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), AEGON USA Investment Management, LLC (intervenor), Bayerische Landesbank (intervenor), BlackRock Financial Management, Inc. (intervenor), Cascade Investment, LLC (intervenor), the Federal Home Loan Bank of Atlanta (intervenor), the Federal Home Loan Mortgage Corporation (Freddie Mac) (intervenor), the Federal National Mortgage Association (Fannie Mae) (intervenor), Goldman Sachs Asset Management L.P. (intervenor), Voya Investment Management LLC (f/k/a lNG Investment LLC) (intervenor), Invesco Advisers, Inc. (intervenor), Kore Advisors, L.P. (intervenor), Landesbank Baden-Wurttemberg (intervenor), Metropolitan Life Insurance Company (intervenor), Pacific Investment Management Company LLC (intervenor), Sealink Funding Limited (intervenor), Teachers Insurance and Annuity Association of America (intervenor), The Prudential Insurance Company of America (intervenor), the TCW Group, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instruction, and approval of a proposed settlement.

Index No. 652382/2014

Motion Sequence 001
Motion Sequence 008
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THE TRUSTEES' OMNIBUS RESPONSE TO OBJECTIONS

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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,[1] HSBC Bank U.S.A., N.A., and Deutsche Bank National Trust Company, solely in their respective capacities as trustees, indenture trustees, successor trustees, and/or separate trustees (collectively, the "Trustees") of residential mortgage-backed securitization trusts (the "Accepting Trusts"), respectfully submit this omnibus response to the various objections to the Settlement asserted by the QVT Funds, Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited ("DW Funds"), Construction Laborers Pension Trust for Southern California and Laborers Pension Trust Fund for Northern California ("California Pension Funds"), the National Credit Union Administration Board As Liquidating Agent ("NCUA"), Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"), W&L Investments, LLC, the Federal Home Loan Bank of Boston ("FHLBB"), and the Triaxx Entities ("Triaxx") (collectively, the "Objectors").

PRELIMINARY STATEMENT

The Objectors fundamentally misunderstand the relief that the Trustees seek in this Article 77 proceeding. Their objections boil down to the premise that this Court should second-guess the Trustees' settlement decisions and allow the Objectors to litigate the very claims that are being settled. But the Court's role here is not to supplant each Trustee's independent exercise of its business judgment. Rather, it is to determine whether the Trustees acted reasonably and in

[1] For the 30 Accepting Trusts for which Wells Fargo Bank, National Association ("Wells Fargo"), is Trustee, Law Debenture Trust Company of New York ("Law Debenture") is the appointed Separate Trustee for the purpose of enforcing mortgage loan repurchase claims. Each of Wells Fargo and Law Debenture submits this Response to the extent of its respective obligations as trustee or separate trustee for those 30 Accepting Trusts.

good faith when, after an exhaustive evaluation process, they conditionally accepted a substantial settlement of potential claims against JPMorgan Chase ("JPMorgan") on behalf of the Accepting Trusts.[2] The Settlement, one of the largest settlements in American history, will provide investors (including the Objectors) in 319 securitization trusts with a pro rata share of a cash payment of approximately $4.2 billion, plus additional value in servicing improvements. The Settlement will resolve factually complex breach-of-contract claims involving hundreds of trusts and hundreds of *thousands* of underlying loans. And the Settlement will benefit investors now while ending the uncertainty posed by the alternative: many years of contentious and potentially wasteful litigation, amplified by unsettled law on a variety of issues, and no guarantee of any meaningful recovery for the Trusts.

To be sure, in assessing the good faith and reasonableness of the Trustees' decision, the Court will have an opportunity to review the Trustees' collective efforts to evaluate the Settlement. The Trustees did not rest solely on the fact that by far the largest group of investors in the Accepting Trusts (the "Institutional Investors")—with every incentive to maximize recovery—negotiated the economic terms of the Settlement, support the Settlement, and requested that the Trustees accept it. The Trustees, with the assistance of experienced counsel, also retained four highly-credentialed experts to opine on core issues relevant to the Settlement's value and terms. The Trustees collected and produced extensive information requested by these experts, and reviewed over 200 pages from eight separate reports (the "Expert Reports"), plus hundreds of pages of accompanying exhibits. On top of that, the Trustees retained a fifth expert, Professor Daniel Fischel, one of the country's leading authorities on corporate law and economics, to review and consider those reports, to conduct his own evaluation of the

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[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the First Amended Petition filed on October 2, 2014 (the "Petition").

Settlement, and to recommend to the Trustees on a loan group-by-loan group basis whether to accept the Settlement. Indeed, many of the Objectors' quibbles with the Expert Reports merely parrot issues that Professor Fischel had already identified and taken into account. As independent parties served by experienced counsel and experts, the Trustees were well-positioned to evaluate whether accepting the Settlement was in the best interests of certificateholders.

Additionally, the Trustees took the extra step of soliciting input about the Settlement from all investors through a robust and open notice program during the 9-month evaluation period. After receiving the proposed Settlement, the Trustees promptly disclosed the Settlement Agreement to investors through designated notice procedures and other forms of publication, including a website created specifically to supply information to investors about the Settlement, rmbstrusteesettlement.com. The Trustees then updated certificateholders on a regular basis of the status of the Trustees' evaluation process, invited certificateholders to provide any information that they believed might be relevant to that process, and later published all of the Expert Reports on the Settlement website. Over the course of nine months, certificateholders received six notices relating to the Settlement and the tools that the Trustees were using to evaluate it.

Despite their longstanding access to both the Settlement and the Expert Reports, the Objectors now complain that they need more information before they can decide whether the Settlement is in their individual best interests. This objection is misguided. Nothing in the Governing Agreements permits a certificateholder to disrupt the Trustees' exercise of discretion on behalf of all certificateholders because one certificateholder thinks a different decision might be more beneficial to its own interests. The Governing Agreements are clear that the Trustees act for the benefit of *all* certificateholders, and the Governing Agreements preclude individual certificateholders from seeking to advance their individual interests at the expense of others.

Nor is it the function of this Article 77 proceeding to enable individual certificateholders to do so by throwing open the gates of discovery to adduce largely irrelevant information. And while the Objectors also lob various potshots at the Expert Reports, implying that the Court will be called upon to sift through the spreadsheets and formulae embedded in each report, the opposite is true. The essential question before this Court is whether it was *reasonable* for the Trustees to rely on the Expert Reports in making their decision to accept the Settlement. Especially because the Objectors do not even attempt to challenge the expertise of these highly-credentialed advisors, the question answers itself in the affirmative. By considering the advice of subject matter experts, accepting a Settlement that pays billions of dollars to investors today, and opting not to roll the dice through years of costly litigation involving hundreds of trusts and thousands of individual loans with no certainty of recovery, the Trustees have met (and exceeded) the applicable standard of good faith and reasonableness. The Court should grant the Petition.

ARGUMENT

As Justice Kapnick held earlier this year when she approved (over the objection of many of the same objectors) a trustee's decision to settle claims in a settlement that it negotiated with largely the same group of investors, New York trust law does not permit a court to "interfere" with the discretionary act of a trustee's decisions unless there is "an abuse of discretionary authority." *In re Bank of New York Mellon*, No. 651786/11, 2014 WL 1057187, at *9 (Sup. Ct. N.Y. Cnty Jan. 31, 2014) [hereinafter *Countrywide Proceeding*].[3] In another, earlier Article 77

[3] Justice Kapnick set forth the standard as follows:

> What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty. RESTATEMENT (THIRD) OF TRUSTS: Judicial Control of

proceeding, also reviewing a settlement decision by a securitization trustee, the court similarly held that the decision "is entitled to judicial deference" and that "the trustee's view must prevail" because of "the trustee's showing of [its] reasonableness." *In re IBJ Schroder*, No. 101580/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) ("[T]he trustee's decision to compromise the . . . action is within the scope of the trustee's powers, is reasonable and prudent, and is entitled to judicial deference.").

These Article 77 decisions are consistent with and reinforce the general rule that "[w]here 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." RESTATEMENT (THIRD) OF TRUSTS § 50 cmts. a, b (2003) (quoting RESTATEMENT (SECOND) OF TRUSTS § 187 (1959)). Thus, a trustee will not be found to have abused its discretion where it acts in good faith to further the purpose of the trust and its actions are reasonable.[4]

In other words, and contrary to some of the Objectors' assertions (*see, e.g.*, Notice of Prelim. Objection and Mem. of Law in Support ("FHLBB Objection") at 4, NYSCEF Doc. No. 108), the question before the Court in this proceeding is *not* whether the Settlement is "fair,

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> Discretionary Powers § 87, cmt. b (2007). Some examples of abuse of discretion include: when a trustee (1) acts in bad faith and receives an improper inducement for exercising the power in question, (2) acts in good faith but for a reason other than to further the purpose of the trust or the purpose for which the power was granted, *i.e.* using trust funds to make well-intentioned, reasonable distributions when those distributions are not related to the stated purpose of the trust and (3) in exercising a power, acts unreasonably or beyond the bounds of reasonable judgment.

Id. at cmt. c (internal citations omitted).

[4] Contrary to Ambac's Statement of Grounds for Objection ("Ambac Objection") at 13-15, NYSCEF Doc. No. 149, there has been no Event of Default under the Governing Agreements. But in any event, whether an Event of Default has occurred is irrelevant to the standard of review. When taking action, the Trustees are always bound to act reasonably and in good faith; the absence of an Event of Default merely permits the Trustees *not* to act and to instead limit themselves to duties specifically set forth in the Governing Agreements.

reasonable and adequate." That is the standard to approve a settlement of a class action; it does not apply to this Court's review under Article 77 of whether the Trustees' decision to accept the Settlement on behalf of the Accepting Trusts was reasonable and made in good faith. Nor is this Article 77 proceeding an opportunity for the Objectors to *litigate* the settled claims against JPMorgan—precisely the undertaking that any settlement is meant to avoid. *See Robertson v. Nat'l Basketball Ass'n*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (courts routinely deny discovery into the merits of settled claims because the "settlement hearing is not a trial or a rehearsal of the trial. . . . [I]t does not attempt to decide the merits of the controversy."); *In re Amsted Indus., Inc. Litig.*, 521 A.2d 1104, 1107 (Del. Ch. 1986) (denying requested discovery because the purpose of the hearing was not the final determination of the merits of claims or defenses asserted in such litigation). As the federal courts have observed, "since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial." *Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972) (quoting *Saylor v. Lindsley*, 456 F.2d 896 (2d Cir. 1972)).

The Trustees have complied with the applicable standard of review in all respects. Their decision to accept approximately $4.2 billion, along with servicing improvements, instead of initiating costly and uncertain litigation, was made in good faith and was entirely reasonable. *Accord* Mem. Op. and Order, and Findings of Fact and Conclusions of Law, Approving the FGIC Settlement Motion at 19-20, ECF No. 5042, *In re Residential Capital, LLC*, No. 12-12020 (MG) (Bankr. S.D.N.Y. Sept. 13, 2013) (approving settlement in light of, among other things, "anticipated scope of discovery"; describing "enormous discovery burden required" in RMBS case "involv[ing] only five securitizations").

I. The Trustees Acted in Good Faith.

In analyzing the Trustees' good faith, it is necessary to determine whether any credible allegations of bad faith exist. The duty of loyalty is "the duty of a trustee[] not to profit at the possible expense of the beneficiary." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952). In the analogous context of corporate boards, "directors are *presumed* to have acted properly and in good faith, and are called to account for their actions only when they are *shown* to have engaged in self-dealing or fraud, or to have acted in bad faith." *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 (2d Cir. 1980) (emphasis added). Because of the nature of this Settlement, bad faith would mean that the Trustees accepted a settlement that they knew was inadequate in order to gain personally from such acceptance. The Objectors advance two flimsy conflict theories.

First, several of the Objectors allege that the Trustees were conflicted because they settled claims to "avoid" potential liability on their own part. *See, e.g.*, FHLBB Objection at 7, 14-15 and DW Funds' Statement of Objections to Proposed Settlement and to the Trustees' Pet. ("DW Funds Objection") at 8, NYSCEF Doc. No. 100. This conflict theory is factually baseless because, while the Petition seeks a finding that the Trustees did not breach any duties in connection with the Settlement, there is no "release" of any potential Trustee liability in the Settlement Agreement or anywhere else. Even the proposed relief sought by the Trustees here is limited to the Trustees' entry into the Settlement; the prospect of successfully defending that decision could not, therefore, have been an inducement to enter into the Settlement. And the theory of liability is incoherent: it presumes that it is improper to avoid liability by *complying* with all applicable duties. Even accepting, *arguendo*, that that was the Trustees' intent, that would mean that the Governing Agreements served their purpose of aligning the interests of the Trustees with those of investors.

Second, the assertion by some of the Objectors that the Trustees had conflicts of interest because they were indemnified by JPMorgan for legal and expert fees is similarly meritless. Under the Governing Agreements of certain Accepting Trusts, JPMorgan has an indemnification obligation. In connection with such Trusts, JPMorgan was not providing anything beyond what it was contractually bound to fund. In those Trusts where JPMorgan does not have an existing indemnification obligation pursuant to the Settlement Agreement, JPMorgan has paid, and continues to pay, the Trustees' legal and expert fees associated with the Trustees' evaluation of the Settlement and this proceeding. Absent these payments, the Trustees would have had to seek to recover such fees from Trust funds as permitted by the Governing Agreements. JPMorgan is therefore providing the Accepting Trusts—and not the Trustees—with a benefit. Finally, JPMorgan has paid such fees for each trust, regardless of whether the Settlement was accepted.

In any event, trustee indemnities do not create conflicts of interest, as a matter of law. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) ("As to the indemnifications, the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability . . . so it was reasonable for U.S. Bank to seek indemnification once it became clear that there was a dispute."). Indeed, indemnities help to avoid conflicts, as they ensure that trustees, which have no direct economic interest in trusts, do not have a disincentive to invest in trust administration. Moreover, as the master servicer of certain of the Accepting Trusts, JPMorgan was in some instances already obligated to fund these types of expenditures under the Governing Agreements. Thus, any conceivable "conflict" was inherent in the contracts and was therefore waived, as a matter of law. *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. c(2) ("A trustee may be authorized by the terms of the trust, expressly or by implication, to engage in transactions that would otherwise be prohibited by the rules of undivided loyalty"); *id.*

cmt. c(4) (conflict rules do not apply to trustee's seeking reasonable compensation). Justice Kapnick made this point in the *Countrywide Proceeding*. *See* 2014 WL 1057187, at *12 ("[T]his Court previously found in its Decision/Order dated May 20, 2013 . . . that the December Indemnity Agreement did not raise a 'colorable claim of conflict or self-dealing' . . . and since issuing that Decision/Order the Court has not been persuaded otherwise.").

II. The Trustees Acted Reasonably and Did Not Abuse Their Discretion.

Given that the Objectors' conflict theories are meritless, the only question that remains is whether the Trustees' decisions to accept the approximately $4.2 billion Settlement were so unwarranted as to amount to an abuse of discretion. It is well-settled law that "[w]here 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 Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010). A court can find that a trustee abused its discretion in exercising this power only when it "has acted unreasonably—that is, beyond the bounds of a reasonable judgment." RESTATEMENT (THIRD) OF TRUSTS § 87 at cmt. c (2007). "What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty." *Id.* § 87 at cmt. a.

As the First Department has ruled and at least some of the Objectors concede (FHLBB Objection at 1, California Pension Funds Objection at 4, NYSCEF Doc. No. 104, DW Funds Objection at 3), the Trustees have the power to enforce and settle loan repurchase claims. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012). The question is not whether the handful of Objectors, or the Court, would have hired different advisors or made a different decision, but whether the Trustees acted within the bounds of reasonable discretion by relying on carefully chosen experts and their recommendations. *See*

RESTATEMENT (THIRD) OF TRUSTS § 93 cmt. c (2012) ("If, however, a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue.").

A. The Trustees Reasonably Considered the Support of the Institutional Investors.

As a threshold matter, it was reasonable for the Trustees to consider the support of the Institutional Investors that negotiated the terms of the Settlement with JPMorgan. These Institutional Investors are the beneficial owners of 32.45% of the certificates issued by the trusts subject to the settlement proposal, many have fiduciary duties of their own, and they had every incentive to maximize the value of the Settlement. *See Countrywide Proceeding*, 2014 WL 1057187, at *10 (approving, in part, trustee's decision to accept a similar settlement and noting that "[i]t is also clear that the Trustee placed considerable weight on the fact that the Settlement was supported by twenty-two (22) institutional investors, including arms of the federal government, prominent investment managers acting as fiduciaries for their clients, and institutions managing their own money"). Professor Fischel determined that the Institutional Investors' holdings were substantially representative of the trusts, and concluded that they had no reason not to press for the maximum recovery possible. *See* Fischel Report at 34-36. By its terms, the Settlement Agreement also does not favor these investors over others. As required by the Governing Agreements, the settlement funds will flow down the waterfall, in accordance with the terms of the contract, to the investors that are entitled to receive them, regardless of whether those investors are part of the Institutional Investor group. The Objectors have also pointed to no evidence (because there is none) that the Settlement terms favor the Institutional Investors to the detriment of other investors.

B. There is No Dispute That the Trustees' Advisors Are Highly Qualified.

As set forth in the Petition, the Trustees relied on expert advisors in evaluating the key issues relating to the Settlement, including recommendations on whether to accept the Settlement as to individual Trusts and particular loan groups. The Trustees' right to rely on such opinions is widely recognized. *See Countrywide Proceeding*, 2014 WL 1057187, at *13-14, *17 (finding trustee acted reasonably in substantial part in entering settlement agreement, and discussing opinions of expert advisors trustee relied upon). Under such circumstances, the issue is not whether the opinions are right or wrong, but rather "whether the trustees properly relied on the opinions." *Cruden v. Bank of New York*, 85 CIV. 4170 (JFK), 1990 WL 131350, at *10 (S.D.N.Y. Sept. 4, 1990) *aff'd in relevant part*, 957 F.2d 961 (2d Cir. 1992); *see also In Matter of Heizer Corp*., No. CIV. A. 7949, 1988 WL 58272, at *5 (Del. Ch. June 6, 1988).

Tellingly, the Objectors do not question the Trustees' experts' qualifications. Nor could they:

- Professor Daniel Fischel of Compass/Lexecon, a former Dean of the University of Chicago Law School, and a Professor Emeritus of Law and Business, who was retained "to form an independent opinion of the reasonableness and adequacy of the Proposed Settlement for each Trust and each supporting loan group," is one of the leading academic authorities on corporate law and economics.[5]

[5] *See* Expert Report of Daniel R. Fischel ("Fischel Report"), attached as Exhibit A to the Affirmation of Matthew D. Ingber ("Ingber Affirmation"), at 7; Supplemental Expert Report of Daniel R. Fischel ("Supplemental Fischel Report"), attached as Exhibit B to the Ingber Affirmation, at 1. Professor Fischel also directed the Law and Economics program at the University of Chicago, and was a Professor of Law and Business at the Kellogg School of Management at Northwestern University and the Northwestern University Law School. Fischel Report at 1. He has published approximately fifty articles in leading legal and economics journals and co-wrote The Economic Structure of Corporate Law with Judge Frank Easterbrook of the Seventh Circuit Court of Appeals. *Id.* Courts of all levels, including the Supreme Court of the United States, have cited his articles. *Id.* He has served as a consultant or advisor on economic issues for numerous high-profile organizations, including the Department of Justice, the Securities and Exchange Commission, the New York Stock Exchange, and the Federal Trade Commission. *Id.* at 1-2. He has testified as an expert witness in proceedings in federal and state

- Faten Sabry, Ph.D., is an accredited statistician with an advanced business degree from Stanford University, and is widely published on the economics of subprime lending, the credit crisis, and the impact of securitization on the cost of credit and liquidity.[6] She was amply qualified to apply the allocation formula set forth in paragraph 3.05 of the Settlement Agreement and perform an analysis of losses.

- Jeremy Reifsnyder has over 35 years of experience in financial markets, including over 25 years of experience in structured finance and securitized products, and was plainly qualified to analyze servicing claims the Trustees may have against JPMorgan and to determine what benefit may be derived by the implementation of the Subservicing Protocol.[7]

- After twelve and a half years as an Associate Justice of the Appellate Division, Third Department, retired New York Supreme Court Justice Anthony Carpinello was qualified to provide three expert reports for the Trustees' review: (1) a report regarding the statute of limitations for claims that are to be released by the Settlement; (2) a report regarding the differences between claims brought by "monoline insurers" and those brought by Trustees, as well as the impact of the Tolling and Forbearance Agreement entered into by the Trustees and JPMorgan; and (3) a report on the interplay between the applicable statute of limitations and the requirement that JPMorgan receive notice of, and be given an opportunity to cure, breaches prior to filing a suit asserting repurchase claims.[8]

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courts across the country, including in the Article 77 proceeding before Justice Kapnick regarding the settlement of over 530 Countrywide trusts. *Id.* at 2.

6 Expert Report of Faten Sabry, Ph.D. ("Sabry Report"), attached as Exhibit C to the Ingber Affirmation, at 11-12. Dr. Sabry has also provided expert reports and deposition and trial testimony in dozens of cases, including those involving residential mortgage-backed securities ("RMBS"). *Id.* at 11-12. Multiple business journals, including the Journal of Structured Finance, Journal of Investment Compliance, Journal of Alternative Investments, and Journal of Banking Regulation and Business Economics, have published her research. *Id*.

7 Expert Report of Jeremy E. Reifsnyder ("Reifsnyder Report"), attached as Exhibit D to the Ingber Affirmation, at 4. In addition to having significant experience in evaluating the risk of, underwriting the credit of, structuring, and pricing financial transactions involving corporate credit and asset-backed risks, Mr. Reifsnyder has also worked on or evaluated the performance of at least 900 separate RMBS securitizations. *Id.* at 4. He is currently the Managing Director of Boston Portfolio Advisors, Inc., a company specializing in the management of performing and distressed asset portfolios and related litigation support. *Id*. Previously, he held leadership positions at numerous large financial institutions, including Continental Bank, Société Générale, Deutsche Bank AG, Capital Markets Assurance Corporation, MBIA Insurance Corporation, CDC IXIS Financial Guaranty, and Bear Stearns Asset Management. *Id*. at 4-5. Mr. Reifsnyder received his M.B.A in Finance from the Wharton School of the University of Pennsylvania in 1978. *Id*. at 5.

8 Expert Report of the Honorable Anthony J. Carpinello (Ret.), dated May 5, 2014 ("First Carpinello Report") attached as Exhibit E to the Ingber Affirmation; Expert Report of the

- One of the fifty most-cited law professors of all time, Professor Schwartz is a Sterling Professor of Law and a Professor of Management at Yale University. He was also qualified to opine on various issues regarding the interpretation of the Governing Agreements of the at-issue trusts under New York law.[9]

By failing to object to the qualifications of these experts, the Objectors tacitly concede that the Trustees relied upon advisors who rendered expert opinions within the scope of their expertise. For this reason alone, the Court should not credit the Objectors' criticisms about the discrepancies they perceive among the opinions. That some of the advisors themselves disagreed on various points only shows that they acted independently and were not steered to some pre-determined conclusion. The Trustees reasonably anticipated that it would be useful to retain an expert to facilitate the review of the other advisors' opinions and therefore asked Professor Fischel to do so and then render "bottom-line" recommendations on a Trust-by-Trust and loan group-by-loan group basis.

C. None of the Objections to the Expert Reports Undermine the Reasonableness of the Trustees' Decision to Accept the Settlement.

Virtually all of the objections are devoted to doing precisely what New York law says is irrelevant—attempting to poke holes in the Expert Reports on which the Trustees were entitled to rely. In *Cruden*, the Second Circuit *disagreed* that "the Trustee's good faith" was "put in

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Honorable Anthony J. Carpinello (Ret.), dated May 27, 2014 ("Second Carpinello Report") attached as Exhibit F to the Ingber Affirmation; Expert Report of the Honorable Anthony J. Carpinello (Ret.), dated June 20, 2014 ("Third Carpinello Report") attached as Exhibit G to the Ingber Affirmation. As Associate Justice, he participated in over 12,500 appeals and regularly adjudicated breach of contact claims and issues regarding statutes of limitations. First Carpinello Report at 2-3.

[9] Expert Witness Report of Alan Schwartz, dated May 27, 2014 ("Schwartz Report"), attached as Exhibit H to the Ingber Affirmation, at 1. Professor Schwartz has taught and written in the fields of contracts, commercial law (including secured transactions), corporate finance and bankruptcy for over thirty years. *Id*. He has published three casebooks, and dozens of articles in various journals and law reviews. *Id*. Professor Schwartz is highly regarded as an authority in his fields. *Id*. On top of his academic accomplishments, Professor Schwartz has also served on the boards of publically traded companies for over twenty years. *Id*.

question merely by virtue of the fact that the opinion relied upon may have been wrong," holding that "to so hold would eviscerate the opinion of counsel defense." *Cruden*, 957 F.2d at 972. The Second Circuit's conclusion applies with equal force to the Trustees' reliance here on the experts' opinions.

These objections are too frail to undermine the Trustees' decisions. Nor do they provide any basis for the Court to conclude that the Trustees abused their discretion in relying on the Expert Reports and the summary report of Professor Fischel to determine that it was in the best interests of certificateholders for the Trustees to accept the Settlement for the Accepting Trusts.

1. Purported Information Deficit.

Redactions and Lack of "Back-Up" Information. Several Objectors assert that they cannot "assess the accuracy" of the Expert Reports because they contain redactions, appear contrary to public information or purportedly lack "back up information." *See, e.g.*, FHLBB Objection at 3. This objection is both inaccurate and misleading. First, this objection misunderstands the function of the Expert Reports, which were not written to persuade potential objectors but to assist the Trustees in making their decisions. Second, the objection is misleading because the vast majority of facts material to the Trustees' settlement decisions are apparent from the face of the reports themselves. Professor Fischel's first report alone, for example, contains 235 footnotes and 139 pages of supporting data. Some redactions were necessary to protect confidential information of JPMorgan, investors represented by Quinn Emanuel Urquhart & Sullivan, LLP, and the Institutional Investors when the Trustees published the reports online, but that in no way undermines the reliability of the reports or the Trustees' reliance on them. Third, and most importantly, despite the fact that all necessary information is available in the redacted reports, the Trustees have made clear that they intend to produce un-redacted versions of the Expert Reports once an adequate protective order is in place.

Lack of Information about the Negotiations. Several Objectors assert that they know nothing about the process by which their fellow investors took the initiative to negotiate the Settlement for the benefit of all investors, including the Objectors.[10] Such information is not relevant, because the Trustees did not negotiate the economics of the settlement, they did not consider any evidence of the negotiations in making their decision to accept the settlement, and they do not seek in their Petition any finding regarding the negotiations.

Even in the class action context, where class counsel derives its very authority from the court, and the court must review the settlement for its adequacy, settlement negotiations still are not discoverable without prior evidence of collusion. *See*, *e.g.*, *Lobatz v. U.S. West Cellular of Cal. Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000) (quoting *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987)) ("[D]iscovery of settlement negotiations is proper only where the party seeking it lays a foundation by adducing from other sources evidence that the settlement may be collusive."); Joseph McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 6:11 (11th ed. 2014) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion between plaintiffs and defendants in the negotiating process."). Evidence

10 For example, some of the Objectors point to their ignorance about: the Institutional Investors' position on the amount of JPMorgan's liability (FHLBB Objection at 12); the communications between Trustees and investors, including the Institutional Investors (DW Funds Objection at 6); investigations other than hiring of experts (FHLBB Objection at 2, 3-4; DW Funds Objection at 4); whether the Trustees adequately looked into other grounds for repurchase claims that would not be time-barred (Ambac Objection at 12); whether the Trustees adequately examined losses as a proxy for representation and warranty claims or the distinguishing features of the applicable PSAs (Mem. of Law in Support of Its Objection to Petitioners' Appl. Seeking Judicial Approval of Proposed Settlement ("Triaxx Objection") at 5, NYSCEF Doc. No. 151; and the Trustees' knowledge of investors' positions relating to the Settlement (DW Funds Objection at 8).

of the negotiations is even less relevant here, because the Trustees did not participate in those negotiations.

Two Objectors highlight that Professor Fischel remarked that he lacked information about the process by which the proposed Settlement was negotiated. FHLBB Objection at 3; DW Funds Objection at 6 (citing Fischel Report at 36-37). More relevantly, though, Professor Fischel still recommended acceptance, explaining that such information is not necessary to evaluate the economic terms of the Settlement. *See* Fischel Report at 17, 50, 82-88.

2. Purported Inadequacy of the Settlement Amount.

Settlement Value. Several Objectors quote Professor Fischel's observation that the "Settlement is below that of other Settlements involving similar issues." FHLBB Objection at 11-12 (quoting Fischel Report at 21); Ambac Objection at 9; DW Funds Objection at 5; *see also* The QVT Funds' Mem. of Law in Support of Their Motion to Intervene ("QVT Funds Objection") at 4, NYSCEF Doc. No. 88. What they do not quote is the very next sentence, in which Professor Fischel identified important differences between this Settlement and other settlements of RMBS claims (such as the composition of the mortgage collateral at issue, the number of trusts involved, whether the released claims were for securities fraud or were contract-based, and whether the plaintiffs in other settlements were monoline insurers). Fischel Report at 21. Those differences, he found, support the adequacy of the Settlement even though it represents a relatively smaller fraction of collateral losses. Simply being smaller, by some measure, than other reasonable settlements does not make this one inadequate.

Objections to the Allocation. Several Objectors object to the Settlement's formula for allocating the approximately $4.2 billion cash payment among the Accepting Trusts. *See* QVT Funds Objection at 5-6; Triaxx Objection at 2-6; Letter re In re Application of U.S. Bank National Association, et al., Index No. 652382/2104 ("W&L Investments Objection") at 2-3, NYSCEF Doc. No. 148. These objections miss the mark. If the allocation is flawed, that should be manifest in the settlement payment being too small for one or more of the Accepting Trusts or loan groups, and a resulting "reject" recommendation by the experts for such Accepting Trusts or loan groups. Because the Trustees and their experts evaluated the Settlement separately for each Accepting Trust and loan group, their approach would have identified the relevant consequence of a flawed allocation—namely, whether any Accepting Trust will receive a settlement payment that is too low. In some cases, Professor Fischel recommended that the Settlement be rejected; in other instances, holders that had sufficient Voting Rights exercised their right to provide a direction and indemnity and directed that the Settlement be rejected for a given trust or loan group, likely because they believed the Settlement was too low given what they perceived to be more favorable prospects in litigation. Tellingly, however, the Objectors (who had more than nine months to evaluate this issue) have presented no evidence that the Trustees improperly relied on the experts' conclusion that the Settlement was appropriate for each Accepting Trust or loan group.

Failure to Provide Class Action Exception to Release. The California Pension Funds do not base their objection on the Settlement itself or the Trustees' evaluation of it, but on an email in which JPMorgan's counsel declined to confirm that the Settlement would have no effect on their securities fraud class action lawsuit. This objection is self-defeating—the entire objection is devoted to explaining how the Settlement does not, by its terms, release securities fraud claims, a point that the Trustees do not dispute. *See* Settlement § 4.04 ("The releases and waivers . . . do not include any direct individual claims for securities fraud or other alleged disclosure violations . . . that an Investor may seek to assert based upon such Investor's purchase or sale of Securities."); *see also id.* § 3.02 (releasing claims "based upon the Governing Agreements and that relate to the origination, sale, delivery, and/or servicing of Mortgage Loans to or in the Settlement Trusts").

JPMorgan's Ability to Offset Damages. The California Pension Funds also take issue with the following reservation of rights:

> [T]he question of the extent to which any payment made or benefit conferred pursuant to this Settlement Agreement may constitute an offset or credit against, or a reduction in the gross amount of, any [direct individual claims for securities fraud or other alleged disclosure violations that an Investor may seek to assert based upon such Investor's purchase or sale of Securities] shall be determined in the action in which such claim is raised, and . . . the Parties reserve all rights with respect to the position they may take on that question in those actions and acknowledge that all other Persons similarly reserve such rights.

Settlement § 4.04. They announce that they "find this clause unacceptable" and argue that it "gives JPM[organ] the power to minimize the payment of damages in [the Fort Worth Action]." California Pension Funds Objection at 10.

This, too, is not a serious objection. Far from giving JPMorgan some power that it did not already have, Section 4.04 says exactly the opposite: damages in securities fraud cases "shall be determined in the action in which such claim is raised," *not* in the Settlement. "[T]he mere recital of the reservation of rights cannot create rights which are not proven to exist." *Kennedy v. Mineola, Hempstead & Freeport Traction Co.*, 77 A.D. 484, 491-92 (2d Dep't 1902), *aff'd*, 178 N.Y. 508 (1904).

3. Purported Flaws in the Fischel Reports.

Professor Fischel examined a number of factors to determine whether the Settlement was reasonable as to each Trust or loan group, explaining that the expected recovery on the claims released by the Settlement is "driven by a number of factors, many of which are uncertain." Fischel Report at 10. Keeping this in mind, he considered a number of factors that are indicative of the likelihood that accepting the Settlement is superior to rejecting it. He performed this analysis on a Trust-by-Trust basis in his initial report (*id.* at 7), and then on a loan group-by-loan group basis in his supplemental report (Supplemental Fischel Report at 1). In generating bottom-line recommendations, Professor Fischel established a method for determining whether any Trust would be "harmed" by the Settlement and, thus, whether the Settlement was inadequate for that Trust. *Id*. at 17-19. He recommended that the Trustees reject the Settlement for a particular Trust when the following criteria were satisfied: (1) "The holders of a substantial proportion of the Trust's Certificates have expressed opposition to accepting the Proposed Settlement for that Trust and their holdings exceed those of certificateholders who support the Proposed Settlement"; (2) "There is an indication that the Expected Recovery would be greater than the value of the Settlement Consideration"; and (3) "The Trust's claims that are released by the Proposed Settlement, other than those related to servicing, are not likely to be barred or there is an indication that the Trust's recovery on servicing claims would exceed the Settlement Consideration." *Id.* Whatever point the Objectors wish to make, this is not a settlement objection: no part of the Court's evaluation of the Trustees' settlement decisions turns on the correctness of Professor Fischel's analysis or methodology. Each of these "objections" is nonetheless briefly discussed below to illustrate their lack of substance.

<u>The Trustees' "Obligation" to Enforce Repurchase Rights</u>. Several Objectors object that Professor Fischel recommends inclusion of most 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." *See*, *e.g.*, FHLBB Objection at 7. The Objectors highlight the portion of Professor Fischel's analysis stating that at least one measure of Expected Recovery for many Accepting Trusts exceeds the Settlement Payment and that a substantial number of the Accepting Trusts have claims that are

not time-barred, arguing that the combination of these two factors should have led to the rejection of the Settlement.[11]

This objection is wrong for two reasons. First, the Fischel Report considers many ways of valuing litigation claims. The second prong of his decision rule is satisfied if *one* such measure (out of six) exceeds the expected settlement payment for the Trust. Thus, he recommends rejection if there is any indication at all that a non-time-barred claim exists that might be worth more than the Settlement and some sizable investor (not even the 25% required by the Governing Agreements to direct litigation) appears to prefer litigation. Where the majority of investors who have announced their views support the Settlement, or where no group of investors has mobilized to do anything, he reasonably interpreted that as an indication that there is no meaningful investor support for litigation. In his view, that is a good reason for a Trustee to accept the Settlement for the relevant Trust.

Second, contrary to the claims of several of the Objectors (FHLBB Objection at 7; Ambac Objection at 13; QVT Objection at 3, 6-7), the Trustees were not obligated to reject the Settlement or commence litigation against JPMorgan absent direction and indemnity from certificateholders. The Objectors' contention (FHLBB Objection at 7; Ambac Objection at 13) that this contractual requirement is null because the Trustees may have been able to seek reimbursement in some instances from trust assets, subject to caps and other contractual

[11] FHLBB Objection at 5-6; DW Funds Objection at 7; Notice of the National Credit Union Administration Board of Liquidating Agent of Intent to Appear and Object to the Proposed Settlement ("NCUA Objection") at 12, NYSCEF Doc. No. 121; Ambac Objection at 11. Relatedly, one Objector purportedly extrapolated forensic re-underwriting results using Professor Fischel's valuation methodology for repurchase claims to posit that the potential litigation recovery is eight to twelve times greater than the value of the Settlement. Ambac Objection at 10-11. Of course, Ambac's "extrapolation" is based on plaintiff-side re-underwritings, which Professor Fischel stated are "contested" and "must be interpreted with caution." Fischel Report at 66.

limitations, is simply wrong. Further, the Fischel Report was issued after repeated notices from the Trustees updating certificateholders as to the status of the evaluation of the Settlement, and expressly inviting certificateholders to provide direction and indemnity to the Trustees. *See*, *e.g.*, Fourth Notice ("[T]he RMBS Trustees expect that the time period between receipt of the Expert Evaluations and the Acceptance Date under the Proposed Settlement Agreement likely will be short. As a result, in each case it may not be practicable to notify Certificateholders prior to the Acceptance Date of Determinations made by RMBS Trustees . . . Certificateholders that wish to provide a direction with respect to the Proposed Settlement Agreement for consideration by an RMBS Trustee should contact the applicable RMBS Trustee as soon as possible to verify their holdings and receive a confidential form of direction and indemnity letter."). It was therefore reasonable for the Trustees to rely on Professor Fischel's analysis, as it accounted for the important absence of certificateholders with substantial enough holdings to direct litigation through a direction and indemnity. Fischel Report at 18.[12]

<u>Whether Many of the Trusts Have Time-Barred Claims</u>. Several Objectors question Professor Fischel's assumption (relying on Justice Carpinello's opinion) that the repurchase claims for many Trusts are untimely, despite the accrual rule set forth in *Ace Securities Corp. v. DB Structured Products, Inc.*, 112 A.D. 3d 522 (1st Dep't 2013), *review granted*, 23 N.Y.3d 906 (2014) [hereinafter *Ace*].

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[12] DW Funds complains (at 8) that the certificateholders had no chance to organize because the Trustees accepted the Settlement only two weeks after publication of the Fischel Report, but this objection ignores the fact that the Trustees disclosed the Settlement Agreement itself eight months earlier, and the Trustees repeatedly invited investor input and specifically warned that they may need to disclose the reports shortly before the deadline to accept the Settlement. DW Funds also wrongly asserts (at 4, 8) that the Trustees of the trusts for which the acceptance date was extended did not solicit investor direction concerning the Settlement. The relevant Trustees did provide individual notices to the certificateholders of such trusts soliciting direction and explaining the actions the Trustees anticipated taking upon receipt of a satisfactory direction and indemnity to either accept or reject the Settlement or upon failure to receive any direction at all.

FHLBB's objection (at 6) hinges on the possibility that the Court of Appeals might overturn *Ace* and render those claims timely. But FHLBB has not explained how it could be an abuse of discretion for the Trustees to accept the approximately $4.2 billion Settlement for claims that were worth nothing (or close to nothing) under the law that existed at the time they made their decision, in reliance on the opinion of a retired Justice of the Appellate Division that the existing law is likely to withstand appeal. The alternative proposed by FHLBB would be to gamble the billions of dollars embodied in a certain and binding settlement on the prospect that (1) the First Department might reverse *Ace* at some point in 2015 or later and (2) a certificateholder would step forward to direct the Trustees to pursue litigation on behalf of the Trusts, so that the Trustees could try to prevail on claims in an amount that may be greater than the Settlement. It was reasonable for the Trustees to refrain from rolling the dice in this way.

Taking a different approach, Ambac contends (at 11-12) that the repurchase claims are timely despite *Ace* because some Accepting Trusts have contractual provisions in their Governing Agreements that purport to specify when the claims accrue, and contends that the Trustees failed to assess alternative claims that could purportedly be brought against JPMorgan to circumvent *Ace* altogether (Ambac Objection at 11-12; *see also* QVT Funds Objection at 5-6).

Nearly every court to consider accrual provisions in the context of RMBS has held that such provisions do not extend the statute of limitations, relying on New York cases stating that parties cannot extend a statute of limitations by contract.[13] Justice Carpinello reviewed cases

[13] *See Lehman XS Trust, Series 2006-4N ex rel. U.S. Bank Nat. Ass'n v. Greenpoint Mortg. Funding, Inc.*, 991 F. Supp. 2d 472, 478 (S.D.N.Y. 2014); *Deutsche Bank Nat.'l Trust Co. v. Quicken Loans Inc.*, No. 13 CIV. 6482 PAC, 2014 WL 3819356, at *3 (S.D.N.Y. Aug. 4, 2014); *see also John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544, 551 (1979) ("If the agreement to 'waive' or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot 'in advance, make a valid promise that a statute founded in public policy shall be inoperative.'") (citations omitted).

addressing accrual provisions and other statute of limitations cases and explained that "the majority of courts which have had to address the issue of when the six-year Statute of Limitations begins to run on claims for violations . . . of representations and warranties . . . have held that the violations occurred as of the date that the Trusts were funded or 'closed.'" First Carpinello Report at 2-4, 9-11. As to alternative claims, Justice Carpinello opined that "[t]he rule that the six year Statute of Limitations for claims relating to violations of representations and warranties accrues on the date of closing applies regardless of how these claims are denominated." *Id*. at 7. There is no support for any objection that the Trustees failed to adequately analyze the statute of limitations issue.

Further, even if this Court were to disagree with Justice Carpinello's opinion, that would merely be a finding that the opinion on which the Trustees relied is subject to dispute, not a finding that the Trustees' actions were unreasonable or in bad faith. *See Cruden, supra*. As Justice Kapnick stated, a trustee must conduct sufficient evaluation or obtain sufficient expert input before settling a claim (*see Countrywide Proceeding*, 2014 WL 1057187, at *52), and that is precisely what the Trustees did here.

<u>Adequacy of Professor Fischel's Methodology</u>. DW Funds objects (at 5) that Professor Fischel's methodology was flawed because he failed to conduct a loan file review, and instead relied on public benchmarks to assess the Settlement. But New York courts have upheld the use of public benchmarks to assess a proposed settlement, most notably in the *Countrywide Proceeding*. A loan file review is hardly the guarantee of certainty that DW Funds suggests; in repurchase litigation, plaintiffs and defendants regularly review the same files and derive wildly different defect rates, oftentimes many dozens of percentage points apart in their estimates of

defect rates.[14] For this reason, the Trustees reasonably relied on Professor Fischel's decision to rely on public, undisputed data and the conclusions he derived from it.

4. Purported Flaws in the Sabry Report.

Dr. Sabry performed several analyses in her report including: (1) estimating net losses for each Trust, including past and expected future losses; (2) estimating the "Adjusted Individual Trust Losses" for most of the Trusts;[15] (3) estimating the "Total Adjusted Trust Losses," which is the sum of the "Adjusted Individual Trust Losses;" (4) estimating the "Trust Allocated Settlement Percentage" which, for each Accepting Trust, is the "Adjusted Individual Trust Loss" divided by the "Total Adjusted Trust Losses"; (5) estimating the "Trust Allocable Share" which, for each Accepting Trust, is the "Gross Settlement Amount" multiplied by the "Trust Allocated Settlement Percentage"; and (6) conducting an economic analysis to estimate the amount of losses that may be attributable to representation and warranty claims and report results overall and for each Accepting Trust separately. Sabry Report at 8-9.

Supposed Inaccuracies. FHLBB objects (at 8) that Dr. Sabry's report on the size of losses under-counts the losses suffered by the Accepting Trusts based on the representation and warranty breaches. If her estimate is accurate, FHLBB asserts, then JPMorgan has volunteered to pay between 100% and 263% of its total repurchase liability. As a threshold matter, none of the

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14 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 at most 11%. *MBIA Insurance Corp. v. Countrywide Home Loans Inc.*, 602825-2008, New York State Supreme Court, New York County (Bransten J.). 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*. *In re Residential Capital, LLC*, Case No. 12-12020 (MG), United States Bankruptcy Court, Southern District of New York.

15 In her calculation of the "Adjusted Individual Trust Losses," Dr. Sabry excluded 90% of the Net Losses on JPMorgan Trusts associated with nine Third Party Originators who are still solvent and could theoretically contribute to any recovery on behalf of the trusts. Sabry Report at 8.

economic models employed by Dr. Sabry in her report purport to estimate the potential litigation recovery if the Trustees were to sue JPMorgan for its breaches of representations and warranties under the Governing Agreements. Sabry Report at 9-11. In the absence of a different estimate of losses (which Objectors have not provided), Dr. Sabry's report opines only that the Settlement amount is highly favorable to the Accepting Trusts. As with the statute of limitations, the alternative is difficult to justify—the Trustees would have had to *reject* a highly favorable Settlement on the ground that their expert's opinion suggested that the Settlement consideration substantially exceeded the potential litigation recovery.

Reliance on GSE Data and Modeling Based on the FHFA Complaint. FHLBB attacks (at 9-11) two of the three alternative methodologies that Dr. Sabry used to estimate, on a Trust-by-Trust basis, the amount of losses that may be attributable to the representation and warranty losses: (1) losses based on actual repurchase demands for the Trusts and imputed government-sponsored enterprise ("GSE") repurchase data, and (2) econometric modeling of loan-level default behavior and credit attributes of 60 of the 330 Trusts, using the 60 trusts that were the subject of a complaint filed by the Federal Housing Finance Agency (FHFA) against JPMorgan and others.[16]

[16] FHLBB argues that the FHFA complaint alleged widespread and systematic failures of the underlying loans to satisfy underwriting guidelines, not just the loan to value (LTV) and owner occupancy data that Dr. Sabry relied upon. FHLBB Objection at 11. But Dr. Sabry's reliance on those two sets of data was reasonable in that these two metrics were quantifiable data points that can be discretely analyzed. In any event, the FHFA allegations relating to these two factors were specific, while the allegations of general breach were generalized. FHLBB also trumpets how the re-underwriting of the loans in three of the Accepting Trusts indicated that 79%-98% of the underlying loans breached representations and warranties. *Id.* at 10-11. FHLBB neglects to mention that the data they cite relates to untested allegations in FHFA's complaint. Moreover, Fannie Mae and Freddie Mac, plaintiffs under conservatorship in the FHFA action, support this Settlement.

FHLBB's various objections about Dr. Sabry's use of the GSE data in the second methodology, and FHFA's modeling, only highlight why it was reasonable for the Trustees to rely on advisors when attempting to size the potential losses. *First*, though the Trustees are never required to demonstrate perfect (rather than reasonable) judgment, both Dr. Sabry and Professor Fischel candidly acknowledged that there is no perfect way to measure indications of liability for these complex claims. Dr. Sabry and Professor Fischel both examined the issue from multiple angles (Dr. Sabry identified three methods, Professor Fischel six), and no one method is dispositive on its own. Indeed, Professor Fischel took different approaches than Dr. Sabry in sizing potential losses (*see* Fischel Report at 21, 50-55), but reached materially the same conclusion—and ultimately recommended acceptance of the Settlement for the majority of loan groups. The fact that different analytical approaches each yielded materially similar outcomes was, in itself, confirmation that the Trustees could rely reasonably on the experts' estimates.

Second, Objectors acknowledge that Justice Kapnick upheld the settlement discretion of at least one of the Trustees (The Bank of New York Mellon ("BNYM")) that relied on an advisor's analysis of GSE data to evaluate representation and warranty losses in the *Countrywide Proceeding*. Notably, Objectors make no effort to explain why it was therefore *unreasonable* for the Trustees to rely on an expert doing the same thing in here.[17]

5. Purported Flaws in the Reifsnyder Report.

The Trustees asked Mr. Reifsnyder to investigate (1) the potential claims that might be asserted against JPMorgan for failure to adequately service loans and (2) the potential benefit

[17] FHLBB suggests (at 9) that there is something improper about the fact that BNYM's expert, Brian Lin, "reweighted" the GSE data in the *Countrywide Proceeding* to adjust the data differently. Mr. Lin's "reweighting" had an entirely different purpose: to account for the composition of different loan portfolios in the two data sets so as to ensure a meaningful comparison. Nothing in his report or in the *Countrywide* record suggests that GSE defect rates are always lower than defect rates in private-label securitizations.

that could reasonably be expected from implementation of subservicing and, specifically, the provisions of the Subservicing Protocol attached to the Settlement Agreement. Reifsnyder Report at 6. In order to perform this analysis, he first determined the "servicing loss differential," which is the difference between losses associated with JPMorgan's servicing of the Relevant Loans and losses on loans serviced by other comparable servicers in comparable trusts, from January 2009 to December 2013. *Id*. at 7. He considered this value to be the "best estimate . . . of the relative impact of JPMorgan's servicing on the level of losses experienced in the Trusts." *Id*. Mr. Reifsnyder also estimated the potential benefit, in terms of avoided losses and subservicing fees paid by JPMorgan to the subservicers, that could result from a transfer of seriously delinquent loans to subservicers. *Id*. at 10-11.

<u>Value of the Servicing Improvements</u>. FHLBB hones in on Mr. Reifsnyder's statement in his report that JPMorgan was already required to improve its servicing, and had voluntarily transferred some loans to Select Portfolio Servicing, Inc. ("SPS"), an approved subservicer in the Subservicing Protocol. Reifsnyder Report at 9. As a result, he finds that much of the estimated potential benefit of the Subservicing Protocol might be realized independent of its implementation (*id.*), an observation that FHLBB uses to suggest that the servicing improvements were a sham. FHLBB Objection at 12-13. FHLBB misses a fundamental point: while JPMorgan had voluntarily implemented subservicing of some loans, nothing required it to continue to subservice loans until the Settlement Agreement was signed. But as Reifsnyder explained, the Subservicing Protocol ensures that JPMorgan will *continue* to maintain servicing improvements; without it, JPMorgan could remove a Trust from subservicing at any time. Reifsnyder Report at 10 ("[I]mplementation of the Subservicing Protocol would [still] be valuable because it will require seriously delinquent loans remain [sic] in subservicing or be

transferred to subservicing."). Once again, it was reasonable for the Trustees to rely on Mr. Reifsnyder's opinions that a continuing obligation to deliver servicing improvements generates substantial value for the Accepting Trusts.

Professor Fischel's Use of the Reifsnyder Report. In reviewing and considering the conclusions from all the Expert Reports, Professor Fischel critiqued one method that Mr. Reifsnyder employed to value the Settlement's servicing improvements. Fischel Report at 56-58. FHLBB suggests that Fischel's criticism is evidence that Reifsnyder's entire opinion is flawed. FHLBB Objection at 13. But that not only misstates Professor Fischel's report, but also disregards the role that Professor Fischel played. The Trustees hired him to, among other things, help the Trustees integrate into their decisions the analyses of the other experts and to understand the limits and possible shortcomings of their advice. Professor Fischel's thoughtful review of certain aspects of the Reifsnyder Report hardly suggests that the latter is unreliable, and it certainly does not make the Trustees' decision to retain Mr. Reifsnyder an abuse of discretion. This is merely another case of the Objectors, with no evidence of their own and no indication that they have done anything to advance Trust claims or the Trustees' evaluation of the Settlement, trying to use the very thoroughness of the Trustees' evaluation as evidence of unreasonableness. Such efforts fall far short of what New York trust law requires to upset the Trustees' decisions to accept the Settlement.

III. The Objectors Do Not Have Standing to Assert Objections Concerning Trusts in Which They Did Not Invest.

As several of the Court's recent orders demonstrate, an objector does not have standing to object to the Settlement for any Accepting Trust or loan group in which it is not a current holder. *See* NYSCEF Doc. Nos. 185, 186, and 187 ("The court holds that [proposed objector] is not eligible to intervene, object or appear in this matter because he does not claim to be a certificateholder, and does not otherwise make a showing that he is a potentially interested person in the Accepting Trusts or the subject matter of this proceeding."); *see generally Ambac Assur. Corp. v. EMC Mortg. LLC*, 2014 WL 5285261, at *4-5 (N.Y. App. Div. 1st Dep't Oct. 16, 2014) (discussing limitations on standing to assert rights with respect to RMBS trusts).

Based on the information disclosed by the Objectors in response to the Court's request,[18] it appears that for many of the trusts, there are no objections at all. On these trusts, there is either no intervening investor or the intervention is by the Institutional Investors who favor the Settlement and do not seek discovery from the Trustees. Any arguments or discovery requests by the Objectors with respect to these trusts are therefore irrelevant and should be denied.

18 *See* Tr. of Record, 9:20-10:8 (Oct. 29, 2014) (Doc. No. 102).

CONCLUSION

For the foregoing reasons, the Trustees request that the Court grant the Petition.

Dated: New York, New York
December 3, 2014

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