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 **AFFIDAVIT OF MINGSUNG TANG IN SUPPORT OF TRIAXX'S MOTION TO COMPEL DISCLOSURE BY THE INSTITUTIONAL INVESTORS**

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

MINGSUNG TANG, being duly sworn, deposes and says:

1. I am litigation consultant to Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, "Triaxx"). I submit this affidavit in support of Triaxx's motion to compel limited disclosure by the Institutional Investors concerning their holdings in the trusts (the "Covered Trusts") that are the subject of the settlement that, in turn, is the subject of this proceeding.

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.

3. There are two serious flaws with the Allocation Formula. First, as set forth below, 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.

4. The second serious flaw in the Allocation Formula, related to the first, is that 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 ***catastrophic loss***.

5. The holdings information of the Institutional Investors as of September 1, 2008 and April 1, 2009 is directly relevant to analysis of the Allocation Formula.

A. Triaxx's Investments in the Covered Trusts

6. Attached hereto as Exhibit A is a summary exhibit of Triaxx's holdings among the Covered Trusts (the "Triaxx-Held Trusts"). The holdings were purchased at or about the time of issuance – that is, in 2005, 2006 and 2007 – and had an original notional value of approximately $1.5 billion.

7. Before the financial crisis started in 2008, there was a proliferation of residential mortgage-backed securities ("RMBS") backed by risky subprime, scratch and dent, second lien or adjustable-rate mortgage loans, including negative-amortizing, pay-option adjustable-rate mortgage loans ("POAs").

8. Triaxx invested in RMBS originated by JPMorgan. Triaxx invested prudently, and did not invest in risky RMBS. Triaxx invested only in super-senior classes of RMBS backed by prime, first-lien, 30-year fixed-rate mortgages.

9. Among the Covered Trusts constituting Triaxx's positions, the funds held 20,056 mortgage loans with aggregate original outstanding balance of about $9.94 billion. At October 2014, these Trusts realized about $660 million in losses, hold in excess of $455 million in delinquent loans, and hold about $1.87 billion in performing loans. See Exhibit B.

B. The Differences Among the Covered Trusts Are the Quality of the Mortgage Loan Collateral and the Differences in the Representations and Warranties in the PSAs

10. I have reviewed thousands of mortgage loans and hundreds of Pooling and Servicing Agreements ("PSAs") and Prospectus Supplements ("Pro Supps") for the Covered Trusts, and I can summarize them as follows: although the Covered Trusts share the same general structure, the loans that served as collateral in the Covered Trusts present significantly different levels of risk, and the representations and warranties in the PSAs differ. As a result, the Covered Trusts have different claims against JPMorgan for breach of representation and warranty ("R&W Claims").

1. The Trusts Hold Different Types of Loans

11. The Covered Trusts can be categorized by the types of loans they hold:

a. Prime Fixed-Rate. Prime Trusts hold first-lien, thirty-year fixed-rate loans made to prime borrowers, whose income has been verified and who purported to have equity in their homes.

b. Prime Alt-A Fixed-Rate. Fixed-rate Alt-A Trusts also hold first-lien, thirty-year fixed-rate loans of prime quality, but an alternative ("Alt") source of documentation

was used during underwriting. For example, if a borrower was self-employed and did not have a Form W-2, another document was used.

c. Subprime. These Trusts hold loans to borrowers who present a greater risk of default than prime borrowers due to their poor credit history, some of which did not require income documentation, i.e., "liar loans."

d. Alt-A Pay-Option Adjustable Rate ("Alt-A POA"). A "pay option" adjustable rate loan begins with a temporary payment schedule, often based on a low "teaser" rate. After the temporary interest rate expires, the borrower can elect to pay a minimum payment that can be less than the interest-only payment. If the borrower does this, the rest of the interest is deferred and added to principal (negative amortization) until a deferral limit is reached. If the deferral limit is reached, the loan "recasts," which can result in substantial sudden increases in the borrower's payments.

e. Scratch and Dent. These Trusts hold "scratch and dent" residential mortgages that "may include mortgages that have been originated outside an originator's program guidelines in some way, or mortgages where borrowers missed payments in the past," or "loans with document defects at origination that were since rectified," or "non-prime loans that were seriously delinquent at the time of securitization." Exhibit C.

f. Second Lien. Second lien loans include second mortgages and home equity lines of credit ("HELOCs") subordinate to first mortgages.

2. The Different Types of Loans Present Different Risks

12. The different types of loans present different risks. Credit risk, the risk that a borrower will default on a loan, is greater with subprime borrowers than prime borrowers, irrespective of representation and warranty breaches. Credit risk is also greater with adjustable-rate mortgages, particularly POAs, which create "payment shock" credit risk:

the risk that the borrower will be unable to make payments when the interest rate increases. By contrast, fixed-rate loans are underwritten to the full payment of principal and interest, necessitating a higher quality of borrower and thus presenting much less credit risk than with adjustable-rate or POAs.

13. Different loans also present different "security risk," the risk that the collateral for the loan (the borrower's property) will not be adequate to repay the loan in full if the borrower defaults. There is greater security risk with second lien loans, because if the property value decreases by any amount, the second mortgage may be insufficiently collateralized. If the borrower defaults, the first lien holder has a priority over any liquidation proceeds. This makes second liens sensitive to market downturns. Security risk is also greater with POAs, because the reverse amortization can increase the amount of the loan over time.

14. For all these reasons, the fact that the riskier subprime, scratch and dent, Alt-A POA, and second lien Covered Trusts have incurred greater losses than the safer prime and prime Alt-A fixed-rate Covered Trusts does not justify the assumption that losses in these Trusts give rise to valid R&W Claims. The riskier Trusts would be expected to have greater losses, given the heightened risk profile of the loans they own.

15. Exhibit D attached hereto is a summary of losses among the Covered Trusts. It graphically illustrates the inherent risk characteristics of loans, from the least risky (the Trusts holding prime Loans, with average percentage losses of 5% of original notional value) to most risky (the Trusts holding second lien loans, with average losses of 49%).

3. The Settling Certificateholders' Holdings

16. Triaxx has undertaken a review of the reported holdings of the Institutional Investors in the Covered Trusts. See Exhibit E. Less than half of the Institutional Investor's holdings are in prime or Alt-A prime Trusts, of which only one-third are fixed-rate.

The majority of their holdings are in the risky adjustable rate (including POA), subprime, second lien and scratch and dent trusts. See id.

17. These types of Trusts have greater Losses than the prime and Alt-A prime Trusts, such as the Triaxx-Held Trusts. See id. In fact, greater losses were expected at the origination of the riskier Trusts, as shown by the fact that they paid a higher yield.

18. Certificates issued by these riskier Trusts trade at distressed prices.

19. Exhibit F attached hereto demonstrates the effect of the proposed settlement on a JPMorgan second lien Trust.

4. The Representations and Warranties Vary

20. Attached hereto as Exhibits G1-G4 are excerpts from the American Home Purchase Agreement, and PSA excerpts for JPMMT 2007-S2, BSABS 2005-AC5, and BSABS 2005-AC6 (hereinafter, the "Prime Trusts").

21. Origination fraud was a substantial risk when the loans were originated (approximately 2004-2007). *See, e.g.*, Financial Crisis Inquiry Commission Report at xxii ("One study places the losses resulting from fraud on mortgage loans made between 2005 and 2007 at $112 billion."), attached hereto as Exhibit H.

22. However, the Representations and Warranties for fraud differ widely among the Covered Trusts. *See, e.g.*, Exhibit G1 (American Home Purchase Agreement), 26, § 7.01(hh), restated in Exhibit G2 (JPMMT 2007-S2 PSA), 64, § 2.05(d)(xii) (stating that "[n]o fraud . . . with respect to the Mortgage Loan has taken place . . .").

23. In contrast, my review found that certain Subprime and Scratch and Dent Trust PSAs, such as for BSMF 2007-AR2 and BSABS 2006-SD3, respectively, contain no language concerning fraud in their representations and warranties.

24. The Prime Trusts clearly state that the "Seller . . . makes the representations and warranties contained" in the related purchase agreements, or that the Seller directly makes the representations and warranties. Exhibit G2 (JPMMT 2007-S2 PSA), 64, §§ 2.05(d)(x)-(xv); *see, e.g.*, Exhibit G3 (BSABS 2005-AC5 PSA), 306, § 7. In the other trusts, such as BSMF 2007-AR2, this is not always the case.

25. The Scratch and Dent Trusts disclose in their prospectuses that investors take heightened risks in purchasing their loans, while the Prime Trusts do not. See, e.g., BSABS 2006-3 Prospectus Supplement, S-19, S-20 (disclosing that "approximately 17.25% of the mortgage loans" actually "were 30 days or more contractually delinquent" by cut-off date principal balance, and that the mortgage pool included impaired mortgage loans owing to "violated . . . underwriting guidelines," "missing or defective loan documentation," "previous [loan delinquency]," and/or borrowers with "credit write-offs, outstanding judgments, current or prior bankruptcies," among other reasons), attached hereto as Exhibit I.

C. The Allocation Formula Is Irrational and Unfair Because Very Different Trusts Are Treated Identically Without Regard to Causation of Losses

26. In summary, the proposed settlement produces an irrational and unfair result because investors in riskier trusts that suffered losses for economic reasons, rather than because of breaches of representations and warranties or servicing failures – the claims being settled – are compensated equally (or as shown below, even more favorably) than investors in less risky trusts that actually suffered losses from the claims being settled. This irrational and unfair result is compounded by the windfall profit nature of the settlement for the Institutional Investors, as discussed below.

D. The Information Requested Is Relevant to Whether the Allocation Formula Will Produce Windfall Profits for the Institutional Investors

27. Because of both the irrationality of the Allocation Formula and the timing of certain of the Institutional Investors' purchases, as shown below the Allocation Formula produces windfall profits for some if not all of the Institutional Investors. This not only renders the proposed settlement unfair to more prudent buy-and-hold investors such as Triaxx, but raises a question as to whether the Institutional Investors, as the parties that negotiated this settlement, purportedly on behalf of all bondholders however situated, had and have a conflict of interest in negotiating the proposed settlement. The information sought by this motion to compel is relevant to both the fairness and conflict aspects of the settlement, and therefore is information that the Court should consider.

28. The Institutional Investors' holdings as of September 1, 2008 and April 1, 2009 are relevant to the fairness and conflict analyses. This is because holdings on September 1, 2008 would have been purchased before the financial crisis. April 1, 2009 was the low point for RMBS prices during the financial crisis. Therefore, an Institutional Investor showing no or small holdings at this date and substantial holdings at the time the Petition was filed will receive windfall profits from the settlement. That Institutional Investor would have purchased RMBS ***after the losses were incurred***.

29. In contrast, prudent investors like Triaxx purchased RMBS before the financial crisis and held their positions, experiencing losses. However, prudent investors like Triaxx purchased high quality RMBS that had strict representations and warranties, and a high percentage of the losses are due to breaches. As shown above, the lower quality RMBS losses are due to more to economic factors than breaches. The Allocation Formula is irrational

because it makes losses a proxy for breaches of representations and warranties, but does not account for economic factors that caused losses independent of breaches.

30. Several of the Institutional Investors have already disclosed a portion of their positions on the covered dates to the public. For example, Pimco Total Return Fund (ticker "PTTRX") has $106 billion in assets. Extracting from public filings, it had $1.7 billion in the covered trusts at the peak of the financial crisis (April 2009) and $ 5.3 billion after the financial crisis (December 2014). Similarly, Goldman Sachs Asset Management Strategic Income Fund (ticker "GSZAX") had no exposure at the peak of the financial crisis (April 2009) and $268 million after the financial crisis (December 2014). Exhibit J attached hereto graphically illustrates how, as an example, Goldman Sachs will have windfall profits of $60 to $100 million, whereas Triaxx will suffer a loss of approximately $72 million. Under the settlement, Goldman Sachs will receive a larger allocation as a percentage of its investment.

31. The foregoing is an example based on publicly information. However, the Court should have such information available to it as to all holdings of all Institutional Investors, so that the Court is in a position to understand the actual financial impact of the proposed settlement. Triaxx's motion to compel seeks this information.

32. Producing documents is not burdensome for the Institutional Investors, especially since in many cases the answer may just be "none." All of the Institutional Investors will have precise records of their purchases and sales and of their portfolio positions over time. Production will require only extraction of existing data. Moreover, in order to produce the information that has already been produced for the date in the recent past, they must have discovered when they purchased the RMBS. The objection of the Institutional Investors to produce is like a person disclosing his age but objecting to disclosing his date of birth.

E. Conclusion

33. 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.

MINGSUNG TANG

Sworn to before me this
6th day of July, 2015

Notary Public

MAUREEN GALLAGHER
Notary Public, State of New York
No. 01GA4706185
Qualified in New York County
Commission Expires September 30, 2017