

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

In the matter of the application of U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures),

Petitioners,

For an order, pursuant to CPLR § 7701, seeking judicial instruction.

Index No.: 652382/2014

Hon. Marcy S. Friedman
IAS Part 60

AFFIRMATION OF JOHN G. MOON IN SUPPORT OF TRIAXX'S MOTION TO COMPEL DISCLOSURE BY THE INSTITUTIONAL INVESTORS

JOHN G. MOON, hereby affirms under penalty of perjury:

1. I am a member of the Bar of the State of New York and of Miller & Wrubel P.C., counsel for respondents Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, "Triaxx"). I submit this affirmation in support of Triaxx's motion to compel limited disclosure by the Institutional Investors concerning their holdings in the trusts that are the subject of the proposed settlement in this proceeding (the "Covered Trusts").

2. Specifically, Triaxx seeks disclosure of the Institutional Investors' holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009. This information is relevant to the rationality and fairness of the allocation formula (the "Allocation Formula") in the proposed settlement, for the reasons set forth in the accompanying affidavit of Mingsung Tang and the accompanying Memorandum of Law.

3. The purpose of this affirmation is to inform the Court how the Allocation Formula was addressed in another RMBS settlement proceeding: *In Re Residential Capital, LLC*, Chapter 11 Case No. 12-12020 (Bk. S.D.N.Y.) (“ResCap”). On February 20, 2015, the Court entered into the record certain documents from the ResCap Proceeding [Document Nos. 281-88].

4. In ResCap, Triaxx objected to the allocation formula in the proposed RMBS settlement on substantially the same grounds as Triaxx objects to the Allocation Formula in this proceeding:

(a) First, as set forth in the Tang Affidavit, under the Allocation Formula there is no causal relationship between an investor’s recovery and whether that investor’s investment was the subject of breaches of representations and warranties or servicing failures — the subjects of the claims being settled — investors may have lost money simply because of market conditions; and

(b) Second, some investors, notably certain of the Institutional Investors, may actually be achieving *windfall profits* from the settlement, because they bought their investments at distressed prices after the market for RMBS crashed, as distinguished from buy-and-hold investors such as Triaxx who bought their investments at or shortly after the time of issuance, and for whom the proposed settlement results in a substantial loss.

5. In this proceeding, the Institutional Investors seem to be suggesting that there is no basis for Triaxx’s objection to the Allocation Formula. However, in ResCap, *the Trustees agreed with Triaxx that the allocation formula should be revised.*

6. On June 21, 2012, Triaxx filed an Objection to Debtors’ 9019 Motion [Docket No. 481].¹ The primary grounds for Triaxx’s objection was that the Allocation of the Allocated

¹ References to “Docket No.” in this Affirmation are to publicly available docket entries in the ResCap bankruptcy proceeding.

Allowed Claim proposed in the 9019 Motion [Docket No. 320-2, Exhibit B] was inequitable [Docket No. 481 at ¶¶ 12-19]. Triaxx set forth how Debtors' Allocation incorrectly assumed that losses in riskier Trusts were equally as likely to have been caused by representation and warranty breaches as losses in safer Trusts. *See id.* Based on an analysis of 356 Settling Trusts, Triaxx presented to the Court data establishing that Settling Trusts holding different collateral type experienced substantial differences in losses as a percentage of original notional value [Docket No. 481-1]. Therefore, Allocation of the Allocated Allowed Claim, based on losses, inequitably favored Settling Trusts (and their investors) holding riskier collateral [Docket No. 481 at ¶ 19].

7. On November 29, 2012, Triaxx filed an Objection to Debtors' Second Supplemental Motion Pursuant to Fed. R. Bankr. 9019 for Approval of the RMBS Trust Agreement [Docket No. 2308] and Declaration of Claire L. Huene [Docket No. 2309]. In those filings, Triaxx called into question the Allocation methodology advanced by the 9019 Motion in two important respects. First, Triaxx graphically illustrated how the default rates for adjustable-rate Mortgage Loans correlated to increases in interest rates generally, in contrast to fixed-rate Mortgage Loans. [Docket No. 2309, Ex. A; Docket No. 2308 ¶¶ 5-7]. Second, Triaxx presented evidence that some Trusts holding prime and alt-A Mortgage Loans received a "no fraud" representation from Debtor, stating, "[n]o fraud or misrepresentation has taken place in connection with the origination of any Mortgage Loan." *See id.* at ¶ 8. By contrast, many Trusts holding sub-prime loans contained a Fraud Liability Exclusion. *See id.* Therefore, Triaxx effectively refuted the central presumptions of the Allocation methodology that representation and warranty claims were equal among Trusts and could be based upon losses.

8. On December 20, 2012, counsel for the Steering Committee invited Objectors to the 9019 Motion to discuss the allocation methodology. A proposed revision to the allocation

methodology would base allocation on breach rates derived from a statistically significant sampling of loans stratified by vintage, product type, and securitization sponsorship platform. On January 18, 2013, counsel for Triaxx met with counsel for the Trustees, Institutional Investors and others to discuss the same.

9. On February 4, 2013, the RMBS Trustees filed a Statement Regarding Debtors' Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of RMBS Trust Settlement Agreements [Docket No. 2833]. In that Statement, the RMBS Trustees stated that they "believe that the Revised Claim Allocation Methodology addresses the objections filed to the Debtors' Claim Allocation Methodology because it sufficiently accounts for the differences among the characteristics of each Settling Trust." *Id.* at ¶ 11.

10. On March 15, 2013, Debtors filed a Reply Brief Re Objection of Assured Guaranty to Motion for Approval of RMBS Trust Settlement Agreements [Docket No. 3218]. In that filing, Debtors stated that "the parties have recently worked on a revised allocation formula that takes into account defect rates, product type, and other criteria for each trust. These steps will permit differentiation among the trusts based on the merits of each trust's claims." *Id.*

11. Triaxx was the leading Objector to the original allocation methodology on the grounds that it was based on losses generally and did not distinguish among the Settling Trusts (although there were Objections to other aspects of the Allocation). Triaxx's Objections and other submissions brought to the attention of the Bankruptcy Court important distinctions among the types of Settling Trusts (*e.g.*, prime, alt-A, sub-prime, pay-option adjustable-rate, second lien). Indeed, each type of Settling Trust presents different credit risk and security risk, and they exhibit different sensitivities to economic conditions that cause losses in the absence of a representation or warranty

breach. Triaxx also showed that Settling Trusts vary with respect to the types of representations and warranties that were made concerning fraud in the origination of the Mortgage Loans.

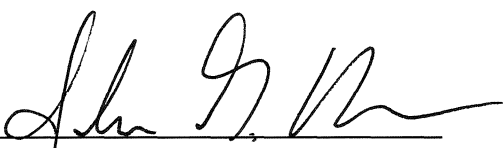
12. For these reasons, the original allocation methodology in ResCap was fundamentally unfair to the Settling Trusts, because it was based on losses and not breaches of representations and warranties. As such, Settling Trusts having losses due to economic events would partake of the Allowed Claim at the expense of Settling Trusts having losses due to cognizable breaches of representations and warranties. Triaxx advocated to rationalize the allocation methodology to one that was based upon applicable legal principles, and that took place without a court order. Revision of the allocation methodology benefitted all of the Settling Trusts, because it caused each Trust to be allocated a lawful share, rather than certain Settling Trusts with outside losses unjustly benefitting at the expense of other Trusts.

13. The Institutional Investors' holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009 are relevant to this analysis because this information will assist the Court in understanding the actual economic outcome of the proposed settlement relative to actual losses caused (or not caused) by the breaches of representations and warranties, and servicing failures, that are the subject of the claims being settled.

E. Conclusion

14. For these reasons, I respectfully submit that the Court should direct the Institutional Investors to disclose their holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009.

Dated: July 7, 2015



John G. Moon