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. 19 Hon. Marcy S. Friedman Oral Argument Requested **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT-INVESTORS' MOTION TO COMPEL THE INSTITUTIONAL INVESTORS TO PRODUCE NEGOTIATION DOCUMENTS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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 of their Motion to Compel the Institutional Investors'[2] production of documents concerning the negotiation of the proposed settlement agreement among JPMorgan Chase & Co. ("JPMorgan") and the Institutional Investors, dated November 15, 2013, and modified July 29, 2014 (the "Proposed Settlement"), including any presentation or analysis provided to or discussed with JPMorgan relating to the subject matter of the Proposed Settlement (the "Negotiation Documents").

PRELIMINARY STATEMENT

At the heart of the sales pitch by the proponents of the Proposed Settlement is the fact that certain large and sophisticated Institutional Investors support it – which of course they should since they negotiated it. But if the proponents are going to continue to rely so significantly on the Institutional Investors' support as a reason for this Court to bless the Proposed Settlement, justice requires an opportunity to test just how beneficent – or not – these large and sophisticated parties actually were in negotiating it. This is especially so given the presence of several glaring problems with the Proposed Settlement, such as the fact that 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"); Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. ("Triaxx"); and W&L Investments, LLC ("WL") (collectively, the "Respondent-Investors").

[2] "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), Doc. No. 192.

Proposed Settlement, *reached out of earshot of these Trustees*,[3] is markedly worse for investors than the settlement reached with Countrywide, even though the claims against JPMorgan are significantly stronger than the claims against Countrywide at the time that settlement was negotiated. Respondent-Investors are also entitled to probe the negotiation of the so-called "Haircut," a peculiar aspect of the allocation formula whereby investors in certain trusts receive considerably diminished payments. Tellingly, only a fraction of the Institutional Investors' considerable holdings are in trusts significantly impacted by the Haircut. The origin and basis for the Haircut remain a mystery. Accordingly, the Negotiation Documents are Respondent-Investors' ***only*** means of obtaining clarification regarding the allocation provisions of the Proposed Settlement.

The Institutional Investors advance a half-hearted relevance objection, observing that the Trustees took no part in the settlement negotiations nor "seek any finding concerning the settlement negotiations or their substance."[4] However, there are at least two reasons why such documents are "material and necessary" to the action: (i) to allow the Court and the Respondent-Investors to explore the possibility of a side deal benefitting the Institutional Investors disproportionately or at the expense of other investors, and (ii) to clarify the basis for allocation of the settlement amount, including the "Haircut." Moreover, that the Trustees did ***not*** consider documents underlying the settlement negotiations is further evidence of their deficient process and warrants discovery.

[3] "Trustees" has the same meaning as set forth in The Trustees' Brief in Support of the Settlement (Aug. 3, 2014), NYSECF Doc. No. 9.

[4] The Institutional Investors' Memorandum of Law on the Scope of Discovery (Dec. 9, 2014), NYSECF Doc. No. 230, at 4.

Next, the Institutional Investors invoke California's mediation privilege in an attempt to block discovery of documents concerning negotiation of the Proposed Settlement, even though there is *de minimis* connection to California. The law of New York – and not California – governs the discoverability of materials in this proceeding. Moreover, in all meaningful respects, New York has substantial, if not overwhelming, contacts with the parties, the trusts, and underlying claims. New York is the forum state, it is where JPM and many of the Institutional Investors are located, and it provides the governing law for the PSAs. As such, a mediation privilege is inapplicable in this Article 77 proceeding. The mediation privilege is also intended to promote open and frank communications without fear that statements subsequently could be used against a party by its adversary. No such concern exists in the present situation, in which Respondent-Investors are parties on whose behalf the settlement negotiations took place and upon whom the Proposed Settlement is being foisted.

STATEMENT OF FACTS

The Institutional Investors negotiated the Proposed Settlement with JPMorgan in which an array of claims "in contract, tort or otherwise" relating to over 300 JPMorgan trusts (the "Accepting Trusts") with expected losses of $65 billion would be released in return for only $4.5 billion. *See* Expert Report of Daniel R. Fischel (July 17, 2014) ("Fischel Report") ¶ 11. On November 15, 2013, the Institutional Investors informed the Trustees of the Proposed Settlement and requested that the Trustees accept it on behalf of the trusts that they represented. In contrast to another mega-settlement spanning hundreds of RMBS trusts, the Trustees – the parties entrusted to protect the interests of absent investors – were not involved in the negotiations that led up to the Proposed Settlement, and no record of those negotiations has been made public or presented to the Trustees' experts, the Court, or Respondent-Investors who likewise were not

involved in those negotiations. Fischel Report ¶ 56. The Trustees ultimately accepted the Proposed Settlement and filed this Article 77 proceeding.

Both the nature of the settlement negotiations and the Proposed Settlement itself raise serious questions as to the reasonableness of the settlement and the Trustee's evaluation of it. First, the Institutional Investors purported to settle investors' claims on a global basis, including for many trusts in which the Institutional Investors have little or no stake. Second, the Proposed Settlement calls for JPMorgan to pay a mere 7.6% of the losses projected for many of the Accepting Trusts and a microscopic 0.8% for certain Accepting Trusts subject to the Haircut,[5] despite mountains of evidence of rampant misconduct by JPMorgan. Such evidence includes JPMorgan's admission that "it made serious misrepresentations to the public – including the investing public – about numerous RMBS transactions," including the Accepting Trusts, in connection with its $13 billion settlement with the U.S. Department of Justice.[6]

Respondent-Investors have requested production of the Negotiation Documents from the Institutional Investors on several occasions, to no avail. Request No. 1 of Respondent-Investors' First Set of Requests for Production sought "[a]ny 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." Ex. 1.[7] In response, the Institutional Investors

[5] Section 3.05 of the Proposed Settlement provides that the settlement payment will be allocated pro rata among the various trusts based on the amount of losses suffered by each trust, except that losses "associated" with certain "Selected Third-Party Originators" are discounted by 90% in the allocation calculation – the Haircut. RMBS Trust Settlement Agreement (Oct. 2, 2014), Doc. No. 59, at § 3.05(b).

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

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

contended that such documents were "not material, necessary, relevant or reasonably calculated to lead to the discovery of admissible evidence" because "[t]he Article 77 Petition makes clear that the Trustees did not participate in the settlement negotiations, did not rely on any information from the settlement negotiations in making their settlement decisions, and do not seek any finding in this proceeding regarding the settlement negotiations." Ex. 2 ("Institutional Investors' Objections and Responses"). The Institutional Investors further argued that the settlement documents were not discoverable, citing California's mediation privilege and a single, inapposite New York case. *Id.*

Similarly, Request Nos. 1 and 2 of Respondent-Investor W&L's First Set of Discovery Requests to the Institutional Investors requested documents relating to the distribution methodology described in the Proposed Settlement.[8] Ex. 3. The Institutional Investors again objected to the production of such documents, arguing that they were irrelevant and privileged under California. Ex. 4. Although the Institutional Investors subsequently agreed to produce drafts of the settlement agreements, they continue to resist production of any other document or communication associated with the settlement negotiations.[9]

[8] W&L joins in this Motion only to the extent this Motion seeks to compel discovery sought by W&L pertaining to CHASE 2007-A3 and CHASE 2007-S6, and concerning only the distribution methodology. *See* Ex. 3. In negotiating and settling claims without a loan file review, the settlement proponents worked around the contractually prescribed methodology for valuing the claims. A loan file review would have also provided the information necessary to allocate the settlement payment to the trusts and tranches that suffered harm from the breaches being settled. In the absence of a loan file review, the Court would need to understand the basis on which the distribution decision was made.

[9] Ex. 5 (Stipulation filed May 29, 2015); *see also* March 20, 2015 Hr'g Tr. at 67.

ARGUMENT

I. Documents Relating to the Negotiation of the Proposed Settlement Are Material and Necessary

Article 77 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). 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). Here, the Negotiation Documents are material and necessary to establishing whether the Proposed Settlement complies with the terms of the PSAs, and whether the Trustees abused their discretion and acted in good faith in connection with evaluating, and ultimately accepting, the Proposed Settlement.

First, discovery of the Negotiation Documents is necessary to discern whether the Institutional Investors derived any unfair benefit different from, or to the detriment of, other investors from the Proposed Settlement. Any such advantage would contravene the provisions of the Accepting Trusts' PSAs. *See, e.g.*, GreenPoint Mortgage Funding Trust 2005-AR5 PSA § 11.04(d) ("No one or more Certificateholders shall have any right by virtue of any provision of

this Agreement to affect the rights of any other Certificateholders or to obtain or seek to obtain priority or preference over any other such Certificateholder . . . .”). For example, it is troubling that only approximately 3.4% of the Institutional Investors’ over $80 billion in holdings are in Accepting Trusts where all, or substantially all, of the loans were originated by “Selected Third Party Originators” subject to the Haircut.[10] For these trusts, the investors will receive only ***0.8%*** of projected losses as a result of the Haircut. For the majority of the trusts –and where the Institutional Investors have almost 90% of their holdings – the Proposed Settlement will pay 7.6% of projected losses. Fischel Report ¶ 95. At the very least, that a vastly disproportionate share of the Institutional Investors’ certificates benefit at the expense of the Haircut Trusts raises red flags as to the fairness of the Proposed Settlement and the negotiation process.

Second, the Negotiation Documents should provide an explanation for the basis and reasons for the Proposed Settlement’s allocation methodology, including the Haircut. The current record is devoid of any explanation as to the rationale for a key feature of the Proposed Settlement – the method by which the $4.5 billion is to be distributed to investors. Discovery of the Negotiation Documents will shed light on the formulation of this methodology.

Third, in order to evaluate the reasonableness of the Trustees’ decision to accept the Proposed Settlement, one must 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 an “exhaustive evaluation process.” Trustees’ Omnibus Response to Objections (Dec. 3, 2014), Doc. No. 194, at 2. By the Trustees’ own admissions, they neither participated in the settlement negotiations nor considered the documents underlying the negotiations. As the Court stated,

[10] There are nine such Accepting Trusts (the “Haircut Trusts”): JPMAC 2005-OPT1, JPMAC 2005-OPT2, JPMAC 2005-WMC1, JPMAC 2006-WF1, JPMAC 2006-WMC1, JPMAC 2006-WMC2, JPMAC 2006-WMC3, JPMAC 2006-WMC4, and JPMMT 2005-ALT1.

"don't the trustees need to have known what proposals were on the table and what were rejected and why the compromises were made in, in assessing the reasonableness of the settlement?" March 20, 2015 Hr'g Tr. at 37:8-11. That the Trustees would approve the settlement without basic due diligence into how the terms were negotiated is an abdication of their role as stewards of investor interests.

II. The Institutional Investors Cannot Shield Documents Behind the California Mediation Privilege

A. The California Mediation Privilege Is Inapplicable

This is a New York proceeding evaluating a proposed settlement under New York law concerning New York trusts sponsored by a New York domiciled entity. The Institutional Investors' attempts to shield their conduct from the Court's scrutiny via California's mediation privilege fails. Under New York choice-of-law principles, New York law applies to the discoverability of the Negotiation Documents, and no mediation privilege exists in New York.

In choice-of-law analysis, New York courts often look to whether the law at issue is procedural or substantive in nature. With respect to procedural law, "the law of the forum state is usually in control." *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 41 (1961). The First Department has determined that issues of privilege are procedural, and therefore New York law applies to this Article 77 proceeding. *People ex. Rel. Spitzer v. Greenberg*, 50 A.D.3d 195, 198, 851 N.Y.S.2d 196 (1st Dept. 2008) ("New York courts routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues."); *Codey ex rel. New Jersey v. Capital Cities, Am. Broadcasting Corp.*, 82 N.Y.2d 521, 530 ("[E]videntiary questions such as privilege are best resolved in the

State – and in the proceeding – in which the evidence is to be used.").[11] New York does not recognize a mediation privilege. *See Hauzinger v. Hauzinger*, 842 N.Y.S.2d 6464, 647 (4th Dep't 2007) ("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."). The Institutional Investors do not and cannot show any reason why New York's policy in favor of disclosure should be rejected under these circumstances.

Even if the issue at hand "contains elements of both substance and procedure," *cf. Brandman v. Cross & Brown Co. of Florida, Inc.*, 125 Misc.2d 185, 186, 479 N.Y.S.2d 435, 436 (N.Y. Sup. Ct. 1984), the result is the same because New York is the state with the most significant – indeed, overwhelming – contacts.[12] For substantive law, courts in New York defer to the "law of the place 'which has the most significant contacts with the matter in dispute,'" termed the "center of gravity" rule. *Babcock v. Johnson*, 12 N.Y.2d 473, 479 (1963) (citing *Auten v. Auten*, 305 N.Y. 155, 160 (1954)). The purportedly privileged communications and documents concern claims arising under ***New York law*** relating to ***New York trusts***; the parties

[11] Although the New York Court of Appeals has not officially blessed it, *see In re Holmes*, 22 N.Y.3d 300, 317 (2013), Section 139 of Restatement (Second) on Conflict of Laws is not inconsistent. Section 139 provides:

> [e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

[12] *Lynbrook Glass & Architectural Metals, Corp. v. Elite Associates, Inc.*, cited in the Institutional Investors' Objections and Responses as grounds for withholding the Negotiation Documents, is readily distinguishable. There, in the interest of open discussion, the court ordered that the parties engage in mediation and further directed that documents associated with that mediation would be confidential and returned to the documents' owners at the end of mediation. *Lynbrook Glass & Architectural Metals, Corp. v. Elite Assocs., Inc.*, No. 5238/88, 1996 WL 34450917 (N.Y. Sup. Ct. Aug. 20, 1996); *aff'd*, 656 N.Y.S.2d 291 (2nd Dep't 1997). The court rejected the argument that one party's inadvertent retention of a settlement document provided grounds for a third party's discovery of what was otherwise a court-mandated confidential document. *Id.* This unusual circumstance has no bearing on New York's general rule of not recognizing a mediation privilege, and, in any event, the mediation at issue here is entirely unlike the mediation in *Lynbrook*.

all expected the Trustees to seek approval of the Proposed Settlement in a ***New York court***; and JPMorgan – the party paying the Proposed Settlement – has its principal place of business in New York.[13] Furthermore, the PSAs for the Accepting Trusts all contain New York choice of law provisions.[14]

The fact that JPMorgan and the Institutional Investors sought out a mediator who was located in California should not hijack what is otherwise an entirely New York-related matter. *See Miller v. Basic Research LLC*, No. 2:07-CV-871 TS, 2013 WL 1194721, at *2-3 (D. Utah 2013) (rejecting application of California mediation privilege and applying Utah law to permit admission of settlement term sheet). Indeed, giving such extraordinary significance to the location of the mediator would invite rampant gamesmanship, permitting parties to shield otherwise discoverable communications by choosing a California mediator.

Similarly, the Institutional Investors argue that California's mediation privilege should be applied because ***only three*** – out of more than 20 – of the Institutional Investors have their principal places of business in California. However, these California contacts pale in comparison to the numerous and meaningful contacts with New York noted above. In the

[13] RMBS Trustees sued by investors in several actions outside of New York have moved to transfer those actions to New York or dismiss as *forum non conveniens* on the grounds that New York is the state with the most significant contacts. *See, e.g.*, The Bank of New York Mellon's Mot. to Dismiss, or in the Alternative, to Stay Pursuant to Rule 12(B)(3) and the Forum Non Conveniens Doctrine, *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490, at *3 (C.P. Hamilton Cnty. July 15, 2013) ("this is a case against a New York bank that is governed by New York law, in which all of the conduct at issue occurred in New York . . ."); *see also* Def. the Bank of New York Mellon's Mot. to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, for Leave to Amend the Answer, and Brief in Support, *American Fidelity Assurance Co. v. Bank of N.Y. Mellon*, No. 11-cv-1284, at *4 (W.D. Okla. Mar. 3, 2014) (arguing that Bank of New York Mellon, as a "New York-chartered bank with its principal place of business in New York" was not subject to personal jurisdiction in Oklahoma).

[14] *See, e.g.*, GreenPoint Mortgage Funding Trust 2005-AR5 Pooling and Servicing Agreement § 11.06 ("THIS AGREEMENT AND THE CERTIFICATES SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK . . . .").

context of ***all*** the impacted investors in all 319 Accepting Trusts, the California contacts are *de minimis*.

B. Even if the California Mediation Privilege Applies, Respondent-Investors Should be Permitted Access to the Mediation Documents

Even if the Court determines that it should consider the California mediation privilege, that privilege should not prevent the disclosure of the Negotiation Documents to the Respondent-Investors. The Respondent-Investors – as parties whose interests are being settled – fall within the scope of the privilege and are entitled to access those documents.

California's mediation privilege is intended to encourage "candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement." *Cassel v. Superior Court*, 51 Cal.4th 113, 133 (Cal. 2011). However, the statute provides that "[e]vidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." Cal. Evid. Code § 1120(a). Moreover, parties should not be permitted to use "mediation as a pretext to shield materials from disclosure." *Rojas v. Superior Court*, 33 Cal.4th 407, 417-18 (2004) (citations omitted); *see also Gonzales v. T-Mobile, USA, Inc.*, No. 13CV1029-BEN (BLM), 2014 WL 4055365, at *7 (S.D. Cal. Aug. 14, 2014).

In purporting to negotiate a global settlement on behalf of all investors, the Institutional Investors effectively stepped into the shoes of the Trustees, which owe duties to ***all*** investors.[15] Just as the Trustees would be required to share the documents underlying settlement negotiations

[15] Because Events of Default have occurred for all the trusts, the Trustees owe ***fiduciary*** duties to investors. *See* Plaintiffs' Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, *Blackrock Allocation Target Shares: Series S. Portfolio v. U.S. Bank Nat'l Assoc.*, No. 14-cv-09401, at *37 (S.D.N.Y. Mar. 23, 2015) ("After the occurrence of Events of Default, U.S. Bank's common law duties expand to include a fiduciary duty to the Trusts and Holders.").

with the investors, so too should the Institutional Investors that negotiated a global settlement inclusive of trusts in which they themselves had no interests. Pursuant to the PSAs, the Institutional Investors are not permitted to engineer a benefit for themselves at the expense of other investors. The Institutional Investors had an opportunity to participate in, guide, and develop the settlement, during which they presumably determined what they considered to be fair and reasonable. So long as Respondent-Investors are precluded from accessing the Negotiation Documents, it remains uncertain as to whether the Proposed Settlement is fair and reasonable for all investors, or whether those investors that participated in the negotiations obtained special benefits.

When, as in a typical case, a mediation resolves a private dispute among private litigants, the settlement has little or no bearing on other persons and the private litigants are amply able to judge the "fairness" and "reasonableness" of it. This is not such a typical case. The Proposed Settlement compromises rights not just of the Institutional Investors, but also of the Respondent-Investors and other persons. As such – and especially because those left outside the Institutional Investors' tent do not share the interests of the Institutional Investors – the "fairness" and "reasonableness" of the Proposed Settlement is not only not presumptive, but is very hotly disputed.

In that regard, this proceeding is in some ways analogous to a class action, in which there is a reduced expectation of privacy in mediation. One California federal court has noted that "in the context of class action litigation . . . the expectation of confidentiality regarding mediation is diminished because the rights of third parties are involved and the court must scrutinize settlements to ensure that the class members' rights are protected . . . ." *Molina v. Lexmark Int'l, Inc.*, No. CV 08-04796 MMM, 2008 WL 4447678, at *16 (C.D. Cal. Sept. 30, 2008). Analyzing

the reported decisions of state and federal judges concerning legal disputes involving mediation, one law review article noted:

> The level of vigilance for maintaining the confidentiality of mediation discussions varies depending on the context of the litigation. ***If the mediation settlement affects the rights of third parties, such as settlement in class action cases, the expectation of confidentiality appears to disappear or be substantially diminished*** . . . . In short, the bargaining process in class actions is closely scrutinized and frequently placed on the public record—whether the settlement is reached through unfacilitated negotiation or with the assistance of a mediator.

Coben, James R. and Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 68 (2006) (emphasis added). Indeed, scrutiny of the settlement negotiations is even more important here than in a class action because investors here have no ability to opt out and are forced to express objections in this proceeding. Thus, the Institutional Investors clearly had a "substantially diminished" "expectation of confidentiality" in the course of negotiating a settlement that they fully contemplated would be brought to court in order to be made binding on a large group of investors without their consent.

CONCLUSION

For all the foregoing reasons, Respondent-Investors respectfully request that the Court grant their motion to compel the Institutional Investors' production of the Negotiation Documents.

DATED: New York, NY
May 29, 2015

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