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

In the matter of the application of	Index No. 652382/2014
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 ING 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.	Part 60 Motion Sequence No. 18 Hon. Marcy S. Friedman Oral Argument Requested **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT-INVESTORS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM JPMORGAN**

TABLE OF CONTENTS

TABLE OF AUTHORITES

Case **Page(s)**

Other Authorities

Respondent-Investors[1] respectfully submit this memorandum of law, together with the Affirmation of Michael C. Ledley dated May 29, 2015, in support their Motion to Compel JPMorgan Chase & Co. ("JPMorgan") to produce documents pursuant to Rule 3124 of the Civil Practice Law and Rules ("CPLR"), in response to the Requests 1, 6, and 11 of Respondent-Investors' First Set of Requests for Production and in response to the Requests for Production on Behalf of Ambac (together, the "Requests").

PRELIMINARY STATEMENT

This is an extraordinary proceeding in which this Court is asked to provide judicial blessing of a proposed settlement (the "Proposed Settlement") that would release and discharge JPMorgan from any liability relating to 319 Residential Mortgage Backed Securities ("RMBS") trusts (the "Accepting Trusts") with exposure in excess of $65 billion. Respondent-Investors are certificateholders and a financial guaranty insurer with express third party beneficiary rights in several of the Accepting Trusts in which the petitioners serve as Trustees.[2]

Respondent-Investors bring this motion to compel JPMorgan to produce four narrow categories of documents that the Trustees ***should have*** but did ***not*** request from JPMorgan in considering the Proposed Settlement. The documents bear directly on the reasonableness of the Proposed Settlement and whether the Trustees abused their discretion in accepting it despite the

[1] The Respondent-Investors are 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"); the QVT Fund V LP, QVT Fund IV LP and Quintessence Fund L.P. (the "QVT Funds"); Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"); DW Catalyst Master Fund, Ltd. and DW Value Master Fund, Ltd. (formerly Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited) (the "DW Funds"); and Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. ("Triaxx") (collectively, the "Respondent-Investors").

[2] Petitioners U.S. Bank N.A., The Bank of New York Mellon, The Bank of New York Mellon Trust Company, N.A., Wilmington Trust, N.A., Law Debenture Trust Company of New York, Wells Fargo Bank, N.A., HSBC Bank USA, N.A., and Deutsche Bank National Trust Company (collectively, the "Trustees").

well-established and highly-publicized information establishing pervasive misconduct throughout every phase of JPMorgan's securitization business.

First: Respondent-Investors have requested production of the draft complaint provided to JPMorgan by the United States Department of Justice ("DOJ") with respect to claims concerning JPMorgan's securitization misconduct, which were resolved in a $13 billion settlement with the DOJ announced less than five days after the Trustees were first presented with the Proposed Settlement for consideration. In that widely publicized settlement, JPMorgan admitted to various forms of misconduct throughout all aspects of its securitization business including that it knowingly securitized loans that violated representations and warranties concerning the underwriting quality of the loans. There were also numerous reports that the draft DOJ complaint incentivized JPMorgan to the negotiating table and to meet the DOJ's demands, presumably because it marshals and organizes powerful additional evidence of JPMorgan's improper securitization practices that the DOJ obtained during its investigation. As such, this draft complaint, which relates to the exact conduct covered by the Proposed Settlement, would have greatly informed the Trustees' evaluation of the Proposed Settlement had they bothered to seek it. The relevance of the DOJ complaint (and any documents attached or referenced therein) cannot be in genuine dispute, and there is absolutely no burden on JPMorgan to producing this information. At least one other court has previously ordered JPMorgan to produce the draft DOJ complaint.

Second: Respondent-Investors requested that JPMorgan produce documents sufficient to show the results of any mortgage loan re-underwriting performed with respect to loans in the Accepting Trusts. There are several settled and pending litigations brought against JPMorgan in which plaintiffs have established pervasive, material breaches of representations and warranties

based on forensic re-underwriting reviews of several thousands of loans in the Accepting Trusts – including at least 25 cases identified by the Trustees' expert, Professor Fischel. This Court has specifically identified re-underwriting results as an example of materials that are relevant to the Trustees' consideration of the Proposed Settlement and should be produced without prejudice to any parties' objections to relevance. Production of the re-underwriting reports imposes minimal burden on JPMorgan.

Third: Respondent-Investors requested that JPMorgan produce documents concerning the whistleblowing activities of Alayne Fleischmann (a former JPMorgan employee) regarding the quality of loans originated, acquired, or securitized by JPMorgan. Ms. Fleischmann served as RMBS deal manager for JPMorgan between 2006 and 2008 responsible for JPMorgan's due diligence in connection with sponsoring and securitizing mortgage loans. Her whistleblower reports were the subject of numerous media reports during the period the Trustees evaluated the Proposed Settlement, which indicated that her evidence (much like the draft DOJ complaint), was instrumental in causing JPMorgan to agree to the settlement, and any reasonably diligent Trustee would have requested this information. This information appears to involve a relatively small volume of communications and JPMorgan has articulated no burden or other legitimate objection for withholding the documents.

Fourth: Ambac requested that JPMorgan produce targeted, specific categories of documents that JPMorgan has ***already produced*** to Ambac in related litigation between the parties, which concern the ***same*** Accepting Trusts and loans that are the subject of Ambac's objections in this proceeding. Indeed, Ambac has proposed that JPMorgan simply agree to deem those documents produced in this proceeding, which would eliminate entirely any burden in

reproducing those materials here. Yet again, JPM does not and cannot identify any possible burden with respect to Ambac's proposed compromise.

The foregoing documents bear directly on the Trustees' actions in accepting the Proposed Settlement. This limited, highly relevant and non-burdensome discovery is crucial for Respondent-Investors to adequately present their objections in this proceeding, which requires the Court to consider the substantive reasonableness of the settlement and the Trustees' review and consideration thereof. Unable to articulate any burden or legitimate basis for refusing to produce the requested documents, JPMorgan makes the blanket assertion that this information is not material or necessary to the Court in assessing the Trustees' petition. However, even if JPMorgan's relevance objection had any merit – and it does not – this Court has already encouraged JPMorgan to produce specific categories of documents (including re-underwriting reports) and other non-burdensome discovery without prejudice to any parties' claims that they are not relevant or otherwise discoverable. Accordingly, the Court should order JPMorgan to produce the foregoing categories of documents without further delay.

STATEMENT OF FACTS[3]

A. The Proposed Settlement

The Trustees filed this Article 77 proceeding to obtain judicial approval of a $4.5 billion Proposed Settlement that would resolve all repurchase and servicing claims against JPMorgan for over 300 separate residential mortgage-backed securities trusts with expected losses of approximately $65 billion. The Trustees – which are the parties entrusted to protect the interests of the investors and other beneficiaries therein – were not involved in the negotiations with

[3] Respondent-Investors incorporate fully the facts set forth in (i) their respective Statements of Grounds for Objection, (ii) their Memorandum of Law Regarding the Scope of Discovery Under Article 77 (NYSECF Doc. No. 238), and (iii) Ambac's Memorandum of Law Regarding Discovery From JPMorgan (NYSECF Doc. No. 247).

JPMorgan that resulted in the Proposed Settlement. Rather, the Proposed Settlement was negotiated by JPMorgan and a group of 21 institutional investors, which together hold positions in many (but not all) of the Accepting Trusts.[4] On November 15, 2013, counsel for the Institutional Investors presented the Proposed Settlement to the Trustees and requested that the Trustees accept it on behalf of the trusts they represented. Although the Proposed Settlement was negotiated by the Institutional Investors and JPMorgan (without the participation of the Trustees or any of Respondent-Investors), its effect is not limited to the interests of those investors. On the contrary, the Proposed Settlement would release repurchase and servicing claims (including claims "in contract, tort or otherwise") against JPMorgan for all certificateholders in the Accepting Trusts.

To evaluate the Proposed Settlement and determine whether to accept its terms on behalf of absent investors in the Accepting Trusts, the Trustees were afforded the opportunity to conduct due diligence and request documents and information from JPMorgan regarding its securitization practices and potential liability with respect to the Accepting Trusts. Specifically, the Proposed Settlement provides that:

> The Trustees may request documents or other information from JPMorgan to conduct such diligence, may retain experts to assist them, and may conduct such other due diligence as they deem necessary to inform themselves concerning the Settlement. JPMorgan agrees to use reasonable best efforts to provide promptly to the Trustees documents reasonably requested by the Trustees and necessary for the Trustees' due diligence . . . .

Proposed Settlement § 2.05.

In a notice dated August 1, 2014, the Trustees announced that they had accepted the Proposed Settlement and shortly thereafter they filed this Article 77 proceeding to request

[4] "Institutional Investors" has the same meaning as set forth in The Institutional Investors' Response to the Objecting Certificateholders' Objections to the Trustees' Request for Relief (Dec. 3, 2014) (NYSECF Doc. No. 192).

judicial approval. In their petition, the Trustees seek a declaration that they accepted the Proposed Settlement based on a "thorough and reasonable investigation," and that they made their "settlement decision in good faith." Amended Petition ¶¶ 75-76. The Trustees also seek a declaration barring certificateholders from asserting any claims against any Trustee with respect to its "evaluation and acceptation" and "implementation" of the [Proposed] Settlement. *Id.* ¶ 77. In subsequent submissions to this Court, the Trustees asserted that they accepted the Proposed Settlement "after an exhaustive review process." *See* Trustees' Omnibus Response to Objections (NYSECF Doc. No. 194).

Respondent-Investors are certificateholders in several of the Accepting Trusts in which the Petitioners serve as Trustees. In addition, Ambac provided financial guaranty insurance on certificates issued by eight of the Accepting Trusts and is a third-party beneficiary of the agreements governing the Accepting Trusts. Accordingly, if approved, the Proposed Settlement would release substantially all claims of the Accepting Trusts, thereby materially affecting Respondent-Investors' and Ambac's ability to recoup losses from defective loans sold and securitized in the Accepting Trusts by JPMorgan.[5]

B. JPMorgan's Improper Securitization Practices

There have been widespread reports that many of the loans that JPMorgan sold to the Accepting Trusts did not comply with the representations and warranties that JPMorgan made about them in the agreements governing the transactions. As set forth in Ambac's Statement of Grounds for Objection (NYSECF Doc. No. 149), Ambac has litigated with JPMorgan for more than six years concerning JPMorgan's fraudulent RMBS securitization practices in connection

[5] On October 16, 2014, the First Department affirmed a decision by Judge Ramos to dismiss Ambac's breach of representation and warranty claims against JPMorgan on the basis of lack of standing because Ambac's contract rights are purportedly held by the Trustees. *See Ambac Assur. Corp. v. EMC Mortgage LLC*, 121 A.D.3d 514, 995 N.Y.S.2d 545 (2014). Although Ambac believes the ruling to be erroneous, Ambac must rely on the Trustees in pursuing contractual remedies against JPMorgan.

with four securitization offerings by JPMorgan affiliate Bear Stearns (the "Second-Lien Litigation"). In early 2012, Ambac also brought suit against JPMorgan for fraud and breach of contract (the "First-Lien Litigation") to recover losses it suffered for Accepting Trusts insured by Ambac that are at issue in this proceeding (the "Ambac Insured Trusts").[6]

As detailed in Ambac's two complaints and throughout the course of its litigations against JPMorgan, Ambac uncovered powerful and extensive evidence of pervasive malfeasance by Bear Stearns and JPMorgan. For example, Ambac found compelling evidence that JPMorgan and its affiliates deliberately lied about the quality of loans – telling Ambac and investors that the collateral was of investment quality while internally describing that collateral as a "Sack o' [expletive]" – and lied about its due-diligence and quality-control processes – telling Ambac and investors that these processes were in place to ensure the quality of the collateral when in fact they were used by JPMorgan to pocket recoveries for itself at the expense of the trusts. In its publicly filed complaint in the First-Lien Litigation, Ambac further cites evidence demonstrating the existence of widespread breaches of representations and warranties, including the results of forensic re-underwriting of loan files.

Much of the evidence that Ambac has uncovered has been used to support other actions and settlements against JPMorgan. For example, on November 19, 2013 – which was less than five days after JPMorgan and the Institutional Investors presented the Proposed Settlement to the Trustees – the DOJ announced that it entered into a landmark $13 billion settlement with

[6] The Ambac Insured Trusts include: Bear Stearns Mortgage Funding Trust 2006-AR2 ("BSMF 2006-AR2"), Bear Stearns Mortgage Funding Trust 2006-AR4 ("BSMF 2006-AR4"), GreenPoint Mortgage Funding Trust 2005-AR5 ("GPMF 2005-AR5"), GreenPoint Mortgage Funding Trust 2006-AR2 ("GPMF 2006-AR2"), GreenPoint Mortgage Funding Trust 2006-AR3 ("GPMF 2006-AR3"), Structured Asset Mortgage Investments II Trust 2006-AR7 ("SAMI 2006-AR7"), Structured Asset Mortgage Investments II Trust 2006-AR8 ("SAMI 2006-AR8"), and Bear Stearns Alt-A Trust 2006-R1 ("BALTA 2006-R1"). As a result of the breaches of representations and warranties and other wrongful conduct by JPMorgan, Ambac has paid or is obligated to pay hundreds of millions of dollars under its policies related to the Ambac Insured Trusts.

JPMorgan with respect to securities issued by several of the Accepting Trusts (as well as several other securitization trusts), in which JPMorgan substantially admitted that it systematically securitized loans that it knew did not comply with representations and warranties about underwriting quality. In addition, as a result of an earlier investigation by the SEC revealing JPMorgan's improper securitization practices, in November 2012, JPMorgan agreed to pay more than $296 million to settle charges brought by the SEC including charges that JPMorgan covertly entered into bulk settlements with mortgage loan originators on defective loans that it sold into securitizations and kept the cash for itself.[7]

C. Respondent-Investors' Document Requests to JPMorgan

On December 8, 2014, Respondent-Investors served their First Set of Requests for Production to JPMorgan seeking discovery regarding JPMorgan's securitization practices and other evidence regarding the improper practices and policies that JPMorgan and its affiliates and employees conducted in the origination, securitization and servicing of the loans within the Accepting Trusts. *See* Ex. 1.[8] The Requests seek discrete and easily identifiable information that the Trustees could and should have obtained from JPMorgan, but apparently made no attempt to do so. Respondent-Investors spent a great deal of time coordinating amongst each other so as to limit discovery to specific categories of documents responsive to eleven (11) discrete and narrowly tailored Requests. Respondent-Investors now bring this motion to compel JPMorgan to produce documents in response to the following Requests:

- Request No. 1: Any draft complaints provided to you by the DOJ to JPMorgan with respect to claims resolved in the JPMorgan-DOJ Settlement, including the draft

[7] *See* SEC Press Release *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171486012.

[8] "Ex. __" refers to the exhibits attached to the Affirmation of Michael C. Ledley, dated May 29, 2015, filed herewith.

complaint prepared by the United States Attorney's Office for the Eastern District of California.

- Request No. 6: Documents sufficient to show the results of any mortgage re-underwriting that was performed by or on behalf of any person with respect to loans held by [the Accepting Trusts].

- Request No. 11: All documents involving Alayne Fleischmann concerning her whistleblower activities including, but not limited to, her communications with Greg Boerster [and] William Buell regarding the quality of loans originated, acquired, or securitized by JPMorgan.

In addition, based on the vast universe of evidence uncovered by Ambac through its litigations and investigation into JPMorgan's securitization practices, the Requests incorporated seven separate requests on behalf of Ambac seeking specific categories of information about the mortgage loans in the Ambac Insured Trusts that are included in the Proposed Settlement. *Id.* In particular, Ambac requested that JPMorgan produce readily available quantitative and summary data showing JPMorgan's due diligence, quality control, and repurchase demands concerning the very loans that JPMorgan securitized in the same Accepting Trusts at issue here.

Although the Requests have been outstanding since December 8, 2014, and despite the passage of over five months, JPMorgan has refused to produce any documents in response to the Requests and has also failed to provide specific responses and objections to Respondent-Investors' individual Requests as required by CPLR § 3122. Instead, JPMorgan has interposed the blanket position that the standard of review and attendant scope of discovery in this proceeding justifies JPMorgan's wholesale refusal to produce the documents requested by Respondent-Investors. *See, e.g.*, March 17, 2015 Letter from R. Sacks to M. Ledley (annexed hereto Ex. 4). In addition, JPMorgan has asserted that the requested discovery is not relevant and is duplicative of information that the Trustees received and will produce. *See* March 4, 2015 Letter from R. Sacks to M. Ledley (annexed hereto as Ex. 2). JPMorgan further sought to require that Respondent-Investors serve entirely new document requests making clear that

JPMorgan will only "entertain narrowed requests for targeted information that is relevant to the Proceeding and is not otherwise being produced to you by the Trustees." *Id*.[9] As noted above, JPMorgan's contention that the discovery is duplicative fails because the Requests at issue concern documents that the Trustees ***could and should have, but did not*** request or receive from JPMorgan in considering the Proposed Settlement and, thus, would not be part of the Trustees' anticipated production.

In an effort to avoid burdening this Court with unnecessary motion practice, Respondent-Investors have attempted to resolve these discovery disputes through several meet-and-confers and correspondence exchanged with JPMorgan over the last several months. In the interests of compromise, Respondent-Investors have further narrowed their Requests (on a without prejudice basis) to the materials sought in this motion. Despite the Court's repeated statements encouraging the parties to produce non-burdensome discovery without prejudice to objections as to relevance and discoverability, JPMorgan has refused to produce any documents responsive to Respondent-Investors' outstanding Requests and the parties are at an impasse.[10] Accordingly, Respondent-Investors bring this motion to compel JPMorgan to produce four categories of documents that are material and necessary in determining whether the Trustees abused their discretion in accepting the Proposed Settlement with JPMorgan with respect to their Trusts.

[9] *See also* April 27, 2015 Letter from R. Sacks to M. Ledley (refusing to produce documents responsive to the Requests because "as we have repeatedly stated, and for many months, JPMorgan will consider requests that are not duplicative and do not seek irrelevant discovery into the merits of the settle claims" and that Respondent-Investors "elected not to make any such requests") (annexed hereto as Ex. 6).

[10] Copies of the correspondence exchanged by Respondent-Investors and JPMorgan leading up to this motion are annexed hereto as Exs. 2 – 6.

ARGUMENT

Disclosure in an Article 77 Proceeding is expressly "governed by [A]rticle 31," (CPLR § 408), which provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR § 3101(a); *see also Diamond State Ins. Co. v. Utica First Ins. Co.*, 37 A.D.3d 160, 161 (1st Dep't 2007) ("New York law requires full disclosure of all material and necessary matter to prosecute or defend an action"). "The words 'material and necessary' as used in section 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014) (quoting *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968). Indeed, New York courts have long held that the standard for discovery is "generous and broad." *Mann ex rel. Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 29 (1st Dep't 2006). In accordance with the liberal discovery rule, parties in an Article 77 proceeding "shall be entitled to full and complete discovery with regard to all previous actions taken by . . . Trustees, and shall be entitled to inspect and/or copy any and all documents and/or things which evidence their administration of trust assets." *Milea v. Hugunin*, 24 Misc. 3d 1211(A), at *12 (Sup. Ct. Onondaga Cty. 2009).[11]

As an initial matter, this Court's review of the Proposed Settlement is ***not*** limited to a superficial evaluation merely of the Trustees' process. Even under an abuse-of-discretion standard, the Court must determine whether the decision reached by the Trustees was objectively reasonable. *See* Restatement (Third) of Trusts, § 87 cmt. c (trustee abuses its discretion by

[11] 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.").

"act[ing] unreasonably--that is, beyond the bounds of a reasonable judgment"). Judicial intervention for abuse of discretion is therefore "called for" where "the trustee's decision is one that would not be accepted as reasonable by persons of prudence." *Id.* In this case, the Court cannot assess whether the Trustees exercised "reasonable judgment" without some review of the merits and value of the claims to be released in comparison with the compensation to be paid.[12] Accordingly, the applicable standard of review requires the Court to consider the substantive reasonableness of the settlement and the Trustees' review and considerations thereof. That is not possible without a sufficient record into the improper securitization practices of JPM and an assessment as to whether the Trustees properly considered such information or whether they are simply providing their rubber stamp imprimatur.

However, even if *arguendo* the focus is primarily or exclusively on the reasonableness of the Trustees' process, one most consider not only what the Trustees chose to look at, but also what they chose ***not*** to look at, particularly where the Trustees claim to have conducted a review that was "thorough" and "exhaustive." With respect to the documents sought by the Requests, the Trustees never bothered to request or receive this information from JPMorgan in evaluating the Proposed Settlement and, thus, JPMorgan is the only source from which the documents and information at issue may be obtained.

The targeted information that Respondent-Investors seek from JPMorgan easily falls within the broad "material and necessary" standard for disclosure applicable to Article 77 proceedings in that it (i) contradicts the Trustees' claim that they actually conducted the

[12] JPMorgan is also incorrect in arguing that the First Department's March 5, 2015 decision in *In re Bank of New York Mellon*, 4 N.Y.S.3d 204 (1st Dep't 2015) somehow limited the standard of review and attendant scope of discovery in this Article 77 proceeding so as to justify JPMorgan's wholesale refusal to provide any discovery. *See* March 17, 2015 Letter from R. Katz to M. Ledley (annexed hereto as Ex. 4). This Court has properly rejected that position, noting that the First Department's decision "made no new law . . . on the scope of proper discovery in this proceeding." March 20, 2015 Hearing Tr. at 11.

"thorough" and "exhaustive" evaluation process that is so central to their Petition, and (ii) demonstrates that the value of claims to be released in the Proposed Settlement with respect to Respondent-Investors' trusts dwarfs the consideration to be paid by JPMorgan for those trusts and, thus, that the Trustees' decision was unreasonable.

I. JPMorgan Should Be Ordered To Produce Documents Responsive To Respondent-Investors' Requests

A. JPMorgan Should Be Ordered to Produce the Draft DOJ Complaint

Respondent-Investors seek discovery of the draft complaints (including any documents attached to or referenced therein) provided to JPMorgan by the DOJ in connection with the DOJ's investigation of JPMorgan's widespread misconduct surrounding its securitization practices.

The DOJ's investigation and draft complaint resulted in a landmark $13 billion settlement with the DOJ announced on or about November 19, 2013, in which JPMorgan admitted to various forms of misconduct throughout all aspects of its securitization business including JPMorgan's admission that it knowingly securitized loans that violated representations and warranties concerning the underwriting quality of the loans. As summarized in the DOJ's settlement announcement, "JPMorgan acknowledged it made serious misrepresentations to the public – including the investing public – about numerous RMBS transactions," and JPMorgan admitted that "JPMorgan employees knew that the loans did not comply with those [underwriting] guidelines and were not otherwise appropriate for securitization, but they allowed the loans to be securitized – and those securities to be sold – without disclosing this information

to investors."[13] JPMorgan also admitted that it "waived" in loans for securitization that its due diligence vendors identified as non-compliant. *Id.*[14]

The DOJ settlement – and JPMorgan's admissions – applied to securities issued by many of the Accepting Trusts (among others). Moreover, the existence of the draft DOJ complaint was widely discussed for almost the entire period that the Trustees purportedly considered the Purported Settlement and, as such, would have provided the Trustees with a focused and detailed roadmap for the claims they were being asked to release and any reasonably diligent trustee would have requested this information. For example, the draft DOJ complaint has been described as a "secret legal document that could provide new details of how the nation's largest bank handled and sold billions of dollars in now-toxic mortgage securities" and which "focuses on specific allegations of mortgage-related wrongdoing by JPMorgan that the Department of Justice was prepared to file against if settlement talks had collapsed."[15]

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[13] The DOJ's press release announcing the DOJ Settlement, together with the agreement memorializing the DOJ Settlement, the Statement of Facts by JPMorgan, and the list of Accepting Trusts, are available at http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

[14] This admission is consistent with evidence submitted to the Financial Crisis Inquiry Commission by Clayton Holdings, JPMorgan's third-party due diligence provider, indicating that JPMorgan waived in 51% of the laons that Clayton determined to be deficient, more than any of the other banks. Financial Crisis Inquiry Comm'n, Financial Crisis Inquiry Report at 166-67 (2011), available at http://cybercemetery.unt.edu/archive/fcic/20110310173545/http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_full.pdf.

[15] Kevin McCoy, *JPMorgan Foe Seeks Justice's Unfiled Complaint*, USA TODAY, (Nov. 27, 2013), http://www.usatoday.com/story/money/business/2013/11/27/jpmorgan-draft-complaint/3767713/. *See also* Alison Frankel, *FHLB demands DOJ draft complaint: 'What is JPMorgan trying to hide?'*, REUTERS (Dec. 10, 2013) (describing the draft DOJ complaint as "a much more detailed account of JPMorgan's fraudulent conduct" and "far more enlightening the statement of facts."), http://blogs.reuters.com/alison-frankel/2013/12/10/fhlb-demands-doj-draft-complaint-what-is-jpmorgan-trying-to-hide/; Sophia Pearson, *JPMorgan Settles Pittsburgh Bank Suit Probing U.S. Deal*, BLOOMBERG BUSINESS (Jan. 4, 2014) (reporting that JPMorgan settled civil claims that it made material misrepresentations about loans in its securitizations after being ordered to turn over the draft DOJ complaint), http://www.bloomberg.com/news/articles/2014-01-03/jpmorgan-to-settle-pittsburgh-bank-lawsuit-over-mortgage-debt. *See also* Devlin Barrett and Dan Fitzpatrick, *J.P. Morgan, U.S. Settle for $13 Billion*, THE WALL STREET JOURNAL (Nov. 19, 2013), http://www.wsj.com/articles/SB10001424052702304439804579207701974094982; Ben Protess and

It appears that the Trustees never bothered to request or review the draft DOJ complaint. It is impossible to fathom how the Trustees ignored such blockbuster materials in conducting their purportedly "thorough" and "exhaustive" evaluation, especially when such materials were garnering so much attention at the exact same time of this evaluation. Indeed, the Trustees' failure to obtain the draft DOJ complaint and associated documents is even more inexcusable given that one of the Trustees ***at this exact same time*** sought and obtained nearly identical materials as to another sponsor. Namely, U.S. Bank N.A. successfully moved to compel document identified in a complaint against Credit Suisse by the Attorney General, including establishing "systemic problems" in securitization sponsors' due diligence processes and an "incentives' program rewarding originators of loans in any and all securitizations" in *Home Equity Mortg. Trust Series 2006-5 v. DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2013 WL 6037308, at *3 (Sup. Ct. N.Y. Cnty. Nov. 8, 2013).

JPMorgan has yet to articulate any legitimate objection to providing the draft DOJ complaint, which can be produced at minimal cost and with virtually no burden to JPMorgan. Indeed, one court has already ordered JPMorgan to produce the draft DOJ complaint, although it appears the case settled before JPMorgan complied with the order. *See* Stipulated Order Extending Production Deadline Set on October 17, 2013, *Fed. Home Loan Bank of Pittsburgh v. J.P. Morgan Secs. LLC*, GD09-016892 (Pa. C.P. Allegheny Cty. Nov. 4, 2013) (annexed hereto as Ex. 7). And, even if JPMorgan could articulate some burden to producing such a limited and easily identifiable set of documents, any such burden is vastly outweighed by the relevance of the documents as demonstrated above.

Jessica Silver-Greenberg, *Where Does JPMorgan's $13 Billion Go?*, THE NEW YORK TIMES (Nov. 20, 2013), http://dealbook.nytimes.com/2013/11/20/where-does-jpmorgans-13-billion-go/.

B. JPMorgan Should Be Ordered To Produce Re-Underwriting Results for the Mortgage Loans Securitized in the Accepting Trusts

This Court has specifically identified re-underwriting results as an example of non-burdensome discovery materials that ought to be produced without prejudice to JPMorgan's rights as to relevance. *See* Feb. 23, 2015 Hearing Tr. at 33-35. More recently, during the March 20, 2015 hearing, the Court encouraged the parties to "reach[] some agreement with respect to a sample of reports regarding underwriting or loan reviews," including "documents from other litigations in which JPMorgan has been a party." March 20, 2015 Hearing Tr. at 93. Respondent-Investors took the Court's directions to heart and made a good faith proposal to JPMorgan to limit the scope of this Request to specific samples of loan review results for certain trusts for which litigants have submitted expert reports prepared by re-underwriting experts. *See* April 21, 2015 Letter from M. Ledley to R. Sacks (annexed hereto as Ex. 5).[16]

Specifically, Respondent-Investors identified several settled and pending litigations brought against JPMorgan (or its affiliates) in which plaintiffs have discovered the existence of pervasive breaches of representations and warranties based on forensic re-underwriting reviews of several thousands of loans in the Accepting Trusts with breach rates ranging from 84% to 98%

[16] Respondent-Investors also made repeated good faith attempts to work with JPMorgan to resolve any confidentiality issues relating to the disclosure of these materials, including redactions of non-public personal information relating to borrowers to the extent not addressed by a protective order. Despite claiming to have undertaken efforts to redact borrower information from the population of materials being produced by the Trustees, JPMorgan has refused to respond to Respondent-Investors' proposal to undertake similar efforts with respect to the re-underwriting results for which the Trustees never requested or received from JPMorgan.

of all loans in the respective trusts.[17] Likewise, the Trustees' own expert, Professor Fischel, considered the breach rates in evaluating the adequacy of the Proposed Settlement, and identified at least 25 cases brought against JPMorgan for which there is public information concerning breach rates found by plaintiffs following forensic re-underwriting of loans. *See* Expert Report of Daniel R. Fischel, dated July 17, 2014, Exhibit Q1. Notwithstanding the high "Breach Rates from Complaints" referenced in his report, Professor Fischel assumes a breach rate of ***0%*** for all trusts in which a loan file review has yet to be completed. *Id.*

Based on Professor Fischel's unreasonable assumption and despite the extensive evidence of JPMorgan's systemic misconduct, the Trustees approved the Proposed Settlement, which purports to release all claims "in contract, tort or otherwise" against JPMorgan, including claims for representation and warranty breaches. However, the Trustees (and JPMorgan) cannot rely on their expert's opinions where those opinions are the direct product of the Trustees' own failure to request (and furnish to their experts) crucial information evidencing JPMorgan's misconduct, including re-underwriting results. *See* Restatement (Third) of Trust § 93 cmt. c. (2007) (trustee may reasonably rely on adviser where trustee "has provided the adviser with relevant information").[18]

JPMorgan does not dispute that allegations of pervasive breach rates and re-underwriting reviews has been made publicly available in litigation filings. Nonetheless, it has refused to

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[17] *See, e.g.*, *Ambac v. EMC Mortgage, JPMorgan* (650421/2011), *Ambac v. EMC Mortgage, JPMorgan*, (651013/2012), *Assured v. EMC Mortgage, JPMorgan* (650805/2012), *BSMF 2006-AR1 v. EMC Mortgage* (CA 7658), *BSMF 2006-SL1 v. EMC Mortgage, JPMorgan* (7701), *BSMF 2007-AR2 v. EMC Mortgage* (6861), *BSMF 2007-AR4 v. EMC Mortgage* (7546), *SACO Trusts v. EMC Mortgage, JPMorgan* (651820/2012), *Syncora v. EMC Mortgage* (650420/2012), *Syncora v. EMC Mortgage, JPMorgan*, (653519/2012), *Syncora v. EMC Mortgage* (9-cv-03106), *JPMAC 2006-WMC4 v. WMC Mortgage, JPMorgan* (654464/2012), *FHFA v. JPMorgan* (11-cv-6188).

[18] Although all re-underwriting reports should be produced – as there is minimal burden on JPMorgan to providing this readily identifiable information – Respondent-Investors are willing to accept the Court's suggestion that sample reports be produced by JPMorgan on a without prejudice basis.

produce any of the actual forensic reviews and re-underwriting results generated by the experts in those cases on the grounds that they are "artificially inflated," "hotly disputed," and "unpredictable." *See* April 27 Letter from R. Sacks to M. Ledley (annexed hereto as Ex. 6). JPMorgan's attempt to undermine the legitimacy of re-underwriting results is mere bluster.

In the ***only*** RMBS cases to proceed to trial since the financial crisis, the courts found the plaintiffs' re-underwriting results to be credible and rejected defendants' efforts to discredit those results. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB* ("*Flagstar*"), 920 F. Supp. 2d 475 (S.D.N.Y. 2013); *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., et al.* ("*Nomura*"), No. 1:11 Civ. 6201 (DLC), at 202 (S.D.N.Y. May 11, 2015). In *Flagstar*, Judge Rakoff ruled that the re-underwriting analyses performed by plaintiff's experts were relevant and accurate. 920 F. Supp. 2d 475 (S.D.N.Y. 2013). In addition to a finding that the statistical sampling by plaintiff's expert in *Flagstar* "provided an adequate basis for assessing whether the Trusts as a whole complied with or breached Flagstar's representations and warranties," *id.* at 501, the court performed its "own independent review of several of the loan files" and found that the representative instances highlighted at trial were largely exactly as plaintiff's expert had categorized them. *Id.* at 510-11. Similarly, in her recent *Nomura* decision, Judge Cote affirmatively relied upon plaintiff's re-underwriting analysis to reaffirm that a significant percentage of the sample loans at issue were materially defective. No. 1:11 Civ. 6201 (DLC), at 202 (S.D.N.Y. May 11, 2015). Based upon the re-underwriting performed by plaintiff's expert in that case, the court found that "guidelines were systematically disregarded" and the certificates sold by defendants "were supported by loans for which the underwriting process had failed." *Id.* at 201-202. There is no reason to believe re-underwriting results for the Accepted Trusts are any less credible.

Accordingly, the Court should order JPMorgan to produce documents sufficient to show the results of any mortgage loan re-underwriting results that was performed by or on behalf of any person with respect to loans in the Accepting Trusts, including all expert reports prepared by re-underwriting experts, together with any accompanying exhibits, on behalf of any parties to litigation involving the Accepting Trusts.

C. JPMorgan Should Be Ordered To Produce Documents Involving Ms. Fleischmann's Whistleblower Activities

Respondent-Investors seek documents involving Alayne Fleischmann's whistleblower activities and reports to the DOJ evidencing malfeasance into JPMorgan's securitization business.

Ms. Fleischmann served as a securities lawyer for JPMorgan between 2006 and 2008 and her responsibilities included reviewing loans as part of the due diligence and quality control processes in connection with JPMorgan's sale and securitization of such mortgage loans.[19] In other words, Ms. Fleischmann was part of the JPMorgan department charged with making sure that the bank did not purchase and securitize defective mortgage loans.

Ms. Fleischmann has been described as "the central witness" in the DOJ's investigation – and ultimate settlement with JPMorgan (as described above) – concerning what she described as "massive criminal securities fraud" taking place within the bank's mortgage securitization operations.[20] Ms. Fleischmann reportedly provided the DOJ with detailed information (including documents and deposition testimony) regarding various aspects of JPMorgan's improper securitization practices, which the DOJ used in reaching its settlement with JPMorgan in November 2013. Among other things, Ms. Fleishmann disclosed her findings and concerns to her supervisors at JPMorgan, including managing directors Greg Boester and William Buell, in

[19] *See* "The $9 Billion Witness: Meet JPMorgan Chase's Worst Nightmare," *Rolling Stone Magazine* (Nov. 6, 2014), *available at* http://www.rollingstone.com/politics/news/the-9-billion-witness-20141106.

[20] *Id*.

which she provided detailed examples and consequences resulting from JPMorgan's securitization of knowingly defective mortgage loans. Unfortunately, her efforts were silenced by JPMorgan's and its "no email policy" with respect to defects in mortgage loans that the bank intended for its securitizations.[21]

Once again, JPMorgan is the only available source of this discovery. As such, Ms. Fleishmann's highly-publicized memoranda and communications with other JPMorgan due diligence and securitization executives constitute directly relevant information that the Trustees could have – and should have – requested in evaluating the Proposed Settlement. Moreover, there is virtually no burden on JPMorgan in producing the limited and narrowly targeted information relating to Ms. Fleischmann. Accordingly, the Court should order that JPMorgan produce documents involving Alayne Fleischmann concerning her whistleblowing activities including, but not limited to, her communications with Greg Boester and/or William Buell regarding the quality of loans originated, acquired, or securitized by JPMorgan.

II. JPMorgan Should Be Ordered To Produce – or "Deem Produced" – Documents Responsive To The Requests For Production on Behalf of Ambac

As set forth above and in Ambac's prior submissions to this Court, Ambac has had the benefit of extensive discovery into JPMorgan's fraudulent securitization practices and the quality (or lack thereof) of loans it securitized in the Accepting Trusts (as well as other securitizations). Unlike the Trustees, Ambac has invested substantial resources into investigating and marshalling evidence to support its claims against JPMorgan. Indeed, throughout the course of its litigations, Ambac has identified a vast universe of evidence in JPMorgan's possession that was available to the Trustees but which the Trustees made no effort to obtain or consider.

[21] *Id.*

With the benefit of that experience, Ambac has made targeted requests to JPMorgan for certain documents and data that are highly probative and relevant to issues concerning the Proposed Settlement and that are readily discoverable. Based on Ambac's extensive discovery and familiarity with inner workings of JPMorgan's securitization business, Ambac identified precise categories of documents and databases containing specific information regarding the mortgage loans at issue and potential claims in this proceeding for which the Trustees are seeking to release and discharge JPMorgan of liability in the Proposed Settlement. *See* Requests on Behalf of Ambac (annexed hereto as Ex. 1).

Contrary to JPMorgan's counsel's misrepresentation to the Court at the last conference, Ambac is ***not*** seeking "the entire litigation record" from its other actions against JPMorgan. March 20, 2015 Hearing Tr. at 82. Rather, Ambac is seeking targeted, specific categories of documents – the majority of which are databases or summary reports – that JPMorgan has already produced to Ambac (and that Ambac has already marshaled and analyzed) in the First-Lien Litigation, including (i) data and reports concerning JPMorgan's due diligence on, and quality control of, the mortgage loans, which will identify in summary form those loans that JPMorgan's due diligence and quality control teams found violated representations and warranties, (ii) data concerning any "bulk settlements" that JPMorgan entered into with mortgage loan sellers concerning defective securitized loans without repurchasing the loans from (or otherwise compensating) the securitization trusts, and (iii) monitoring reports that JPMorgan generated to evaluate the quality of loans it purchased from key mortgage originators. *See* Requests on Behalf of Ambac Nos. 2-6. Ambac has proposed – as a compromise and to entirely eliminate ***any*** burden on JPMorgan – that JPMorgan simply agree to deem the requested documents produced in the First-Lien Litigation to be "produced" in this proceeding.

The Trustees knew or should have known about this information, and could have and should have requested this information from JPMorgan (or obtained from Ambac with JPMorgan's consent) in order to properly evaluate the Proposed Settlement. Moreover, JPMorgan has not – and cannot – articulate any issue of burden or specific objection with respect to producing documents responsive to Ambac's requests.

CONCLUSION

For the foregoing reasons, and pursuant to Articles 31 and 77 of the CPLR, the Court should grant Respondent-Investors' motion in its entirety and compel JPMorgan to immediately produce all non-privileged documents responsive to Requests 1, 6 and 11 from Respondent-Investors' First Set of Document Requests and all non-privileged documents responsive to Respondent-Investors' Requests on behalf of Ambac, along with such other relief as the Court deems just and appropriate.

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