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,

-against-

FEDERAL HOME LOAN BANK OF BOSTON (intervenor), TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD. (intervenors), QVT FUND V LP, QVT FUND IV LP, QUINTESSENCE FUND L.P., QVT FINANCIAL LP (intervenors), BREVAN HOWARD CREDIT CATALYSTS MASTER FUND LIMITED AND BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED (intervenor), THE NATIONAL CREDIT UNION ADMINISTRATION BOARD AS LIQUIDATING AGENT FOR U.S. CENTRAL FEDERAL CREDIT UNION, WESTERN CORPORATE FEDERAL CREDIT UNION, MEMBERS UNITED CORPORATE FEDERAL CREDIT UNION, SOUTHWEST CORPORATE FEDERAL CREDIT UNION, AND CONSTITUTION CORPORATE FEDERAL CREDIT UNION (intervenor), and AMBAC ASSURANCE CORPORATION, AND THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION (intervenors),

Respondents,

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

Index No. 652382/2014

Motion Sequence 004

THE TRUSTEES' MEMORANDUM OF LAW REGARDING THE APPROPRIATE SCOPE OF DISCOVERY

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In the face of the expansive discovery served by the Objectors, it bears reminding that the Trustees seek only a finding that they acted within the broad discretion that the law affords them. As to that finding, consistent with the scope of this proceeding and the deferential standard of review, the Trustees have agreed to provide a substantial quantity of material. Yet the Objectors are unsatisfied. They seek expansive discovery to address issues well beyond the bounds of this proceeding, such as whether $4.2 billion (plus the other settlement consideration) is the "right" settlement amount for the released claims; or whether the Trustees could have negotiated a different settlement. Simply put, these requests for production seek discovery as to issues that have no bearing on this special proceeding and are likewise burdensome, numbering over 60. Accordingly, the Court should limit the scope of discovery to that which the Trustees have agreed to produce and no more.

ARGUMENT

I. THE ISSUE BEFORE THE COURT IS WHETHER EACH TRUSTEE'S DECISION WAS WITHIN ITS REASONABLE DISCRETION.

As a general rule, "[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) (citations omitted) (emphasis added). This general understanding regarding the limited role of judicial review over trustees applies with full force in Article 77 proceedings. As Justice Kapnick held earlier this year in approving a securitization trustee's decision to enter into a similar settlement, New York trust law does not permit a court to "interfere" with a trustee's settlement decision unless there is "an abuse of discretionary authority." *In re Bank of New York Mellon*, 2014 NY Slip Op 30309(U), 2014 N.Y. Misc. LEXIS 452, at *30 (Sup. Ct. N.Y. Cnty Jan. 31, 2014). Put another way (by another Article 77 court reviewing a settlement decision by

a securitization trustee), a settlement decision "is entitled to judicial deference," and "the trustee's view must prevail" where the "trustee's decision to [settle] . . . is reasonable and prudent." *In re IBJ Schroder*, No. 101580/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000). Thus, the narrow question here is whether the Trustees abused their discretion by accepting the Settlement.

Contrary to the Objectors' belief, the question before the Court is *not* whether the Settlement is "fair, reasonable and adequate." (*See* FHLBB Objection at 4.) That class action settlement standard does not apply to judicial review under Article 77, and the discovery that they seek goes beyond even that permitted in class actions. Nor is this proceeding an opportunity for the Objectors to *litigate* the settled claims against JPMorgan—precisely the undertaking that any settlement is meant to avoid. *See Newman v. Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972) ("[S]ince 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.") (citations omitted)); s*ee also Robertson v. Nat'l Basketball Ass'n*, 72 F.R.D. 64, 68-69 (S.D.N.Y. 1976). The Objectors' attempt to broaden the scope of issues before the Court is directly contrary to the nature of Article 77 proceedings as well as the circumscribed role courts play in reviewing a Trustee's exercise of its discretion.[1]

II. DISCOVERY SHOULD BE TAILORED TO THE ISSUES IN THE CASE.

CPLR 3101(a), which applies to Article 77 proceedings (*see* CPLR 408), permits discovery only of "matter *material and necessary* in the prosecution or defense" of an action. The "standard of materiality" is defined "as being 'one of usefulness and reason,' with the focus

[1] The Objectors have also served interrogatories on the Trustees. The Trustees have objected to these interrogatories for failure to comply with Comm. Div. R. 11-a(b) and do not address them herein. In any event, the interrogatories fail for the same substantive defects as the document requests.

to be placed on 'sharpening the issues and reducing delay and prolixity.'" *NBT Bancorp v. Fleet/Norstar Fin. Group, Inc.*, 192 A.D.2d 1032, 1033 (3d Dep't 1993) (citations omitted). Accordingly, discovery that will "hardly aid in the resolution of the question [before the court]" or will "unnecessarily broaden the scope of the litigation and invite extraneous inquiries" is improper. *Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 745 (2000) (citations omitted).

Courts have restricted discovery in Article 77 proceedings to evaluating a trustee's actions in connection with the specific relief sought. For example, in *In re Beeman*, the court affirmed an order limiting the scope of discovery to the "petitioner's acts as trustee insofar as they relate to the validity of the intermediate accounts" and denied discovery relating to the "trust corpus" because that discovery "extended beyond the scope of this proceeding." 108 A.D.2d 1010, 1012 (3d Dep't 1985). Likewise in *Andrews v. Trustco Bank, N.A.*, the court affirmed an order denying discovery demands for "all memorandum [sic], correspondence, and work papers related to the administration of the trust," because such requests "plainly are overbroad, seek irrelevant information and impose an undue burden." 289 A.D.2d 910, 913 (3d Dep't 2001) (internal quotations omitted). These limitations follow from the fact that Article 77 proceedings are intended to be summary proceedings. *See Gregory v. Wilkes*, 26 Misc. 2d 641, 642 (Sup. Ct. N.Y. Cnty. 1960).

A. The Trustees Have Already Agreed To Produce All Of The Documents Relevant To The Court's Inquiry.

Consistent with the Court's inquiry and the purpose of Article 77, the relevant documents are those concerning each Trustee's determination whether to accept the Settlement with respect to Accepting Trusts in which the Objectors have a beneficial ownership (the "Subject Trusts"). The Trustees have agreed to provide that material. Specifically, they will produce non-privileged documents and information responsive to the following categories:

1. documents considered by each Trustee's committee or other relevant decision maker(s) when determining whether to accept the Settlement;

2. documents provided by the Trustees to Jeremy E. Reifsnyder, Boston Portfolio Advisors, Inc.; Faten Sabry, Ph.D., National Economic Research Associates, Inc.; or Daniel R. Fischel, Compass Lexecon, in connection with their respective evaluations of the Settlement;

3. identification of witnesses with knowledge of information that is material and necessary to the Court's review of the Trustees' respective decisions to accept the Settlement on behalf of the Accepting Trusts;

4. unredacted versions of the expert reports of (i) Mr. Reifsnyder, dated July 12, 2014; (ii) Dr. Sabry, dated July 17, 2014; (iii) Mr. Fischel, dated July 17, 2014; and (iv) Mr. Fischel, dated July 26, 2014; and

5. the pooling and servicing agreement or the indenture and sale and servicing agreement, and the prospectus supplement and/or private placement memorandum.

The remaining material sought by the Objectors is irrelevant to this proceeding, places an undue burden on the Trustees, and threatens to delay significantly the ultimate recovery for the Trusts. [2]

B. The Objectors Seek Documents Beyond The Scope Of This Proceeding.

In addition to the documents the Trustees have already agreed to produce, the Objectors served more than 60 burdensome requests for production (broadly grouped together below, for ease of review). These requests seek irrelevant documents that would require many months to produce:

1. *Potential repurchase or servicing claims that could have been asserted against JPMorgan or other sponsors or sellers related to the Accepting Trusts and related to trusts that are not part of this Article 77 proceeding.*

Many of Objectors' requests seek documents that, at best, are relevant to the *merits* of the settled claims. But inquiry into the merits of the settled claims is beyond the scope of the issues

[2] The Trustees reserve all rights concerning discovery in this matter. The Trustees will not produce information protected from disclosure by any privilege or immunity recognized by law.

presented in this proceeding. What is more, permitting this discovery would transform this action from one concerning the reasonableness of the Trustees' decision to accept the Settlement into a costly, multi-year litigation of the underlying claims. Doing so would undermine the central benefit of the Settlement—prompt recovery for certificateholders without years of costly and uncertain litigation. *See BlackRock Fin. Mgmt. Inc. v. Segregated Acct. of AMBAC Assur. Corp*., 673 F.3d 169, 179 (2d Cir. 2012) (rejecting attempt by objectors to "recast the . . . proceeding (which concerns a trustee's rights, duties, and obligations) into the underlying claim resolved in the Settlement Agreement").

2. *The Trustees' alleged liability in connection with the Accepting Trusts and/or the Settlement.*

The Objectors seek all documents relating to the Trustees' alleged "liability" in connection with the Accepting Trusts but *unrelated* to the Settlement. These documents are not relevant—they relate to claims that are *not* released in the Settlement and as to which the Trustees seek *no finding* in this case. Indeed, it is clear from the expert reports that the Trustees' alleged liability did not factor into the experts' conclusions.

3. *Statistical, econometric, or other models used by the Trustees' retained experts in their evaluations of the Settlement; and communications between the Trustees and their experts.*

These documents are not relevant to the issue before the Court. At most, they are relevant to conjuring up errors in the experts' reports that are not evident from the face of the reports, or to generating disputes between the Trustees' advisors and the objectors' litigation experts. Simply put, these are precisely the type of matters that do not (and cannot) bear on the good faith of the Trustees, and thus are not relevant in this proceeding.

In sum, there is no justifiable basis for the sweeping discovery Objectors seek here. The Court should tailor discovery to the contours of this special proceeding, and should reject attempts to erode these settled discovery limits.

Dated: New York, New York
December 9, 2014

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