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

NOTICE OF PRELIMINARY OBJECTION AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to the Court's October 9, 2014 Order, Intervenor the Federal Home Loan Bank of Boston ("FHLB Boston") submits this written notice to appear and preliminary object to the proposed settlement submitted to the Court by Petitioners.[1]

I. BACKGROUND

On August 1, 2014, the Trustees initiated this Article 77 proceeding to seek judicial ratification of a proposed $4.5 billion settlement paid by JPMorgan Chase & Co. ("JPMorgan"). The proposed settlement ("Settlement") seeks to resolve the claims of 314 trusts (the "Accepting Trusts") against JPMorgan and its affiliates based on representations and warranties made by JPMorgan, and any claims related to the servicing of the loans in the Accepting Trusts. FHLB Boston owns securities issued by 37 of these trusts, for which it paid nearly $2 billion.[2] If approved, the Settlement would extinguish loan-repurchase and servicing claims that the Accepting Trusts have against JPMorgan, as well as any claims against the Trustees for their evaluation and acceptance of the settlement.

The Trustees did not initiate the investigation leading to the Settlement, or participate in the negotiation process. Instead, the Institutional Investors presented the Settlement to the Trustees for independent evaluation. Pursuant to the terms of the Settlement, the Trustees' evaluation is paid for by JPMorgan. Settlement Agreement ¶ 2.06.

Though nowhere mentioned in the Trustees' petition, many of the Trustees are currently defendants in derivative lawsuits filed by Blackrock, PIMCO, and numerous other Institutional

[1] The Petitioners are 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 U.S.A., N.A., and Deutsche Bank National Trust Company (collectively, the "Trustees").

[2] A list of FHLB Boston's holdings is set forth in Exhibit 1. Pursuant to the Trustees' request, FHLB Boston provided this information to all of the Trustees on October 22, 2014.

Investors. The lawsuits assert claims on behalf of 2100 Trusts across the spectrum of residential mortgage-backed securities sponsors, but carve out the Trusts at issue in this case. The lawsuits seek the recovery of losses to the Trusts caused by the Trustees' failure to abide by their contractual and legal duties to protect the interests of the Trusts, provide notice, or pursue repurchase and servicing claims. *See, e.g., Blackrock Allocation Target Shares, et al. vs. The Bank of New York Mellon*, Index No. 651866/2014, Amended Derivative Complaint, ¶ 235 (N.Y. Cty. Sup. Ct. July 18, 2014) (attached hereto as Exhibit 2).[3]

FHLB Boston lacks sufficient information to determine whether the Settlement is in the best interests of the Accepting Trusts, including those in which FHLB Boston holds interests. Based on the expert reports prepared for the Trustees, there are also substantial questions as to whether the $4.5 billion payment is adequate compensation for the Accepting Trusts' losses, and whether the Trustees' evaluation of the Settlement was marred by conflicts of interest.[4]

II. GROUNDS FOR OBJECTION

A. There is insufficient information at this time for FHLB Boston and the Court to fully and fairly evaluate the Settlement.

In their First Amended Petition, the Trustees ask the Court to find that each Trustee (i) has "the authority to accept, on behalf of each of the Accepting Trusts, the settlement of each of the claims that is released in the Settlement Agreement," (ii) accepted the settlement on behalf of the Accepting Trusts "based on a thorough and reasonable investigation of the claims

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[3] Similar complaints have been filed against the U.S. Bank, Wells Fargo Bank, HSBC Bank USA, and Deutcshe Bank National Trust Company trustees as well. The Institutional Investors who are directly or through affiliates plaintiffs in these actions include Blackrock Financial Management, Pacific Investment Management Co., Teachers Insurance and Annuity Ass'n. and Prudential Insurance.

[4] FHLB Boston reserves the right to amend or supplement this objection based on discovery.

proposed to be released and of the settlement consideration," (iii) made their "settlement decision in good faith," and (iv) "decided to settle because [each Trustee] believed that its decision was in the best interests of the beneficiaries of each Accepting Trust." Doc. No. 57, ¶¶ 75-76. In submitting the proposed settlement to the Court, the Trustees also seek to bar certificateholders "from asserting claims against any Trustee with respect to such Trustee's evaluation and acceptance of the Settlement[.]" *Id.* ¶ 77.

The Trustees bear the burden of proving that they are entitled to the findings they seek. *See* Bogert's Trusts & Trustees § 560 ("The burden of proving that a discretionary power has been properly used is on the person who is asserting rights resulting from the use of the power, for example, on the trustee claiming the approval of an account which shows that he exercised a power in a certain manner[.]") (citing *In re Jaeck's Will*, 42 N.Y.S.2d 514 (Sur. Ct. 1943)). At this time, however, there is insufficient information to determine whether the Trustees are entitled to their requested relief. The only evidence of the Trustees' investigation are the expert reports submitted by the Trustees – several of which are heavily redacted. As explained in further detail below, these reports raise substantial questions regarding the Trustees' evaluation and the conclusions they reach. Furthermore, it is impossible to assess the accuracy of the reports because no back-up information is provided. Instead certificateholders are being asked to accept at face value reports that in many instances appear contrary to public information about the nature and extent of JPMorgan's repurchase and servicing abuse liability. Nothing is known about the negotiation process that produced the Settlement. Indeed, the Trustees' own expert states that he "lack[s] adequate information about the process by which the Proposed Settlement was negotiated." Expert Report of Daniel R. Fischel, July 17, 2014 ("Fischel Report"), ¶ 56. Nothing is known about the Institutional Investors' position on the amount of JPMorgan's liability. Nothing is known about any investigation the Trustees did other than hiring experts at JPMorgan's expense to prepare reports about JPMorgan's liability. On the current record, FHLB Boston cannot determine if the Trustees conducted a "thorough and reasonable investigation" of the claims that are released in connection with the Settlement. Nor can FHLB Boston (or the Court) determine if the Settlement is fair, reasonable, and adequate for all the Accepting Trusts. *See Goldsholl v. Shapiro,* 417 F. Supp. 1291, 1295-96 (S.D.N.Y. 1976) (recognizing that when a court considers approval of a settlement that will bind absent and non-assenting parties, it must determine if the proposal is "fair, reasonable and adequate") (collecting cases).

The Settlement seeks to resolve billions of dollars of liability through what appears to be a pennies on the dollar recovery from an abundantly solvent defendant, JPMorgan. Before FHLB Boston, other certificateholders who were not involved in the Settlement negotiations, or the Court can determine whether the Trustees acted in good faith and in compliance with their fiduciary and contractual duties in connection with the Settlement, substantial additional information regarding the nature and extent of JPMorgan's liability, and the steps, if any taken by the Trustees to fairly evaluate the Settlement should be made available for review. This information will allow FHLB Boston and the Court to determine whether the relief sought in this action is warranted.

B. The limited information that has been made available raises serious questions as to whether the Settlement is in the best interests of the Accepting Trusts.

In deciding whether specific trusts should be included or excluded in the settlement, the Trustees rely exclusively on Mr. Fischel's expert analysis. Mr. Fischel evaluated the Settlement according to three factors: (1) the expression of certificateholder support or opposition to the Settlement; (2) the Settlement payment as compared to the expected recovery from pursuing repurchase and servicing claims; and (3) the timeliness of potential claims. Fischel Report ¶ 29.

While FHLB Boston lacks sufficient information to fully evaluate Mr. Fischel's Report,[5] even assuming Mr. Fischel's analysis is valid, his analysis does not support his conclusion that the Settlement should be accepted for 314 Trusts and only rejected for 16 Trusts. Rather, as explained below, Mr. Fischel's analysis of factors two (Expected Recovery) and three (Timeliness) indicates that the Settlement is inadequate for the overwhelming majority of trusts.

1. The Expected Recovery exceeds the value of the Settlement Consideration for the majority of Trusts.

Mr. Fischel defines the "Expected Recovery" for a Trust as the sum of the "quantification of the potential recovery from Material Breaches, plus the servicing claims and less $1 million (for the cost of pursuing claims)." Fischel Report ¶ 106. With respect to the potential recovery from Material Breaches—defined as the expected lifetime losses for a Trust multiplied by the Trust's Material Breach rate—Mr. Fischel has devised six alternative measures for estimating the Material Breach rate. *See* Fischel Report Exs. Q1 – Q6. These estimates all indicate that the Expected Recovery for many trusts exceeds the Settlement payment. For example, estimating the Material Breach Rate based on the repurchase rate implied by data on loans JPM sold to the GSEs—the analysis used in the Countrywide Settlement—indicates that the Expected Recovery exceeds the Settlement consideration for over 200 trusts. Fischel Report ¶¶ 115-118 & Ex. Q4. Estimating the Material Breach Rate based on early payment defaults ("EPDs") indicates that the Expected Recovery exceeds the Settlement consideration for over 140 trusts. Fischel Report ¶ 114 & Ex. Q3. Taking into account all six measures, the Expected Recovery exceeds the Settlement payment for 271 Trusts. This analysis is consistent with the settlement experience of

[5] By way of example, many of Mr. Fischel's exhibits quantifying the potential recovery from material breaches have been redacted to obscure information regarding the quantification of loan modification claims and the material breach rate. Fischel Report Exhibits Q-1 – Q-6.

numerous entities that have in fact pursued claims against JPMorgan, including settlements between JPMorgan and the U.S. government, which indicate substantial material breach rates for JPMorgan mortgages. Fischel Report ¶ 48.[6]

2. The majority of Trusts have sizeable claims that are not time-barred.

Mr. Fischel asserts that even if a Trust's Expected Recovery exceeds its Settlement payment, this means little if the claims are time barred. But according to Mr. Fischel's own analysis, there are 174 Trusts for which: (1) repurchase claims are not time barred as of August 14, 2014; or (2) even if repurchase claims are time barred, the value of the servicing claims exceeds the settlement payment. Fischel Report Ex. R2. This analysis assumes that the application of the accrual rule to repurchase claims in *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013), will be upheld by the New York Court of Appeals. But, as the Trustees' own expert, Anthony Carpinello, acknowledges: "In light of the closeness of the question, one cannot predict with certainty how the Court of Appeals will rule if the issues of accrual of a cause of action in a securitization case is before the Court." Report of Anthony Carpinello at 4 (May 5, 2014). If the *ACE* decision is reversed, as the HSBC Trustee is urging in the Court of Appeals, then all of the repurchase claims will be timely. Even if *ACE* is not reversed, there are still 174 Trusts with timely claims for which the Expected Recovery on those claims exceeds the Settlement payment.[7]

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[6] Despite results of loan file re-underwriting of over 18,000 loans in the Trusts, which show breach rates between 79% and 98%, neither Mr. Fischel nor any other Trustee expert, takes this information into account when attempting to estimate the total repurchase liability for all of the Trusts. Nor is there any indication that the Trustees undertook any effort to sample any loan files to assess whether the results from previous reviews were indicative of breach rates generally. Thus, it may well be that Mr. Fischel's report significantly underestimates the number of Trusts that would do better in repurchase actions than under the Settlement.

[7] If Trusts are becoming time-barred due to the Trustees' failure to take action, this violates the Trustees' duty of loyalty, and as explained below, further undermines the Settlement.

3. In light of the Trustees' longstanding failure to give notice of events of default, certificateholder silence cannot justify an inadequate settlement.

Mr. Fischel's analysis strongly indicates that the Settlement is not in the best interests of the majority of trusts. Combining Mr. Fischel's analysis of timeliness and Expected Recoveries, there are 174 Trusts that have timely claims with Expected Recoveries that exceed the Settlement payment. Nevertheless, Mr. Fischel recommends, and the Trustees have accepted, inclusion of 314 out of the 330 Trusts in the Settlement solely on the basis that either the Institutional Investors support the Settlement or no certificateholder with more than a 15% interest in the Trust has expressly opposed the Settlement.

But neither Mr. Fishel nor the Trustees offer any support for this analysis. The Trustees have the sole right to enforce a seller's repurchase obligation or a Servicer's servicing obligation (First Amended Petition ¶¶ 48-49), and thus have an obligation to exercise these rights in the interests of all certificateholders. As the Institutional Investors assert in their Complaints against these same Trustees over their handling of other trusts, "the trustee serves the critical role of an independent party with access to all relevant information, including the mortgage loan files, that Investors reasonably understand is under an affirmative duty to take action to protect the interests of the trusts and their beneficiaries, the certificateholders." *See* Ex. 2 at ¶ 176. Trustees cannot abdicate these duties by asserting that they will accept any Settlement, even an inadequate one, unless certificateholders with more than a 15% interest in the trust step forward and object.

Moreover, the absence of objections by certificateholders cannot be construed as support for the Settlement. If Trustees were truly interested in obtaining the views of certificateholders, they could have sent notices with respect to each Trust, clearly informing certificateholders of the Trustee's calculation of the Expected Recovery, the Settlement Payment and its analysis of whether the Trust's claims were timely, and inviting certificateholders to express their support or opposition to the settlement. The Trustees could also have noted for many of the Trusts that a majority of certificateholders could authorize the use of trust assets to pursue repurchase and servicing claims, including providing any needed indemnity. Instead, the Trustees have chosen to sit on their hands and take advantage of a circumstance they helped precipitate—ccertificateholder silence—as a basis for recommending acceptance of the Settlement. This is precisely the same neglect that has resulted in multiple lawsuits against the Trustees for failing to satisfy their obligations to the Trusts.

C. The Expert Reports prepared for the Trustees (at JPMorgan's expense) are inconclusive, inconsistent and unreliable.

1. The Sabry Report

Faten Sabry, PhD, who works for National Economic Research Associates, Inc. ("NERA") prepared a report (the "Sabry Report") purporting to estimate, *inter alia*, "the amount of losses that may be attributable to JPMorgan's alleged breaches of representations and warranties ("Representation and Warranty Losses")." As these losses lie at the heart of the dispute between JPMorgan and certificateholders, an understanding of the losses is key to evaluating the Settlement and the Trustees' good faith in accepting it. However, it is not possible to assess the accuracy or reliability of Dr. Sabry's conclusions because her report it is heavily redacted. Nonetheless, the approach she outlines and the conclusions she reaches raise serious questions as to both.

Dr. Sabry estimates that JPMorgan's Representation and Warranty Losses are between $1.71 billion and $4.49 billion. Sabry Report ¶¶ 5.b–5.d. Hence, incredibly, she concludes that JPMorgan volunteered to pay between 100% and 263% of its total repurchase liability. She applies three different methodologies to achieve this highly dubious result. First, Dr. Sabry estimated Representation and Warranty Losses based on JPMorgan's experience repurchasing loans from Fannie Mae and Freddie Mac (the government-sponsored entities or "GSEs"). However, GSE loans backing "agency" residential mortgage-backed securities are by definition "conforming loans" which are less risky and less prone to representation and warranty defects than the "non-confirming loans" that back the "private label" mortgage backed securities Trusts at issue here. For this reason, in order to even attempt draw any conclusion from the "GSE experience," a dubious exercise in the first instance, it is necessary to account for the different characteristics of the two groups of loans and adjust the results accordingly. Dr. Sabry claims to do this, but she adjusts *in the wrong direction*. She concludes that the repurchase rate for private-label loans would be *lower* than the JPMorgan GSE repurchase rate (for conforming and generally higher quality loans). This allows her to reduce the potential Representation and Warranty losses from $5.4 billion (the result if one assumed the repurchase rate was the same for GSE and private loans) to $4.49 billion. From this Dr. Sabry concludes that if certificateholders pursued *successful* repurchase actions against JPMorgan on behalf of the Trusts, 83% of the Trusts would recover less than provided to the Trusts by the Settlement. Sabry Report ¶ 5.b.

However, what neither Dr. Sabry nor the Trustees reveal is that in the Bank of America Article 77 proceedings before Justice Kapnick, BNYM's expert acknowledged the different credit characteristics between GSE and private loans, and accounted for this by "re-weighting the GSE repurchase data, leading to a higher repurchase rate." *In re Bank of New York Mellon*, Ind. No. 651786/2011, Decision Order Judgment, Jan. 31, 2014 at 39. In other words, BNYM adjusted the results in the opposite direction as Dr. Sabry. In addition, neither Dr. Sabry nor the Trustees mention that Mr. Fischel also provides an estimate of potential Representation and Warranty Losses based on the GSE experience, but he arrives at an entirely different conclusion.

Based on his analysis of the GSE experience, over 200 Trusts would recover more money in repurchase actions than is allocated to them by the Settlement.

Second, Dr. Sabry estimated Representation and Warranty Losses based on the "actual" repurchase demands for the Trusts and imputed GSE repurchase rate data. Based on this analysis, she concluded that total Representation and Warranty Losses were between $1.71 to $1.72 billion, and that every Trust would do worse in a repurchase action than it would under the Settlement. Sabry Report ¶ 5.c. Here again, her conclusions are impossible to test (because all supporting data is redacted) and, at any rate, nonsensical. Dr. Sabry bases this analysis on the number of repurchase requests for loans in the Trusts (what she calls "demand rate") and, in her view, the likelihood that JPMorgan would agree to repurchase them ("repurchase rate"). While this approach produces a highly favorable result for JPMorgan, it is wildly misleading. Dr. Sabry assumes that the demand rate (which she calculates as 5.59%) is reflective of the percentage of loans in the Trusts that violate representations and warranties. This is obviously false. Pursuant to the PSAs, certificateholder repurchase demands only can be made by certificateholders who hold the requisite percentage of voting rights for the trusts –typically 25%. Because it is difficult to achieve this threshold (particularly absent notice from Trustees of, *inter alia*, events of default), the demand rate far understates the percentage of defective loans in the Trusts.

Dr. Sabry's third estimate of Representation and Warranty Losses is derived from allegations in a securities complaint filed by Federal Housing Finance Agency ("FHFA") against JPMorgan, Bear Stearns, and others with regard to certificates backed by loans in 60 Trusts. *See FHFA v. JPMorgan Chase & Co., et al.*, No. 11-6188 (S.D.N.Y., June 13, 2012) (ECF No. 99). Dr. Sabry's analysis once again is misleading. The FHFA Complaint provides a variety of analyses to support the allegation that the offering documents for the JPMorgan certificates purchased by Fannie Mae and Freddie Mac were misleading. One analysis demonstrated through public information that the loan to value ("LTV") and occupancy statistics for the loans backing the certificates materially understated the LTV ratio and number of properties that were owner occupied. Dr. Sabry takes this data, applies "econometric" modeling (the accuracy of which cannot be tested based on the information made available) and determines that these misrepresentations explain 4.5% of defaults in the Trusts. She then uses this number as a proxy for Representation and Warranty Losses, and by multiplying the Trusts Adjusted Losses by this number, calculates total Representation and Warranty losses of $2.6 billion. Based on this figure, she concludes that the Settlement provides a larger recovery than a direct repurchase action for all Trusts. Sabry Report ¶¶ 94-95.

If, in fact, the FHFA complaint were based solely on the LTV and owner occupancy misstatements – and, thus these misstatements were indicative of the only problems with the loans backing the Trusts, Dr. Sabry's analysis would at least potentially make sense. However, the FHFA complaint alleges that on a widespread and systemic basis the loans backing the Trusts failed to satisfy stated underwriting guidelines – *and* supports this allegation with, among other data, re-underwriting results for three of the Trusts. The re-underwriting indicated that 79% to 98% of the loans backing the three trusts breached representations and warranties (roughly 17-22 times the percent indicated by Dr. Sabry analysis). Remarkably, Dr. Sabry does not mention these results in her report even though it is direct evidence of the precise issue she purportedly is analyzing – the degree to which loans backing Trusts are subject to repurchase. Hence, here as well, Dr. Sabry's analysis appears designed to significantly understate JPMorgan's potential repurchase liability.[8]

In short, the conclusions reached by Dr. Sabry in her heavily redacted report do not appear to be credible. Dr. Sabry does not even acknowledge, let alone address, the Institutional Investors' estimate of Representation and Warranty Losses, and this estimate is never even disclosed to certificateholders. Nor does Dr. Sabry consider the possibility that as documented in prior loan file reviews of loans in the Trusts, and alleged in numerous cases against JPMorgan, a substantial percentage of loans backing the Trusts breach representations and warranties and are therefore subject to repurchase. Yet the Trustees are duty-bound to provide certificateholders and the Court with realistic assessments of the potential liability faced by JPMorgan so that the parties and the Court can decide if the Settlement is fair. This has not been done. Thus, while Dr. Sabry would suggest that this Settlement is beyond miraculous (providing 100% to 263% of JPMorgan's total Representation and Warranty Losses), Mr. Fischel candidly admits that the "Settlement is below that of other Settlements involving similar issues." Fischel Report ¶ 35.

2. The Reifsnyder Report

The expert report of Jeremy E. Reifsnyder—who opines on potential servicing claims that are released and the potential benefit of the subservicing protocol that are to be implemented—also offers little insight into whether the Settlement is in the best interests of certificateholders. For instance, Mr. Reifsnyder admits that in order to assess potential claims that might be asserted in litigation arising from JPMorgan's servicing failures, he would need to access "a representative, statistically significant sample of complete JPMorgan loan servicing

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[8] Dr. Sabry's determination that all or most (depending on her methodology) of the Trusts do better under the Settlement than they would do in repurchase actions is directly contrary to the results of Mr. Fischel's analysis, discussed above.

files and records[.]" Reifsnyder Report ¶ 33. Yet rather than performing this analysis, Mr. Reifsnyder utilizes a methodology he admits is "not an estimate of the amount of potential claims for breaches of contractual servicing obligations which might be asserted against JPMorgan in litigation." *Id.* ¶ 9. This alternative methodology does not reveal the actual amount of losses suffered by the Accepting Trusts as a result of JPMorgan's deficient servicing. Indeed, Mr. Fischel indicates that "it is not clear how [Mr. Reifsnyder's] analysis relates to scenarios in which JPM would be held liable for damages for deficient servicing." Fischel Report ¶ 104.

In addition, with respect to the purported servicing improvements offered by JPMorgan as part of the settlement, Mr. Reifsnyder admits that "most of the estimated potential benefit of the Subservicing Protocol would probably be realized independent of implementation of the Subservicing Protocol." Reifsnyder Report ¶ 16. Nevertheless he claims that the value of these benefits is $2.4 billion. *Id.* ¶ 24. These competing statements cannot even be squared by Mr. Fischel, who indicates that "a more fundamental problem [with Mr. Reifsnyder's] analysis [is that it] calculates the benefit of transferring Delinquent Loans to subservicers, not the benefit of the Subservicing Protocol itself." Fischel Report ¶ 92. Without determining the *actual* value of the servicing claims and the *actual* value of the servicing improvements, Trustees cannot have conducted a reasonable and thorough investigation of the Settlement.

D. The Trustees' acceptance of the settlement is tainted by severe conflicts of interest.

It is black letter law that every trustee, including an indenture trustee, owes fundamental duties to the beneficiaries of a trust that cannot be contracted away. Two specific duties recognized by New York law are the duty of loyalty and the duty to avoid conflicts of interest. *See United States Trust Co. of N.Y. v. First Nat'l Bank*, 57 A.D.2d 285, 295-96 (1st Dep't 1977) (recognizing that the "fiduciary obligation of loyalty" could not be contracted away); *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 338-39 (Sup. Ct. N.Y. Cty. March 22,

1991) ("[T]he trustee is at all times obligated to avoid conflicts of interest with the beneficiaries."). *AMBAC* further recognizes that *even before an event of default*, indenture trustees have "a fiduciary duty not to advance its own interests at the expense of the bondholders." 151 Misc. 2d at 340.[9]

Several of the Institutional Investors who support this settlement are named plaintiffs in derivative litigation filed earlier this year against many of the Trustees involving over 2100 RMBS trusts. *See* Ex. 2. These actions allege that the Trustees have caused the subject trusts to suffer enormous losses by, among other things, failing to provide certificateholders with notice of breaches of representations and warranties, failing to enforce the trusts' mortgage repurchase rights, and failing to provide notice of the occurrence of events of default. *Id.* at ¶¶ 450-459. The actions also allege that the Trustees' failures resulted from conflicts of interest. *Id.* at ¶ 441.

The 330 trusts at issue in these proceedings are not included in the over 2100 trusts covered by the Institutional Investors' derivative litigation, even though the allegations contained in the derivative complaints apply with equal force to these 330 trusts. Indeed, in the derivative litigation the Institutional Investors claim that the Trustees' historical failure to assert repurchase

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[9] In addition, under the Governing Agreements to the Accepting Trusts, upon the occurrence of an event of default, the Trustee owes a duty of prudence. For example, § 9.01 of a representative PSA states, "[i]f an Event of Default has occurred and has not been cured or waived, the Trustee shall … use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances on the conduct of his own affairs." *See, e.g.*, BALTA 2005-10 (relevant portions attached hereto as Ex. 3). This provision is consistent with New York law. *See, e.g., Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 12 (1st Dep't 1995) ("[S]ubsequent to an obligor's default … it is clear than the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture."). The imposition of such duties is consistent with "sound public policy," as there is no reason "to allow indenture trustees the benefit of broad exculpatory provisions to excuse their failure to exercise those powers they possess pursuant to the indenture prudently in order to mitigate or obviate the consequences of default." *Id.* at 12.

claims has caused the subject trusts enormous damage, while in these proceedings that same Trustee inaction—and the resulting claim that the repurchase rights of many of the 330 trusts are now time barred—is the principal justifications offered for the deep settlement discount being accorded JPMorgan. Fischel Report ¶¶ 123-126. Yet, by accepting the Settlement, many of the Trustees avoid being sued by the Institutional Investors for the portion of the Trusts' losses that are attributed to the Trustees' failure to take timely action (i.e. the additional amount that could have been recovered if JPMorgan lacked any time-bar defense). While FHLB Boston lacks at this time sufficient information regarding the impact of the derivative litigation on the Trustees' evaluation of the Settlement, there is a strong implication that the Trustees stand to benefit substantially by accepting the Settlement – a classic conflict of interest that would taint any decisions they made with respect to the Settlement.

III. CONCLUSION

For the foregoing reasons, based on the current record, FHLB Boston objects to the Settlement. Substantial questions exists as to the adequacy of the Settlement and the reasons the Trustees have accepted it. These questions cannot be answered without more information. Accordingly, with the Court's permission, FHLB Boston will complete its review after obtaining necessary discovery from the proponents of the Settlement, and will supplement its position on the Settlement accordingly.

DATED: November 3, 2014

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CERTIFICATE OF SERVICE

I, David S. Preminger, hereby certify that on November 3, 2014, a true copy of the above document was served on the Parties, through their counsel of record, via ECF.

S/ *DAVID S. PREMINGER*
DAVID S. PREMINGER