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 COO 2006-1, LTD., TRIAXX PRIME COO 2006-2, LTD., TRIAXX PRIME COO 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 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

Marcy S. Friedman, J.S.C.

JPMORGAN CHASE & CO.'S BRIEF REGARDING THE APPROPRIATE SCOPE OF DISCOVERY

JPMorgan Chase & Co. ("JPMorgan") respectfully submits this brief to address the appropriate scope of discovery in this proceeding and the discovery demands emailed by the Objectors[1] after 6 p.m. last evening, just hours before the Court's deadline for filing these submissions concerning discovery (the "Requests," Ex. 1 to Decl. of Darrell S. Cafasso).

PRELIMINARY STATEMENT

The expansive Requests emailed last night are the very first correspondence from the Objectors to JPMorgan concerning discovery. The Requests demand production of tens of millions of pages of documents relating to matters that have no conceivable bearing on this special proceeding. The Objectors' inexplicable delay has prevented any meet and confer with JPMorgan, in direct contravention of the Court's instruction to "meet and confer and prepare a discovery order prior to December 16, and if there are disputes, let us know a week before." (Oct. 29, 2014 Tr., Cafasso Decl. Ex. 2 & Dkt. No. 102, at 7:17-22.)[2]

But the Objectors' delay need not derail the Court's carefully considered schedule for this special proceeding because the Requests are substantively misdirected. The Requests, which demand *all* documents produced in several far-ranging government investigations and *every* deposition transcript from *all* of JPMorgan's RMBS cases (Req. Nos. 2-4), cannot be squared with the limited scope of discovery in Article 77 proceedings. The question before the Court is whether the Trustees abused their discretion when they accepted the $4.2 billion

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[1] Though not all these parties signed the Requests, the "Objectors" on whose behalf the Requests were sent include the NCUA, QVT Funds, Ambac Assurance Corp., Federal Home Loan Bank of Boston, DW Investment Management, LP, and the Triaxx Funds. (Req. at 1, n.1.)

[2] If possible, proposed intervenor and objector W&L Investments' tactic is even worse. Today, W&L filed its brief on the scope of discovery—asserting that it will seek the same types of wide-ranging discovery as the other Objectors—without having served a single discovery request on any party. (Dkt. No. 229.) The Court's direction six weeks ago to serve any requests and meet and confer on them was intended to avoid this very circumstance where the presence of numerous intervenors results in burdensome, time-consuming and duplicative discovery.

settlement on the recommendation of their independent experts. There is simply no connection between that limited inquiry and the discovery demanded of JPMorgan. The Objectors' Requests should be viewed for what they are—an improper attempt to transform this proceeding into an omnibus trial of the merits of the settled claims—and they should be denied both because they are untimely and because they are substantively improper.

BACKGROUND

The Requests consist of 18 multi-part document requests, 11 of which are propounded on behalf of all Objectors with seven requests propounded on behalf of Ambac alone (the "Ambac Requests"). The individual requests fall into four broad categories:

1) Documents concerning JPMorgan's RMBS securities litigation: Req. Nos. 1-4 and 11 (e.g., "Documents produced by You to the DOJ and to the SEC in connection with the investigations that resulted in the JPMorgan-DOJ Settlement and JPMorgan-SEC Settlement." Req. No. 4.).

2) All correspondence (a) with the Trustees regarding "actual or potential breaches," (b) with any of the Trustees' experts; and (c) with any certificateholder concerning loss analyses and/or events of default: Req. Nos. 5, 7, 9.

3) Documents concerning loan reunderwriting, analyses of JPMorgan's potential liability and events of default: Req. Nos. 6, 8, 10; Ambac Req. No. 7.

4) Documents concerning trusts insured in part by Ambac, including loan files and underwriting guidelines, due diligence reports, quality control reports, loan databases, and "seller monitoring reports": Req. No. 8; Ambac Req. Nos. 1-6.

JPMorgan estimates that the first category of documents alone amounts to more than 31.2 million pages of documents. (Cafasso Decl. ¶ 4.)

ARGUMENT

I. THE SCOPE OF DISCOVERY SHOULD CORRESPOND TO THE NARROW QUESTION BEFORE THE COURT: DID THE TRUSTEES ABUSE THEIR DISCRETION?

As the petitioning Trustees and Institutional Investors discuss in their separate briefs filed today, the scope of discovery corresponds directly to Article 77's standard of review

(whether the Trustees abused their discretion). (Dkt. No. 231, at 1, (quoting *In re Bank of New York Mellon*, No. 651786/2011, 2014 WL 1057187, at *9 (Sup. Ct. N.Y. Cnty Jan. 31, 2014)); *In re IBJ Schroder*, No. 101580/1998, 2000 N.Y. Misc. LEXIS 692, at *8 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) ("[T]he trustee's decision to compromise . . . [an] action is within the scope of the trustee's powers . . . and is entitled to judicial deference."); *Andrews v. Trustco Bank, N.A.*, 289 A.D.2d 910, 913 (3rd Dep't 2001) (denying discovery demands for "'all memorand[a], correspondence, and work papers related to the administration of the trust'" because they "plainly are overbroad, seek irrelevant information and impose an undue burden[.]"). While the Objectors' 60-some requests to the Trustees are not tailored to the narrow question before the Court, there is no dispute that targeted discovery concerning the Trustees' evaluation and decision making is appropriate. Indeed, the Trustees have already agreed to provide extensive materials covering those topics. (Dkt. No. 231, at 3.) Yet, CPLR § 7701's "right to examine the trustees" does not translate to plenary discovery of JPMorgan simply because it has settled certain claims with the Trustees. *See In re Beeman*, 108 A.D.2d 1010, 1012 (3rd Dep't 1985) (limiting discovery to trustee). This is true for at least two reasons.

First, the discovery demanded from JPMorgan is entirely irrelevant to this proceeding. Documents in JPMorgan's possession simply do not bear on the question of whether the Trustees abused their discretion. That question is answered by reviewing the Trustees' processes, not through an unbounded inquiry into securities cases and investigations that have no connection to the Trustees' evaluation of the potential contractual repurchase and servicing claims that are the subject of this settlement.

Second, courts uniformly disallow discovery into the merits of settled claims because, even in the class action fairness context (a far different circumstance involving a

significantly less deferential standard of review of a decision to settle), "the settlement hearing is not 'a trial or a rehearsal of the trial' . . . . It does not attempt to decide the merits of the controversy." *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) (citations omitted); *Zerkle* v. *Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("In determining whether to approve the compromise or not, the Court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that." (internal quotation marks and citation omited)); *Matter of Nachison* v. *Phoenix of Hartford Ins. Co.*, 30 A.D.2d 499, 503 (3d Dep't 1968) (denying discovery to conduct "full scale trial of the issues"); *Newman* v. *Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972) ("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[.]" (internal quotation marks omitted)). If allowed, the discovery sought of JPMorgan, which is not a petitioner here, would twist this special proceeding into a plenary action with months or even years of discovery—an outcome contrary to the design and express purpose of Article 77.

II. THE OBJECTORS' REQUESTS DO NOT MATCH THIS PROCEEDING AND CREATE SUBSTANTIAL BURDEN WITH NO FORESEEABLE BENEFIT

Beyond the significant threshold issues with the nature, breadth and timing of the Objectors' Requests, they are individually untenable. The issues with each grouping described above are addressed in turn:

1) Request Nos. 1-4 and 11 seek tens of millions of pages of documents produced in several government investigations and more than 260 deposition transcripts, with nearly 3,000 exhibits, from all RMBS litigations involving JPMorgan and Bear Stearns. Responding to these massive requests—which sweep in trusts and loans *not even at issue in this proceeding*—are not tailored in any respect to the limited scope of the issues here, would impose extreme burdens on JPMorgan and would turn this into a *de novo* examination to re-value the settled claims. Beyond the substantive impropriety of these Requests, given their breadth and scale, it would likely take many months to collect, review and produce information of this magnitude at extraordinary cost.

2) Request Nos. 5, 7 and 9 seek correspondence (a) with the Trustees regarding "actual or potential breaches," (b) with any of the Trustees' experts; and (c) with any certificateholder concerning loss analyses and/or events of default. This group of demands drives at the merits of the settled claims and does not bear on the Trustees' process or their actual evaluation of the settlement. Moreover, to the extent these individual requests seek correspondence with the Trustees, they are redundant of nearly identical requests previously served on the Trustees. In fact, the Trustees have already agreed to produce all information provided to them by JPMorgan as part of their evaluation process. (*See* Dkt. No. 231, at 3.)

3) Request Nos. 6, 8, 10, and Ambac Request No. 7 seek documents related to loan reunderwriting, analyses of JPMorgan's potential liability (sent to or provided by the Institutional Investors), and events of default. Again, not only do these demands concern the substantive merits of the settled claims, but they are directed to mediation documents that are protected from disclosure and to materials that reflect JPMorgan's own, privileged evaluation of potential claims. And to the extent the Requests seek information that was not provided to the Trustees, they are not plausibly relevant.

4) Request No. 8 and Ambac Request Nos. 1-6 seek documents concerning trusts insured in part by Ambac, including loan files and underwriting guidelines, due diligence reports, quality control reports, loan databases, and "seller monitoring reports." Like the other genres of documents, all of these requests go only to the merits of the settled claims. In particular, the requests for loan files and underwriting guidelines present the specter of new or rehashed expert reunderwriting analyses that the Trustees did not consider in their evaluation. One of the significant reasons for settling the potential repurchase and servicing claims is to avoid these very types of costly, subjective and incredibly time-consuming analyses. This merits discovery should be denied.

In sum, the discovery sought by the Objectors is antithetical to the design and purpose of Article 77's deferential review. The Objectors' conduct in ignoring the Court's direction and dumping these Requests on JPMorgan at the last minute has prevented any meet and confer and is inexcusable. JPMorgan respectfully (i) requests that the Court deny the discovery of JPMorgan sought by the Objectors and (ii) joins the petitioners' request that the Court set narrow parameters for upcoming discovery that promote the purposes of this special proceeding and establish a clear and expeditious path to its conclusion.

Dated: December 9, 2014

/s/ Robert A. Sacks
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