SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instruction.

Index No. 652382/2014

Assigned to: Friedman, J.

RESPONDENTS' MEMORANDUM OF LAW CONCERNING DISCOVERY TO THE INSTITUTIONAL INVESTORS[1]

[1] The Intervenors, Proposed Intervenors, and/or Respondents (collectively, "Respondents") that join in this brief are: the Federal Home Loan Bank of Boston ("FHLB Boston"); 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 ("NCUA"); Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"); Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund (the "DW Funds"); and Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. ("Triaxx"). The DW Funds join this brief as to all Inside Institutional Investors other than Metropolitan Life Insurance Company and Teachers Insurance and Annuity Association of America.

Respondents have served a single production request on the Institutional Investors, seeking information and analyses presented to JPMorgan with regard to the nature and extent of JPMorgan's repurchase and servicing liability. *See* Ex. A. This information is essential to understanding whether the Trustees appropriately considered—as they assert in their First Amended Petition—"the potential recoveries on the claims to be released" and "the legal and factual defenses to such claims." Doc. No. 57, First Amended Petition ("Petition"), ¶ 3. This information is likewise relevant and material to whether the Trustees' acceptance of the Settlement was "based on a thorough and reasonable investigation of the claims proposed to be released and of the settlement consideration." *Id.*, ¶ 75.

The necessity of asking the Institutional Investors for this discovery—as opposed to the Trustees—stems from a remarkable concession by the Trustees during the parties' meet and confer. The Trustees do not have this information because they never requested it from JPMorgan or the Institutional Investors. Indeed, the Trustees to this day, apparently have no idea what the Institutional Investors' position is on the nature and extent of JPMorgan's liability. Yet, the position of JPMorgan's adversary obviously is relevant to understanding the "value" of the claims being released, as well as the reasonableness of the Trustees' decision to accept the Settlement. Accordingly, Respondents' request for this information is appropriate.[2]

A. The Institutional Investors' analysis of JPMorgan's liability is relevant and material to the relief sought by the Trustees.

Respondents make one discrete discovery request to the Institutional Investors:

> Any presentations, analyses, or other documents or communications provided to or discussed with JP Morgan relating to the subject matter of the Settlement or the negotiation of the Settlement.

[2] Respondents have also submitted a single interrogatory to the Institutional Investors regarding their holdings information. There should be no dispute that the Institutional Investors are required to respond to this request. Respondents have already provided their holdings information to Petitioners.

Ex. A at 9. This specific request is relevant and material because this information relates to the process by which the Trustees purportedly evaluated JPMorgan's potential liability to the Trusts, "the potential recoveries on the claims to be released," as well as the negotiation of the Settlement itself. *See* Petition, ¶¶ 3, 75. The extent to which the Settlement represents a large or small percentage of the losses alleged by the Institutional Investors clearly is relevant to any understanding of the negotiation process, and the Trustees' determination that the Settlement is in the best interests of Certificateholders.[3] In addition, the information is relevant and material to evaluating the Trustees' "reasonable reliance" on, among things, Dr. Sabry's determination that the Settlement represents between 100% and 260% of the "amount of losses that may be attributable to JPMorgan's alleged breaches of representation and warranties" (*see* Petition ¶ 63) – reliance that may be significantly undermined by the Institutional Investors' position.

B. Information given to JPMorgan by the Institutional Investors is relevant and not privileged.

The Institutional Investors contend that information they shared with JPMorgan during settlement negotiations is irrelevant because the only issue before the Court is whether the Trustees acted reasonably. There are two flaws with this argument. First, the information is relevant to that precise issue, as discussed above. Second, the Institutional Investors ignore the unique nature of these particular proceedings. The Institutional Investors negotiated a Settlement that compromises not only their claims, but the claims of thousands of Certificateholders, including Respondents. No court appointed them to serve in this capacity, supervised their effort, ensured the absence of conflicts, or evaluated their ability to represent fairly the interests of the group of institutions on whose behalf they purported to act. The Trustees, for their part,

[3] Thus, it is no surprise that in the Countrywide Art. 77 Proceedings, the Institutional Investors produced certain settlement communications, including damage analyses that were provided to Bank of America during negotiations.

were nowhere to be found, even though, as they explain in their petition, they are responsible for enforcing the Trusts' repurchase and servicing obligations. *See* Petition, ¶ 48-50. Under the circumstances, the narrow category of information sought from the Institutional Investors should be produced. *See, e.g., Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 796 N.Y.S.2d 89, 90 (1st Dep't 2005) ("The court properly ruled that the disputed documents relating to the settlement negotiations are discoverable since they are material and necessary to a party's defense of the action"); *DH Holdings Corp. v. Marconi Corp. PLC*, 809 N.Y.S.2d 404, 407 (Sup. Ct. N.Y. Cnty Oct. 24, 2005) (compelling disclosure of settlement related documents because "[t]he heart of this matter is to determine if the settlement was appropriate, and if so, was it reasonable"); *see also Geltzer v. Andersen Worldwide, S.C.*, No. 05-3339, 2007 WL 273526, at *1 (S.D.N.Y. Jan. 30, 2007) (explaining when denying a bankruptcy trustee's motion for judicial approval of a settlement that because the trustee is not acting "in his or her own personal interest, but on behalf of others," the court should "exercise more than superficial scrutiny and may not merely rely on the assurances of any party").

The Institutional Investors also have taken the position that all information responsive to the discovery request is protected by the "mediator privilege." However, New York does not have a rule, legislative or judicial, that recognizes this privilege. *See Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd*, 10 N.Y.3d 923 (2008) ("Although appellant urges this Court to apply the confidentiality provisions in the Uniform Mediation Act as a matter of public policy, New York has not adopted that Act and we decline to do so."). And even if the Court considered the privilege, it is waived where the holder of the mediation privilege or duty of confidentiality "asserts a claim that in fairness requires examination of a protected communication." *Hays v. Equitex, Inc. (In re RDM Sports Group, Inc.)*, 277 B.R. 415,

437 (Bankr. N.D. Ga. 2002) (citing *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)). This doctrine is based in fairness and equity, and does not allow a party to use a privilege as both a shield and a sword. *Id.* (citing *United States v. John Doe (In re Grand Jury Proceedings)*, 219 F.3d 175 (2d Cir. 2000)).[4] Thus, as Co-Petitioners, the Institutional Investors cannot simultaneously claim the Trustees conducted a thorough and reasonable investigation and withhold information that may undermine this position. Indeed, should the Institutional Investors not be required to provide the modest discovery that Respondents seek, then the Institutional Investors should be barred from providing any evidence or testimony in this proceeding purporting to speak to the "arm's-length" nature of the Settlement or the reasonableness and good faith of the Settlement process, as they refuse to disclose their own role in that process and have no particular knowledge of anything known to or considered by the Trustees.

In addition, because the negotiations purportedly were for benefit of all Certificateholders, including Respondents, the information should not be withheld. Under basic principles of trust law, materials affecting the rights of beneficiaries must be disclosed. *See, e.g.*, *Restatement (Second) of Trusts* § 173 cmt. c (1959) ("[T]he beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust."). In fact, even the attorney-client privilege gives way to a beneficiary's right to obtain information relevant to the administration of trust assets, as recently

[4] To the extent the Institutional Investors suggest that the mediation privilege under California law applies because they elected to mediate in California, they are mistaken. The Settlement Agreement indicates that all disputes regarding the settlement will be "governed by and construed in accordance with the laws of the State of New York, without giving effect to the choice of law principles thereof." *See* Settlement Agreement, § 7.19. And even if California law did apply, the privilege is certainly not absolute. *See Stewart v. Preston Pipeline, Inc.*, 134 Cal.App.4th 1565, 1574, n. 11 (2005) (recognizing that the "mediation privilege was never intended by the Legislature to be absolute, no matter how fervently proponents of absolute mediation privilege may argue") (citation omitted).

recognized by Justice Kapnick. *See In re Bank of New York Mellon*, Index No. 651786/2011, Doc. No. 825, Decision/Order, May 21, 2103 at 10-17; *see also Hoopes v. Carota*, 142 A.D.2d 906, 909-10 (3d Dep't 1988). Accordingly, the "mediator privilege"—not even recognized in New York—cannot bar production of the requested information.

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CERTIFICATE OF SERVICE

I, Derek W. Loeser, hereby certify that on December 9, 2014, a true copy of the above document was served on the Parties, through their counsel of record, via ECF.

/s/ *Derek W. Loeser*
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