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.

THE TRUSTEES' BRIEF IN SUPPORT OF THE SETTLEMENT

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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, 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 "Accepting Trustees" or "Trustees") of residential mortgage-securitization trusts (the "Accepting Trusts"), respectfully submit this memorandum of law in support of their concurrently-filed Petition seeking judicial instructions and approval of their acceptance of a settlement on behalf of the Accepting Trusts.

PRELIMINARY STATEMENT

On August 1, 2014, the Accepting Trustees accepted a settlement agreement on behalf of the Accepting Trusts that resolves claims that JPMorgan Chase & Co. and its affiliates (collectively, "JPMorgan") misrepresented the quality of mortgage loans deposited in the Accepting Trusts and failed to service the loans properly (the "Settlement"). The Settlement requires JPMorgan to make a cash payment of $4.5 billion (reduced as required under the terms of the settlement agreement) and to implement detailed mortgage-loan servicing standards that are intended to improve loan servicing and ensure that the highest-risk loans receive the most attention. The Settlement was negotiated by 21 of the largest and most sophisticated institutional investors in the world (collectively, the "Institutional Investors"). The group, which encompasses both fiduciary asset managers and institutions investing their own money, was represented by counsel that has negotiated several of the largest litigation settlements in American history from residential mortgage-backed securities ("RMBS") sponsors and servicers. The settlement offer initially was presented to the Trustees in November 2013.

Since then, the Trustees have devoted eight and a half months to evaluating the settlement offer. As the Trusts' governing agreements expressly permit, the Trustees received opinions from three consulting firms and two legal experts covering a range of economic, business, and legal issues that are relevant to the merits of the Settlement. The Trustees provided investors with notice of the initial settlement offer and of various subsequent developments, and the Trustees have since disclosed each of the expert reports to the public. The Trustees have solicited and received statements by investors in support of and in opposition to the settlement, and the Trustees' experts have considered both the size of the investors' holdings as well as the substance of views that they have expressed. In addition, the Trustees have made their final acceptance of the Settlement contingent on this Court's approval, after a worldwide notice program (described in greater detail in the Petition) and an opportunity for all investors to be heard in a formal judicial proceeding.

Based on the information available to them and the opinions of their expert advisors, each Trustee evaluated the settlement for each of the relevant Trusts that it administers. Each Trustee's entry into the settlement was made in good faith, and followed a robust and informed process. In order to avoid a multitude of lawsuits and the risk of conflicting judgments, the Trustees ask this Court to rule that under New York law, the Trustees' actions are within the scope of their authority.

STATEMENT OF FACTS

The Governing Agreements

The 330 securitization trusts that are subject to the proposed settlement offer were established between 2005 and 2007. As set forth in the Petition, contracts known as Pooling and

Servicing Agreements ("PSAs") govern most of the Trusts.[1] Under the Governing Agreements, a loan originator or aggregator, the "Seller" (here, JPMorgan), sold portfolios of loans secured by mortgages on residential properties ("Mortgage Loans") to another entity, the Depositor. The Depositor then conveyed the Mortgage Loans to the Trusts or one of the Trustees for the benefit of investors (or "Certificateholders") who, through an underwriter, bought securities issued by the Trusts and backed by trust assets from the Depositor (or an affiliate). A master servicer or servicer, or both ("Servicer"), had responsibility for, among other things, collecting debt service payments on the Mortgage Loans, taking any necessary enforcement action against borrowers, and distributing payments on a monthly basis to the Trustees or securities administrator for distribution to the Certificateholders.

The representations and warranties of the Seller—JPMorgan—are at the core of this proceeding. In the Governing Agreements, JPMorgan warranted various matters regarding each Mortgage Loan, such as that each Mortgage Loan was underwritten generally in accordance with the guidelines of a particular originator. The remedy for a breach of a representation or warranty is specified in the Governing Agreements. Those contracts provide that, upon discovery and/or notice of a breach with respect to a particular Mortgage Loan that materially and adversely affects the interests of the Certificateholders, the Seller shall either cure the breach within a certain period of time (usually 90 days) or repurchase the Mortgage Loan at the price of the loan's unpaid principal balance, plus accrued interest.

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[1] Some of the Trusts have a different structure—they issued Notes pursuant to an Indenture (collectively, the "Indentures") on which one of the Trustees serves as indenture trustee. A separate agreement, such as a Sale and Servicing Agreement ("SSA"), governs other terms of these transactions. Although there are important differences between the PSA and Indenture structures, with regard to the Settlement, both the nature of the claims being released and the Trustees' authority to do so are similar under the two structures. The PSAs, Indentures, SSAs and other related agreements are collectively referred to herein as the "Governing Agreements."

Acceptance of the Settlement

In keeping with the Governing Agreements, the Trustees relied on the reports of expert advisors. *See, e.g.*, BSABS 2006-HE1 Pooling and Servicing Agreement §§ 9.01(i), 9.02(a), available at http://www.sec.gov/Archives/edgar/data/1349160/000088237706000465 /d422821_ex4-1.htm. The Trustees received eight formal reports to help it evaluate the claims that would be released under the Settlement and the adequacy of the settlement consideration for each Trust. Four of the reports addressed legal issues, such as the statute of limitations and the meaning of certain contract terms; one addressed claims and settlement terms relating to loan servicing; and one projected each trust's collateral losses and evaluated the sufficiency of the settlement consideration in relation to the losses. The final two reports also analyzed collateral losses, considered the conclusions of certain of the other experts, and made recommendations to accept or reject the settlement, first on a trust level and then at the level of loan groups within some Trusts.

The evaluation process accounted for the totality of the relevant circumstances. As an initial matter, each Trustee reviewed and analyzed the terms of the proposed settlement. The Trustees and their experts and advisors carefully considered the conclusions and recommendations of the experts. They also considered the extent to which investors in each trust had expressed support or opposition to the settlement; the extent (if any) to which investors in each Trust had historically communicated to the Trustee of that Trust an interest in pursuing loan repurchase or servicing claims; the willingness of investors to pursue litigation if the settlement were rejected; and the uncertainty associated with any such litigation.

The Trustees signed the settlement agreement on August 1, 2014, and filed this proceeding on August 4, 2014.

ARGUMENT

The Court has the authority to approve this settlement, and in doing so must apply a highly deferential standard of review: the settlement must be approved unless the Trustees abused their discretion by acting in bad faith or unreasonably. The evidence shows overwhelmingly that this standard has been satisfied.

I. The Court Has the Power to Offer Judicial Instructions Under CPLR Article 77 and Approve the Settlement.

The Trustees invoke the Court's well-recognized equitable power to grant judicial instructions. Section 7701 of the CPLR provides that, with certain exceptions not relevant to this proceeding, "[a] special proceeding may be brought to determine a matter relating to any express trust." This section is "broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants." *In re Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 (1st Dep't 1982). The Accepting Trusts here are governed by the laws of the State of New York and fall within § 7701 of the CPLR. *See, e.g.*, *LaSalle Nat'l Bank Assoc. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001). And the Trustees' request for approval of the settlement is a "matter of interest" within the Court's jurisdiction pursuant to CPLR 7701. *See In re Application of IBJ Schroder Bank & Trust Co.,* No. 101530/1998, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (Article 77 proceeding approving settlement involving assets of a securitization trust) (Ex. 1).

Article 77 merely provides a procedure for pursuing a longstanding equitable remedy. *See In re Bank of New York Mellon*, No. 651786/11, 2014 WL 1057187 (N.Y. Sup. Ct. Jan. 31, 2014) (approving settlement in Article 77 proceeding brought by The Bank of New York Mellon); 4/25/2012 Order, *In re Bank of N.Y. Mellon*, No. 651786/2011 (N.Y. Sup. Ct.) (denying motion to convert Article 77 proceeding into a plenary action) (Ex. 2); 7/24/2014 Order, *In re*

Matter of Trusteeship, No. 14-cv-02494, at ¶ 91 (S.D.N.Y.) (Ex. 3); *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 31 (2d Cir. 2010) (noting that the term "relates to" in § 7701 is a "broad phrase"); *In re Scarborough Props. Corp.*, 25 N.Y.2d 553, 555 (1969) (granting Article 77 petition by "trustees of various trusts" concerning decision to sell trust assets); RESTATEMENT (SECOND) OF TRUSTS § 220 cmt. c (1959) ("Where a trust is administered under the supervision of the courts of a State, those courts have jurisdiction to determine the interests of all claimants, resident or non-resident, with respect to the administration of the trust.").[2]

II. The Trustees Have the Power to Enforce and Settle Repurchase and Servicing Claims.

Under the Governing Agreements, the Trustees have the power to enforce and settle the repurchase and servicing claims at issue here.

Each PSA conveyed to the respective Trustee a pool of mortgage loans, and each Indenture conveyed a security interest in a pool of mortgage loans. Together with that transfer, the Seller made representations and warranties about the characteristics of the loans and the underwriting process. "The plain meaning of [contract provisions that transfer title to a securitization trustee] ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted." *LaSalle*, 180 F. Supp. 2d at 471; *see also In re Bank of New York Mellon*, 2014 WL 1057187, at *9 ("This provision [of the PSA] effectively grants the Trustee the power and authority to commence litigation."); *Wells Fargo Bank, N.A., Trustee v. Konover*, No. 3:05-cv-1924, 2009 WL 2710229, at *3 (D. Conn. 2009) ("The PSA establishes that Wells Fargo as Trustee does have these customary powers [to sue], as other courts have held

[2] Consideration of the Trustees' collective Petition also has the benefit of efficiency and conservation of judicial resources.

in cases involving similar PSAs"); *LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 633 (D. Md. 2002) ("Section 2.01 of the PSA in this case, when read together with other provisions of the PSA, grants [the trustee] the authority to institute this action as the real party in interest"). Indeed, as the First Department has held, the "authority [to sue under the PSAs] is committed *solely* to the trustee." *Asset Securitization Corp. v. Orix Capital Markets, LLC*, 12 A.D.3d 215, 215 (1st Dep't 2004) (emphasis added).

An incident to the right to sue or be sued is the power to compromise or settle suits. *See Levine v. Behn*, 282 N.Y. 120 (1940); *see also Brown v. John Hancock Mut. Life Ins. Co. of Boston*, 145 Misc. 642, 646 (N.Y. Mun. Ct. 1932) ("The power to sue ordinarily carries with it the power to settle."). Thus, "[i]nherent in the Trustee's power to commence litigation is the power to settle litigation." *BNYM*, 2014 WL 1057187, at *9; *see also In re IBJ Schroder Bank & Tr. Co.*, 271 A.D.2d 322, 322 (1st Dep't 2000) ("the same provision of the trust agreement [that] gave the [securitization] trustee the power to commence the underlying action . . . includes the power to settle that action").

III. The Settlement Should Be Approved.

"Where 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 (2007). Thus, "[w]hen reviewing a Trustee's exercise of discretion [to settle], the Court's role is limited to preventing an abuse of discretion." *BNYM*, 2014 WL 1057187, at *9. That inquiry depends on whether the trustee acted reasonably and in good faith. *See Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010) ("Where 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."); *In re First Trust & Deposit Co.*, 280 N.Y. 155, 163 (1939) ("We find no abuse of discretion and no evidence of

bad faith or that the trustee administered the trust in a careless or negligent manner"). Because the Trustees acted in good faith and with reasonable care in entering into the settlement, the Court must approve it.

A. The Trustees Acted in Good Faith Because the Trustees Accepted the Settlement to Benefit the Certificateholders.

The Trustees accepted the Settlement because they believed it was in the best interests of the Certificateholders. *See* Pet. ¶¶ 14, 53, 72. 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).

As set out above, the Trustees considered the terms of the Settlement, advice received from qualified experts, and the feedback received from investors. Moreover, the Trustees do not garner any personal benefit from the Settlement: the cash payment will be distributed entirely to investors, and the servicing improvements will enhance the value of the Trusts' collateral and will not inure to the benefit of the Trustees.

B. The Trustees' Actions Were Reasonable.

Even apart from the merits of the Settlement, several factors are sufficient on their own to show that the Trustees acted reasonably in accepting the Settlement.

1. A Large and Diverse Group of Sophisticated Investors Participated in the Negotiations and Support the Settlement.

The Institutional Investors that negotiated and urged the Trustees to accept the Settlement have substantial holdings in a majority of the trusts. Those vast holdings gave them a tremendous and direct interest in the health of the trusts. They are also among the largest and most sophisticated investors in the world.

In order for this Court to reject the Settlement, it would have to conclude that the process undertaken by the eight Trustees with respect to the Settlement was not only wrong, but so obviously wrong as to constitute an abuse of discretion. The eight and a half-month process by which the Trustees, with the assistance of capable advisors, analyzed the settlement reflects a careful, informed, and rational exercise of the Trustees' discretion.

2. The Trustees Reasonably Relied on Subject-Matter Experts.

In evaluating the Settlement, the Trustees relied on the opinions of experienced advisors. The Governing Agreements expressly endorse the Trustees' consultation with such advisors. *See, e.g.*, PSA §9.02(a); *see also Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) (concluding that trustee reasonably relied, based on findings "that there was a studied approach to the opinions, and that the Trustees and Simpson, Thacher corresponded about them, reflecting discussion and work between them," and stating "[n]or is the Trustees' good faith put in question merely by virtue of the fact that the opinion relied upon may have been wrong; to so hold would eviscerate the opinion of counsel defense"); *In re Joost's Estate*, 100 N.Y.S. 378, 381 (Sur. Ct. Kings Cnty. 1906) ("[W]here, in the course of the administration of his trust, he is confronted with any question which requires the advice of a skilled specialist and in good faith seeks such advice, receives the same, and acts thereon, he is not held accountable for the consequences of following it[.]"), *aff'd*, 126 A.D. 932 (2d Dep't 1908).

As set forth in the Petition and summarized above, the Trustees here relied on a team of highly-qualified legal, business, and economics experts. The reports that the Trustees considered covered the factors that courts themselves consider when evaluating a settlement *de novo*. A settlement must not be judged "in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd,* 818 F.2d 145

(2d Cir. 1987). So long as the settlement is "fair, adequate and reasonable" in light of "the risks in the ongoing litigation [and] the likelihood of plaintiff's ultimate success," it cannot be disturbed. *State v. Philip Morris, Inc.*, 179 Misc. 2d 435, 440 (Sup. Ct. N.Y. Cnty. 1998); *see also Jacobs v. United States*, No. 08-cv-8061, 2012 WL 5504783, at *20 (S.D.N.Y. Nov. 13, 2012).

The Trustees and their experts also reasonably considered the cost, delay, and risk associated with litigating "rep and warranty" litigation on a trust-by-trust basis. Lawsuits over repurchase claims involving 1.26 million loans in 330 trusts, as well as loan-servicing claims that have never actually been litigated by any investor or trustee, "would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court." *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011); *see also In re Residential Capital, LLC*, 497 B.R. 720, 734 (Bankr. S.D.N.Y. Sept. 13, 2013) (approving loan-repurchase settlement in light of "anticipated scope of discovery" and the "enormous discovery burden required" in an RMBS case "involv[ing] only five securitizations"). Accordingly, it was reasonable for the Trustees to account for the uncertainty, cost, and delay inherent in litigation in determining to accept the settlement for the relevant Trusts. *See, e.g.*, *In re AIG Secs. Litig.*, 916 F. Supp. 2d 454, 469 (S.D.N.Y. 2013) (settlement "must take into account a number of variables that may impact the parties' expected gains from foregoing trial, including settlement awards in comparable suits, the cost of delay, the value of potential verdicts in related suits, and changes in the bargaining position of the parties, among other factors"); *Maley v. Del Global Techs. Corp.*, 196 F. Supp. 2d 358, 361 (S.D.N.Y. 2002) (the "uncertainty" of litigation must be "weighed against the immediate and tangible benefits conferred by the Settlement").

* * *

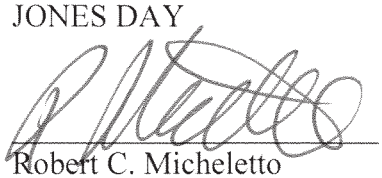
In sum, the Settlement has the support of a diverse group of sophisticated investors, who have substantial holdings in a majority of the trusts, and it was subjected to an exceptionally thorough evaluation by the Trustees and their experts. Because the Trustees' evaluation process and final determinations were reasonable and made in good faith, the Settlement must be approved.

CONCLUSION

For all the foregoing reasons, the Court should grant the Trustees' Petition.

Dated: New York, New York
August 4, 2014

JONES DAY



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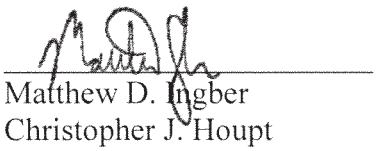

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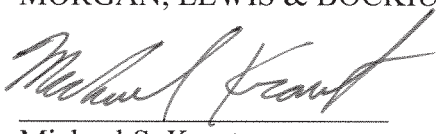

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