised [BNYM] and then stepped back," after which "a different firm" was hired "to sue somebody." R.1751-52; *see also id.* ("Q: You couldn't punch Bank of America in the nose with a lawsuit, could you? A: There's nothing stopping [BNYM] from hiring a law firm to punch Bank of America anywhere they want to.").

[11] Objectors quote *Matter of Kelley*, 23 N.Y.2d 368, 376 (1968), for the proposition that Mayer Brown was required to "disclose to all affected parties" any possible conflicts and "obtain their consent to the continued representation." PB52. *Matter of Kelley* involved a law firm that had failed to disclose to its client that the firm also represented the client's insurance carrier, against whom the client was directly adverse. That fact pattern bears no resemblance to the situation here.

Mayer Brown, BNYM undertook a massive investigation; engaged in vigorously adversarial negotiations; and agreed to *the largest private settlement in history*,[12] nearly twice the highest amount it could have hypothetically collected from Countrywide after many years of costly and uncertain litigation.

### C. Supreme Court Applied The Correct Legal Standards

Finally, Objectors suggest that when Justice Kapnick heard nine weeks of live testimony from 22 witnesses, she believed that she was presiding over an oral argument on a run-of-the-mill summary judgment motion. They contend that she "misapprehended the relevant legal standards" by switching the burden of proof, by accepting BNYM's arguments as true, and by supposedly omitting—from her *54-page decision*—"any analysis or explanation of [the] result" or "the requisite factual findings" necessary for "informed appellate review." PB6, 56-57. Objectors are wrong.

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[12] Objectors are wrong when they say MBIA's settlement with BofA was larger. PB52. In fact, BofA paid MBIA just $1.7 billion. *See* Floyd Norris, *After Years of Battling, Bank of America and MBIA Settle Mortgage Suit*, N.Y. Times Dealbook (Mar. 6, 2013), *available at* tinyurl.com/c469bky. The agreement "canceled out" certain disputes, but BofA also obtained warrants that if exercised would give it an approximate 5% equity stake in MBIA. *Id.* *See also* R.5114 (Objector expert testifying that his "understanding from the public press release was that the total value of the MBIA [settlement] included 1.5 billion in cash" and "8 billion in forgiven claims").

As a threshold matter, the term "summary judgment" in this context does not foreclose a trial on disputed issues of facts. In a special proceeding, "the summary judgment standard" means that the court treats the Article 77 petition as a motion for summary judgment. But as the Judgment notes (at R.89a n.12), "[t]he court may require the submission of additional proof'" (CPLR §409(a)). And "[i]f a triable issue of fact is raised, reference must be made to CPLR 410," which provides that disputed issues "shall be tried forthwith and the court shall make a final determination thereon" (CPLR §410).

That is just what happened here: the 9-week "hearing was held in accordance with CPLR §409(a), which allows the court to 'require the submission of additional proof'" (R.89a n.12); Supreme Court tried disputed factual issues; and it "made the appropriate determinations required of it by this Article 77 proceeding" (R.81a n.5). Nothing at all suggests that Supreme Court somehow mistook the 36 days of testimony from 22 live witnesses and admission of over 1300 exhibits pursuant to CPLR §409 and §410 for an extra-long summary judgment argument.[13]

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[13] Objectors assert (at PB57) that the evidentiary hearing was not a trial under CPLR 410. JRX. *But compare* R.92a (referring to CPLR 410 with respect to triable issues of fact raised by the petition). Certainly, the parties and Supreme Court referred to the proceedings as a "bench trial" numerous times (*see* R.24, 551, 2116, 1109, 1179), and former objector AIG went so far as to demand a jury. R.16133.

### 1. Supreme Court Recognized That The Trustee Bore The Burden Of Proof At All Times

Objectors argue that Supreme Court improperly placed the burden of proof on them rather than on BNYM. PB56 (quoting R.92a). Here is what the court actually said in the portion Objectors cite:

> The Respondents principally contend that the Trustee abused its discretion by acting in bad faith (self-interested), outside its discretion and unreasonably. Accordingly, the Court must determine whether there was any such abuse of discretion which would warrant judicial interference with the Trustee's decision to enter into the Settlement.

R.92a. The words "burden of proof" appear nowhere in this quotation; all it does is summarize Objectors' position below and states, correctly, that Supreme Court would have to "determine" whether there was an abuse of discretion sufficient to "interfere" with the Trustee's decision.

Of course, the next section of the decision *is* titled "Burden of Proof," which, as Objectors note and as discussed further below, applied a summary judgment standard. R.92a.[14] What they ignore is that this section

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[14] Even if Supreme Court *had* relied on a presumption of good faith and expected Objectors to present evidence to the contrary, it would have been amply justified in doing so. Objectors rely on a treatise for the proposition that trustees bear the burden of proof to demonstrate that they exercised discretion reasonably. PB56 (citing BOGERT'S TRUSTS AND TRUSTEES §560). But the cases that this treatise cites for this proposition (at nn. 64, 65) demonstrate the opposite, namely that a *presumption* of reasonableness attaches to a trustee's actions and therefore the burden falls on the non-trustee to override it. *See Keyser v. Powell*, 294 S.W.2d 932, 932, 934 (Ky. 1956) (trustee presumed to have properly exercised discretion in making contract of sale; *In re Jaek's Will*, 42 N.Y.S.2d 514, 519 (Sur. Ct. 1943) (had

placed the burden on the *movant* (here BNYM). As she told BNYM's counsel during the evidentiary hearing: "I think you have the burden," and "you do have the burden of proof." R.5180. Justice Kapnick assessed whether there were disputed issues of fact, based on the pleadings, and required BNYM to put on its proof. After a protracted evidentiary hearing, the court ruled that BNYM had adequately done so "[a]fter reviewing the voluminous record." R.119a.

### 2. Supreme Court Did Not Accept Any of BNYM's Arguments as True

Objectors also argue that when Justice Kapnick referred to the "summary judgment" standard applicable to the Article 77 proceeding (R.92a), she "effectively drew all factual inferences against Objectors." PB56. That is wrong for a similar reason: on a motion for summary judgment, the court draws factual inferences against the *movant*. Nothing in the judgment suggests that the court "accept[ed] as true" any particular argument BNYM made. PB57. Rather, the court discussed the record and *both* parties' positions and simply found that BNYM had the *better* of the competing arguments and evidence.

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self-dealing defendant been duly appointed as trustee, she would not have had burden).

### 3. The 54-Page Judgment Is Plainly Sufficient for Appellate Review

Finally, Objectors assert that the Judgment lacks the "requisite factual findings" and enough "explanation" or "analysis" of its result for "informed appellate review." PB57. Again, we can only wonder whether Objectors are reading the same opinion we are. The opinion assuredly *does* "resolve[] triable issues of fact." *Id*.

Specifically, the opinion expressly adopts some of BNYM's proposed "factual findings in whole or in part, in the context of discussing particular issues." R.80a-81a n.5 (emphasis added); *see also* R.89a n.13 (referring to "the findings in this section"); R.68a-73a (enumerating 22 factual findings in Proposed Final Order and Judgment); R.120 (limiting application of five of those findings in context of loan modification claims). The opinion states exactly which of BNYM's 22 proposed findings and conclusions the court made and did not make (and even subdivides certain findings with respect to loan modification and other claims). It specifies in detail the nature of Supreme Court's inquiry into BNYM's conduct and outlines in depth the competing arguments and evidence relating to each disputed issue. *See* R.94a-114a. And it then concludes that BNYM met its burden of showing good faith and reasonableness on virtually *every* disputed

point.[15] The judgment easily satisfies CPLR §4213's requirement "that the court set forth those ultimate or essential facts on which it relies to reach its conclusion."

None of the authority Objectors cites supports their arguments. In *For The People Theatres of N.Y. Inc. v. City of New York*, Supreme Court issued an "extremely terse decision" that "did not elaborate on the criteria by which it determined" certain predicate facts for the purposes of a constitutional challenge to a zoning law. 84 A.D.3d 48, 59 (1st Dep't 2011). This Court concluded that the absence of "ultimate or essential facts relied upon in reaching its decision" required remand to Supreme Court for "a decision setting forth its findings of fact as to the plaintiffs' facial challenge." *Id.* at 60. Needless to say, the "extremely terse decision" found unsatisfactory in *For the People Theatres* is a far cry from the 54-page Decision, Order, and Judgment entered here. Just because the Judgment first lays out the competing arguments and then concludes BNYM met its burden on almost every disputed point—rather than rejecting Objectors' arguments point by point—does not mean that *this* Court is unable to provide meaningful appellate review.

[15] Objectors' citation to *Bowie v. St. Cabrini Home, Inc.*, 26 Misc. 3d 128(A) (table) (1st Dep't 2009), misses the mark. Here there is no stipulation from BNYM undermining the validity of Supreme Court's factual findings.

Ultimately, Objectors coyly ask for a "remand" for the ostensible purpose of "allow[ing] the Court to review the evidence," as though their request were modest. PB57-58. But as this Court well knows, the Justice who presided over the protracted evidentiary hearing below and heard the live testimony of nearly two dozen witnesses is no longer available to make the editorial changes to her opinion that Objectors apparently seek. Objectors' "remand" request is nothing short of a request for a complete do-over. *See Bowie*, 26 Misc. 3d at *1 (remanding for a new trial) (cited at PB58). This case is light years from one in which that extraordinary relief should be granted.

## II. SUPREME COURT'S DECISION WITH RESPECT TO THE LOAN MODIFICATION CLAIMS SHOULD BE REVERSED

For the reasons given below and in the opening brief, the trial court erred in disapproving BNYM's decision to settle the loan modification claims. Notably, the principal proponents of the loan modification issue below, the Triaxx entities, have not filed a brief in this Court, and the remaining Objectors are left scrounging to support the theory that they themselves never before pressed. *See* OB18 n.10. Their arguments are no better.

As we explained (OB at 24-43), the trial court made a pure error of law when it disapproved BNYM's decision to settle the loan modification

claims. That is, the trial court misapplied the very legal standard it had properly articulated in its approval of the settlement in all other respects, namely, that trustees have broad discretion to settle claims on behalf of their trusts. When Supreme Court second-guessed the reasonableness of BNYM's legal and strategic judgments during the negotiations, including its judgments that the loan modification claim was a losing argument and that advancing it would be counterproductive (judgments in which the Institutional Investors concurred), the court improperly substituted its *own* judgment for that of the trustee. Objectors barely even attempt to counter BNYM's showing that its judgments were reasonable, and in any event their arguments are baseless. Their only other argument is both not properly before this Court—because it a new one lacking factual support in the record—and just as meritless.

### A. BNYM Did Not Settle The Loan Modification Claims For "Nothing"

As already demonstrated (OB25-28), BNYM *did* consider the loan modification claim during the negotiations, and it made reasonable legal and strategic judgments about the claim, including the judgments that it was a losing argument and pressing it would be counterproductive. The trial court recognized that BNYM had considered the claim and did not purport to disagree with either of these legal and strategic judgments. It

reasoned, instead, that BNYM did not investigate the claims thoroughly *enough* because it did not obtain a written report from a law professor, as it did with other issues. But as we explained (OB27-28, 41-43), the decision not to undertake further review was itself a reasonable, discretionary judgment not subject to judicial second-guessing. It cannot be the case that an additional expert must be retained on every issue.

Objectors do not directly dispute the evidence cited in our opening brief, nor do they disagree that BNYM's decision not to pursue further investigation was committed to its discretion. Instead, they persist in accusing BNYM of "ignor[ing]" the loan modification claims and of "agree-[ing] to release those claims for *nothing*." PB38-39 (emphasis in original).

The claim that BNYM entered into a stand-alone settlement of loan-modification claims "for nothing" is indefensible. Those claims were released as part of a *comprehensive* settlement that provides over $11 billion of value to the trusts and their certificateholders. The evidence also is clear and uncontradicted that BNYM's decision not to dedicate additional time and resources to a further investigation of the loan modification claims reflected its considered judgment that pressing those claims would *diminish* its overall negotiating position, both by diluting the trusts' stronger claims and by alienating its adversary. *See* OB2, 13-14,

22. *Matter of New York Title & Mort.*, 257 A.D. 19 (1st Dep't 1939) (cited at PB37)—which involved a statutory cap on the plaintiffs' recovery, necessitating an express valuation of the claim—does not suggest otherwise.[16]

Objectors ask rhetorically: if the loan modification claims "are meritless, why file this appeal?" PB39. The answer is obvious. Although the Objectors are wrong in positing that the Settlement is "null and void" because of the trial court's decision on the loan modification claim,[17] the court's erroneous second-guessing of BNYM with respect to that claim has called the landmark settlement into question. Indeed, we pointed that out in the first page of our opening brief. *See also* R.498a ("Final Court Approval" §2(a)(v)).

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[16] Objectors also cite *Matter of Birnbaum*, 117 A.D.2d 409 (4th Dep't 1986), but that case turned on application of fiduciary duties, which, as we explained above, are inapplicable here.

[17] Objectors argue that Supreme Court's loan modification decision affected the release which was not subject to the agreement's severability clause. PB11-12. Their argument, however, fails to account for the agreement's "Final Court Approval" provision, which states that even if the Article 77 court "enters an order that does not conform in all material respects" to the proposed final order and judgment, "the Parties may, by the written *agreement of all Parties*, deem that order to be the Final Order and Judgment." R.498a (emphasis added).

### B. The PSAs Do Not Require The Sellers To Repurchase Loans Modified For Loss Mitigation

Objectors argue that BofA was obligated to repurchase loans modified for loss mitigation because it made unauthorized modifications as part of its settlement with the State Attorneys General. *See* PB34-36. Because no objector presented this fact-bound theory at trial, and there is no record evidence to support it, it cannot be raised for the first time on appeal. *See Lindgren v. N.Y.C. Housing Auth.*, 269 A.D.2d 299, 303 (1st Dep't 2000) (citing *Chateau D'If Corp. v. City of N.Y.*, 219 A.D.2d 205, 209 (1st Dep't 1996)).

Objectors' depiction of the settlement with the AGs lacks a single record citation. *See* PB34-36. The reason is simple: the factual claim that Countrywide and BofA "agreed to 'pay' for their misdeeds" of predatory lending "by agreeing to modify the terms of a huge number of mortgages—primarily by reducing the principal amounts due and interests payable on them" (PB35)—or that "Countrywide and BofA sought to effectively pass on a huge percentage of the costs of the AG settlement to the 530 Covered Trusts at issue here" (*id.*), was not raised (let alone established) below.

At best, one Institutional Investor witness testified that he was aware of the *Greenwich* case that Objectors cite (at PB 35-36) filed "in the wake of the Countrywide settlement" and included "allegations … about

the requirements to repurchase predatory loans." R.427. But mere knowledge of the *Greenwich* allegations, which were dismissed on standing grounds, is no basis for an appellate finding here that they were true. Moreover, even the *Greenwich* plaintiffs did not espouse the theory Objectors argue here for the first time. To the contrary, the *Greenwich* plaintiffs made the PSA-based argument that Triaxx pressed below, and which BNYM and the Institutional Investors decided lacked sufficient merit to press in settlement negotiations. *See id.*; OB26.

Crucially, Objectors do not argue that any of the modifications BofA made for loss mitigation violated the customary standards for prudent loan servicing or the PSA's terms, or that they were improper in any other way. Nor do Objectors point to any evidence (there is none) that loans were modified that did *not* mitigate losses and benefit the trusts. As we explained (at OB7, 37-38), a modification for loss mitigation is made by the servicer *in lieu of foreclosure*, in cases where the modification will maximize the value of the loan for the trust to the *benefit* of certificate-holders. Objectors do not deny that—regardless of BofA's purported ulterior motives—the trusts would have incurred *greater* losses if BofA had foreclosed on the loans rather than modifying them. There accordingly is no basis in either the law or common sense for thinking that

BofA's settlement with the States (assuming the Court could consider it) should be understood to shift the unrelated risk to BofA that some securitized loans would become delinquent—the very risk that the *certificateholders* accepted by placing their investments. It is for exactly that reason that such modifications do not trigger a repurchase obligation.

Beyond that, Objectors do not disagree with our explanation of the PSAs and prospectus supplements. As we explained (at OB33-39), any claim that BofA was obligated to repurchase loans modified for loss mitigation was inconsistent with the plain terms of the offering documents and would offend the rule against commercial unreasonableness. It was therefore reasonable for BNYM (and the Institutional Investors) not to pursue them in the negotiations. *See Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (holding indenture trustee is not required to seek benefits for certificateholders beyond those provided for by contract). Objectors' silence on this score speaks volumes.

## CONCLUSION

This Court should modify the judgment to approve in its entirety the trustee's conduct in entering into the settlement.

Dated: New York, New York
September 3, 2014

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## PRINTING SPECIFICATIONS STATEMENT

Pursuant to section 600.10(d)(1)(v), the undersigned attorney for Petitioner-Appellant-Cross-Appellee Bank of New York Mellon hereby certifies that this brief complies with §600.10(a). The brief was prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger. Footnotes and point headings comply with section 600.10(a)(3).

On August 14, 2014, the Court granted leave to file an overlength brief of no more than 13,000 words. The brief contains 12,989 words as calculated by Microsoft Word.

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