

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, and approval of a proposed settlement.

Index No: 652382/2014

Assigned to: Friedman, J.

**MEMORANDUM OF LAW IN SUPPORT OF  
PROPOSED ORDER TO SHOW CAUSE  
WHY THE TRIAXX ENTITIES  
SHOULD NOT BE ENTITLED TO INTERVENE**

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### **Preliminary Statement**

Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, the “Triaxx Entities”) submit this Memorandum of Law in support of their Order to Show Cause Why the Triaxx Entities Should Not Be Entitled to Intervene in the Article 77 Proceeding instituted by petitioners 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 (together, the “Trustees”), as trustees for 330 residential mortgage-backed securities trusts (the “Covered Trusts”) containing mortgages sold and/or serviced by JPMorgan Chase & Co. and its affiliates (together, “JPMorgan”), seeking judicial instructions and approval of a proposed \$4.5 billion settlement with JPMorgan. The proposed settlement would bind all persons who may have claims against the Trustees and JPMorgan with respect to the Covered Trusts, including the Triaxx Respondents.

The Triaxx Entities should be permitted to intervene in this action, because: (1) the proposed settlement affects the property and claims for damages of the Triaxx Entities; (2) the existing parties may not adequately represent the interests of the Triaxx Entities; and (3) the proposed settlement and the claims of the Triaxx Entities share common issues of law and fact. The Triaxx Entities respectfully request that the Court enter an order pursuant to CPLR 401, 1012, and 1013 to permit the Triaxx Entities to intervene as respondents in this proceeding.

### **Statement of Facts**

JPMorgan sold millions of loans to trusts. See Trustees’ Petition, ¶¶ 1, 5, 14 (Docket No. 1, August 3, 2014). Those trusts in turn sold notes to a wide variety of investors,

including the Triaxx Entities, which purchased approximately \$1.5 billion of original notional value in 13 of the Covered Trusts. Affirmation of John G. Moon in Support of Proposed Order to Show Cause Why the Triaxx Entities Should Not Be Entitled to Intervene (“Moon Affirmation”), ¶ 3 (October 27, 2014). To assure investors that the loans it was selling were of good quality, JPMorgan made representations and warranties concerning the character of the loans and the creditworthiness of the borrowers. *See* Trustees’ Petition, ¶¶ 9-10. In each of the relevant agreements governing the Covered Trusts, JPMorgan agreed to repurchase loans from the trusts that did not comply with those representations and warranties. *Id.* at ¶ 36. Additionally, JPMorgan continued to service many of the loans after they had been securitized. In its capacity as servicer, JPMorgan assumed obligations under the various pooling and servicing agreements. *See id.* at ¶¶ 6, 9-10.

On August 3, 2014, the Trustees filed a petition to obtain judicial approval of a proposed settlement agreement with JPMorgan to settle all potential claims belonging to the Covered Trusts. Moon Affirmation, ¶¶ 2, 5. Twenty-one institutional investors (the “Institutional Investors”) negotiated the proposed settlement, but it would bind all persons with potential claims against JPMorgan. *See* Moon Affirmation at ¶ 5; Trustees’ Petition at ¶¶ 39-40. The Triaxx Entities did not participate in the negotiations. Moon Affirmation, ¶ 5.

### **Argument**

The Triaxx Entities should be permitted to intervene in this Article 77 proceeding. CPLR 1012(a) permits a party to intervene in an action as of right if “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment” or if “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the

judgment.” Additionally, CPLR 1013 permits a party to intervene with the permission of the Court if “the person’s claim or defense and the main action have a common question of law or fact.” Courts have consistently held that “[w]hether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings.” *Wells Fargo Bank, Nat’l Assn. v. McLean*, 70 A.D.3d 676, 677 (2d Dep’t 2010); *Matter of Bernstein v. Feiner*, 842 N.Y.S.2d 556, 558 (2d Dep’t 2007) (“As a general matter, ‘intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.’” (quoting *County of Westchester v. Dep’t of Health*, 229 A.D.2d 460, 461 (2d Dep’t 1996))); *see also Teleprompter Manhattan CATV Corp. v. State Board of Equalization & Assessment*, 34 A.D.2d 1033, 1033 (3d Dep’t 1970) (“Intervention should be liberally allowed.”).

The Triaxx Entities qualify as intervenors under any of these three standards; therefore, the Court should grant their Petition to Intervene.

## I.

### **THE ARTICLE 77 PROCEEDING WILL DIRECTLY AFFECT THE PROPERTY INTERESTS THAT THE TRIAXX ENTITIES POSSESS**

CPLR 1012(a)(3) allows a party to intervene as of right where “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.” As holders of certificates having an original unpaid balance of \$1.5 billion in 13 of the Covered Trusts, the Triaxx Entities may possess claims against the Trustees and/or JPMorgan based on false representations and warranties, deficient loan servicing, and other unlawful actions. Although the Triaxx Entities

would share in the proposed settlement, they would be forced to relinquish these claims, which are potentially worth far more than the small percentage of the \$4.5 billion settlement that they would receive. The Triaxx Entities fall squarely within the class of persons whose property rights will be affected by the judgment in this action, and who are, therefore, permitted to intervene in this proceeding as of right under CPLR 1012(a)(3).

## II.

### **THE TRIAXX ENTITIES' INTERESTS MAY NOT BE ADEQUATELY REPRESENTED IN THIS PROCEEDING**

In addition, the Triaxx Entities may intervene as of right under CPLR 1012(a)(2), which provides for intervention where “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” The proposed intervenor need not show that the representation will be inadequate, merely that it may be so. *See Matter of Romeo v. New York State Dept. of Educ.*, 2007 NY Slip Op 2840, at \*2 (3d Dep’t 2007) (finding that appellant should have been permitted to intervene as of right where “[a]t the very least, the district’s interests ‘may’ not have been adequately represented.”).

The Trustees have expressly recognized “that some Certificateholders may not agree that the Settlement is reasonable” and that “different groups of Certificateholders may wish to pursue remedies for the alleged breaches in different ways, creating the potential for disagreements among Certificateholders within the same trusts.” *See* Trustees’ Petition, ¶¶ 17-18. The Triaxx Entities’ holdings within the Covered Trusts are unique and likely differ from any of the twenty-one Institutional Investors that have already been granted intervenor status by the Court. *See New York State Public Employment Relations Board v. Board of Educ.*, 46 A.D.2d 509, 513 (4th Dep’t 1975) (“[W]here the interests of [plaintiff] and the [proposed

intervenor's members] are not identical, the [proposed intervenor's] full intervention is required to insure complete litigation of its interests in the judicial forum.”). Finally, there is no dispute that the proposed settlement order seeks to bind the Triaxx Entities, satisfying the second prong under CPLR 1012(a)(2). The Triaxx Entities are, therefore, entitled to participate in this proceeding pursuant to CPLR 1012(a)(2).

### III.

#### **ADDITIONALLY, THE TRIAXX ENTITIES QUALIFY FOR INTERVENTION UNDER CPLR 1013**

In addition to meeting the standards for intervention as of right, the Triaxx Entities should be permitted to intervene pursuant to the discretionary standard under CPLR 1013. The Court may permit intervention where “the person’s claim or defense and the main action have a common question of law or fact.” CPLR 1013. “In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” *McLean*, 70 A.D.3d at 677 (reversing denial of intervention petition where proposed intervenor “demonstrated a real and substantial interest in . . . the outcome of the action”).

Here, the questions of law and fact raised by the Triaxx Entities’ intervention are identical to those already present in the action. The Triaxx Entities seek to assert their rights as to whether the terms of the proposed settlement are fair, which is the purpose of this Article 77 Proceeding. The intervention of the Triaxx Entities will not unduly delay the action. Moreover, the participation of the Triaxx Entities will not prejudice the substantial rights of any party since the Triaxx Entities do not seek to exclude any other Potentially Interested Persons from fully representing their own interests. The Court, therefore, should grant the Triaxx Entities’



Application under its discretionary authority. *See United Servs. Auto. Ass'n v. Graham*, 21 A.D.2d 657, 657 (1st Dep't 1964) (“[I]n view of the broad language of [CPLR 1013] and the mandate for liberal construction, the application of [the proposed intervenor] to intervene should have been granted.”) (citation omitted).

**Conclusion**

For the foregoing reasons, the Triaxx Entities respectfully request that the Court grant their Application in this Article 77 proceeding.

Dated: New York, New York  
October 28, 2014

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