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 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.	Index No. 652382/2014 Part 60 Motion Sequence No. 21 Hon. Marcy S. Friedman Oral Argument Requested **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT-INVESTORS' OMNIBUS MOTION TO COMPEL TO THE INSTITUTIONAL INVESTORS**

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Respondent-Investors[1] submit this Memorandum of Law in support of their Omnibus Motion to Compel against the Institutional Investors. All Respondent-Investors seek production of documents concerning the Institutional Investors'[2] negotiation of the proposed settlement agreement with JPMorgan Chase & Co. ("JPMorgan"), dated November 15, 2013, and modified July 29, 2014 (the "Proposed Settlement"), including any materials provided to or discussed relating to the Proposed Settlement (the "Negotiation Documents"). W&L Investments, LLC ("W&L") separately seeks information relating specifically to the methodology chosen by the Institutional Investors for the distribution of each Accepting Trust's Allocable Share of the Settlement Payment. Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. ("Triaxx") separately seek disclosure of holdings information that would establish whether an Institutional Investor obtains a windfall in the settlement.

SUMMARY OF ARGUMENT

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

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[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. (collectively, the "Respondent-Investors"). DW Funds joins in this motion as to all Institutional Investors other than TIAA and MetLife. W&L Investments, LLC joins only in Part III of this motion.

[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, justice requires an opportunity to test just how beneficent – or not – these large and sophisticated parties actually were in its negotiation. This is especially so given the presence of several glaring problems with the Proposed Settlement, *reached out of earshot of these Trustees*[3] – such as the fact that the Proposed Settlement is markedly worse for investors than the settlement reached with Countrywide, even though the claims against JPMorgan are significantly stronger than the Countrywide claims at the time that settlement was negotiated. Respondent-Investors are also entitled to probe the negotiation of the "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 the Negotiation Documents 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.

– particularly where the Institutional Investors' communications reveal that the Trustees were regularly briefed about the status of negotiations and invited to meetings with the mediator.

Next, the Institutional Investors invoke California's mediation privilege 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.

W&L separately seeks production of documents and other information relating to the Institutional Investors' determination as to how the settlement proceeds will be distributed to various classes of securities within each Trust in support of its contention that the distribution methodology chosen by the Institutional Investors is inconsistent with the plain terms of the Governing Agreements.

Triaxx separately seeks information concerning the Institutional Investors' holdings in the Trusts immediately preceding and following the credit crisis. Triaxx contends that the allocation of proceeds among the Trusts negotiated by the Institutional Investors, which is based on the volume of losses suffered by each trust rather than the volume of defective loans, is unfair and disproportionately compensates the Institutional Investors, who invested heavily in trusts with more risky loans with losses *not* attributable to breaches of representations and warranties, at the expense of investors like Triaxx who invested in trusts backed by less risky loans.

STATEMENT OF FACTS

The Institutional Investors negotiated the Proposed Settlement with JPMorgan in which all 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, 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 – the parties entrusted to protect the interests of absent investors – ultimately accepted the Proposed Settlement and filed this Article 77 proceeding.

Both the nature of the 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]

[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).

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 seeks "[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 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

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[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.

methodology described in the Proposed Settlement. Ex. 3. The Institutional Investors again objected to the production of such documents, claiming irrelevance, burden, and privilege. *See* 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.[8]

ARGUMENT

I. The Negotiation Documents 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

[8] Ex. 5 (Order dated June 18, 2015); *see also* March 20, 2015 Hr'g Tr. at 67.

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, which would contravene the provisions of the PSAs.[9] 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, for which investors will receive only ***0.8%*** of projected losses if the Proposed Settlement is approved.[10] 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. 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 its negotiation.

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.

[9] *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 . . . .")

[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.

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 requested nor considered the documents underlying the negotiations. As the Court stated, "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. <u>The Institutional Investors Rely on the California Mediation Privilege</u>

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 entity. The Institutional Investors' attempts to shield their conduct from this Court's scrutiny via California's law 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

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[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 Assocs., 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*.

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)). Here, the Negotiation Documents concern matters arising under ***New York law*** relating to ***New York trusts***; the parties 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 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

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[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 . . . .").

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

B. Even Under California Law, the Negotiation Documents Should be Produced

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]

[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

Just as the Trustees would be required to share the documents underlying settlement negotiations with the investors, so too should the Institutional Investors that negotiated a global settlement inclusive of trusts in which they themselves had no interests. Alternatively, the PSAs expressly prohibit the Institutional Investors from attempting 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 same interests – 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

the occurrence of Events of Default, U.S. Bank's common law duties expand to include a fiduciary duty to the Trusts and Holders.").

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 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.

Even if the settlement negotiations are privileged, the discovery to date indicates that the Institutional Investors waived that privilege by regularly briefing the Trustees as to status of the settlement negotiations and inviting the Trustees to participate in meetings in New York with the so-called "California mediator." The very fact that the Institutional Investors included the Trustees in the settlement negotiation process operates as a waiver of any such privilege and confirms that the Institutional Investors have no colorable claim of privilege over the documents concerning the settlement negotiations.

III. W&L Seeks Narrow Discovery Concerning the Distribution Methodology Only

The Institutional Investors negotiated the proposed Settlement with JPMorgan and *urged* the Trustees to accept it. Doc. No. 1 at ¶¶ 14-15. Within that Proposed Settlement is a methodology for distributing the Settlement Payment among Certificateholders in each Accepting Trust. Settlement Agreement § 3.06. BNY Mellon, the Trustee for each of the two Accepting Trusts in which W&L has holdings (the "W&L Accepting Trusts") concedes that "no BNYM employee or agent [has] knowledge of" investigations, evaluations, analyses, and communications concerning…the effect of any distribution methodology the Trustees considered and the effect of those distribution methodologies on distributions of the Settlement Payment to the Institutional Investors, senior certificates, junior certificates, or holders of certificates with zero balances. Letter from M. Ingber to M. Rollin, July 2, 2015 (the "July 2, 2015 Letter Response"), at 1. This fact makes the discovery W&L seeks from the Institutional Investors even more critical, as they had the ability to manipulate the distribution for their own benefit. As set forth in W&L's arguments to compel discovery from the Trustees, the distribution methodology chosen by the Institutional Investors is inconsistent with the Governing Agreements and would *not* distribute payment to the Classes of Certificates that actually suffered the losses caused by the claims being released in the Settlement Agreement.[16]

W&L's four targeted discovery requests go to this issue:

> **Interrogatory No. 1** requests identification of agents with knowledge of the amount that will paid to the Institutional Investors under the current distribution methodology.
>
> **Interrogatory No. 2** requests identification of agents with knowledge of any investigation, evaluation, analysis or communications concerning specific facts related to the distribution methodology.

[16] In the interest of brevity, and because this motion is focused on outstanding discovery, W&L will not set forth its position as to how the distribution should occur. However, W&L's supplemental responses to the Institutional Investors' interrogatories set forth W&L's position with respect to distribution and have been served on the Institutional Investors and the Trustees.

> **Request for Production No. 1** requests communications concerning the distribution methodology.
> **Request for Production No. 2** requests investigations, evaluations, notes, and analyses concerning specific facts related to the distribution methodology.

See Ex. 3. The Institutional Investors refuse to respond, claiming irrelevance, burden, and privilege. *See* Ex. 4. W&L moves to compel.

The Institutional Investors' objection on relevance grounds reads the CPLR far too narrowly and is at odds with the very relief requested in this proceeding. In an Article 77 proceeding, disclosure is governed by Article 31, which mandates 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). Applying this standard, "[t]he 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)).

Central to the issue of relevance is the fact that the Trustees rely on the Institutional Investors' negotiation of and support for the Settlement Agreement as evidence of reasonableness. *See, e.g.*, Doc. No. 194 at 9-10. As the Trustees acknowledged in their statement concerning the scope of discovery, "[u]nder this standard, the only documents relevant and discoverable are those that *relate to* the Trustees' decision to accept the Settlement for the trusts in which the objectors have a beneficial ownership or other interest (the "Subject Trusts")." Doc. No. 309 (Ex. C at 1). Legally and logically then, information held by the Institutional Investors regarding this process, including the evaluation, analysis, and advocacy for the distribution methodology is particularly relevant to whether the Court should approve this aspect of the Settlement Agreement and the Trustees' decision-making with respect thereto. Simply put, the settlement proponents cannot have it both ways—they cannot argue the Institutional Investors' involvement is evidence of reasonableness, and at the same time withhold information that may show the Trustees' decision to accept the Institutional Investors' recommendation was a poor exercise of discretion.

Notably, Justice Kapnick, in considering whether to approve the Countrywide settlement, stated the following with respect to discovery:

> I do think if the petitioners want me to make all of these findings and decide that this was a reasonable settlement and there were no conflicts and there were no special provisions of anything special given to the institutional investors with whom they did negotiate as opposed to you with whom they did not directly negotiate, that there is going to have to be a little bit more discovery than just what did you rely on, this law professor and this other law professor and this financial expert and that is the end of that.

In re Bank of N.Y. Mellon, Hr. Tr. p. 13:21-14:7 (N.Y. Sup. Ct. Apr. 24, 2012). So too, here.

Furthermore, the settlement proponents have placed the question of whether the distribution methodology comports with the Governing Agreements and whether it or a different methodology should be used directly in issue. *See* Settlement Agreement §§ 2.09, 3.04(d) (contemplating that the Court may find the distribution methodology does not comport with the Governing Agreements). The Institutional Investors treat this information as relevant and in fact propounded discovery on W&L, requiring W&L to disclose its analysis with respect to the distribution methodology. W&L has complied with the Institutional Investors' requests, and the Court would be aided in having information from the parties who chose the distribution methodology in the first place. In any event, having placed the suitability of the methodology in issue, it is relevant under any standard.

The Institutional Investors' scope and burden objection is similarly meritless. W&L seeks information regarding an extremely narrow, though significant, topic. W&L is not embarking on boundless expedition, but rather seeks limited information concerning a specific provision of the Settlement Agreement. The Institutional Investors argue that W&L "seeks information regarding trusts in which W&L has no holdings." But this misreads W&L's requests. W&L specifically stated, "W&L is interested in the distribution methodology only to the extent it concerns Chase 2007-A3 and Chase 2007-S6." Ex. 3, fn. 1. However, where negotiations, evaluations, decisions, and similar communications affect all Trusts, they necessarily pertain to the two W&L Accepting Trusts, as well. Thus, while W&L disagrees with the Institutional Investors' effort to curtail Respondent-Investors' discovery by limiting it to Trust in which Respondents have holding—*a limitation the Institutional Investors themselves do not observe with respect to their own role in these proceedings*—W&L's requests are well within the scope of allowable discovery even as artificially conceived by the Institutional Investors.

Similarly unfounded is the Institutional Investors' objection that W&L seeks information related to other settlements and communications that pre-date this Settlement Agreement, which they conclude is outside the scope of allowable discovery. The Institutional Investors' own log (attached as Exhibit A to their Objections), shows that documents and communications concerning the distribution methodology were created as early as November 1, 2010. It appears then, that the process of considering and determining the distribution method commenced before the negotiations of the present settlement. All such information and communications would therefore fall within the scope of discoverability to the extent any such information relates to or concerns the analysis and acceptance of the distribution methodology under the Settlement Agreement.

Finally, the Institutional Investors' privilege argument does not apply. As a threshold matter, facts are not privileged, *Miranda v. Miranda*, 184 A.D.2d 286, 286 (1st Dep't 1992), and "[i]n light of the strong policy in favor of full disclosure unless the information sought is immunized, the burden of showing the appropriate immunity should be on the party asserting it." *Koump v. Smith*, 25 N.Y.2d 287 (1969). The Institutional Investors' withholding of facts as privileged is improper and the Court should overrule their objections at least to that extent.

Moreover, as a party whose interest is being settled under the proposed Settlement, and who is a co-investor with Institutional Investors in the Trusts for which they negotiated and urged acceptance of the Proposed Settlement, W&L falls within the scope of any privilege asserted by the Institutional Investors. Indeed, the Governing Agreements for the W&L Accepting Trusts specifically prohibit one or more co-investors from seeking or obtaining a preferred position relative to the rest:

> [I]t being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates of any Class shall have any right in any manner whatever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other such Certificates of such Class or any other Class, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of Certificateholders of such Class or all Classes, as the case may be. For the protection and enforcement of the provisions of this Section, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

PSA Chase 2006-A3 § 12.02; PSA Chase 2006-S6 § 12.02.

This is not a case where an outside third-party seeks disclosure of documents; instead, the Trust beneficiaries, who share the same interests as the parties who negotiated a settlement on their behalf, seek disclosure of documents that pertain to the very rights that were purportedly negotiated on their behalf. Further, whatever confidentiality concerns the Institutional Investors may have as to the rest of the world may be cured by designating documents under the protective order entered in this case. *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250-51 (1st Dep't 2002) ("The settling parties'…interest in confidentiality may be protected by an order limiting the disclosure…as the Supreme Court directs.”). Thus, the Court need not pierce the claimed privilege, but simply find that Respondent-Investors are within it. W&L therefore requests that the Court order the Institutional Investors to comply with W&L’s discovery requests.

IV. Triaxx Seeks Limited Disclosure of Holdings Information[17]

Triaxx seeks information that is very limited and easy to provide: the Institutional Investors’ holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009. This information is relevant to the rationality and fairness of the allocation formula (the “Allocation Formula”) in the proposed settlement, such as investors having no damages partaking of the settlement at the expense of other Trusts.

A. The Differences Among the Covered Trusts Are the Quality of the Mortgage Loan Collateral and the Differences in the Representations and Warranties in the PSAs[18]

Although the Covered Trusts share the same general structure, the loans that served as collateral in the Covered Trusts present significantly different levels of risk, and the representations and warranties in the PSAs differ. As a result, the Covered Trusts have different claims against JPMorgan for breach of representation and warranty (“R&W Claims”). Tang Aff. ¶ 10.

1. The Trusts Hold Different Types of Loans Presenting Different Risks

The Covered Trusts can be categorized by the types of loans they hold.[19] The different types of loans present different risks. Credit risk, the risk that a borrower will default on a loan, is greater with subprime borrowers than prime borrowers, irrespective of representation and warranty breaches.

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[17] This section of the Omnibus Motion is brought by Respondents-Objectors Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. The other Respondent-Investors do not join this section.

[18] The relevant facts are set forth in the accompanying affidavit of Mingsung Tang, dated July 6, 2015(“Tang Aff.”), and the affirmations of Charles R. Jacob III, dated July 7, 2015 (“Jacob Aff.”), and John G. Moon, dated July 7, 2015 (“Moon Aff.”).

[19] The different types of loans are detailed in the Tang Affidavit. Tang Aff. ¶ 11.

Credit risk is also greater with adjustable-rate mortgages, particularly POAs, which create "payment shock" credit risk: the risk that the borrower will be unable to make payments when the interest rate increases. By contrast, fixed-rate loans are underwritten to the full payment of principal and interest, necessitating a higher quality of borrower and thus presenting much less credit risk.

Different loans also present different "security risk," the risk that the collateral for the loan will not be adequate to fully repay the loan if the borrower defaults. There is greater security risk with second lien loans because if the property value decreases by any amount, the second mortgage may be insufficiently collateralized. If the borrower defaults, the first lien holder has a priority over any liquidation proceeds. This makes second liens sensitive to market downturns. Security risk is also greater with POAs, because the reverse amortization can increase the amount of the loan over time.

For all these reasons, the fact that the riskier subprime, scratch and dent, Alt-A POA, and second lien Covered Trusts have incurred greater losses than the safer prime and prime Alt-A fixed-rate Covered Trusts does not justify the assumption that losses in these Trusts give rise to valid R&W Claims. The riskier Trusts would be expected to have greater losses, given the heightened risk profile of the loans they own.

2. <u>Triaxx and the Settling Certificateholders' Holdings</u>

Triaxx invested in RMBS originated by JPMorgan. Triaxx invested prudently, and did not invest in risky RMBS. Triaxx invested only in super-senior classes of RMBS backed by prime, first-lien, 30-year fixed-rate mortgages. Among the Covered Trusts constituting Triaxx's positions, the funds held 20,056 mortgage loans with aggregate original outstanding balance of about $9.94 billion. At October 2014, these Trusts realized about $660 million in losses, hold in excess of $455 million in delinquent loans, and hold about $1.87 billion in performing loans. Tang Aff. ¶ 9, Ex. B.

Triaxx has undertaken a review of the reported holdings of the Institutional Investors in the Covered Trusts. Tang Aff., Ex. E. Less than half of the Institutional Investor's holdings are in prime or

Alt-A prime Trusts, of which only one-third are fixed-rate. The majority of their holdings are in the risky adjustable rate (including POA), subprime, second lien and scratch and dent trusts.

These types of Trusts have greater Losses than the prime and Alt-A prime Trusts, such as the Triaxx-held trusts. *See id.* In fact, greater losses were expected at the origination of the riskier Trusts, as shown by the fact that they paid a higher yield.

3. The Representations and Warranties Vary

Origination fraud was a substantial risk when the loans were originated (about 2004-2007). However, the representations and warranties for fraud differ widely among the Covered Trusts.

The Prime Trusts clearly state the "Seller . . . makes the representations and warranties contained" in the related purchase agreements, or that the Seller directly makes the representations and warranties. *E.g.* Tang Aff., Ex. G2 (JPMMT 2007-S2 PSA), 64, § 2.05(d)(x)-(xv); Ex. G3 (BSABS 2005-AC5 PSA), 306, § 7. In the other trusts, such as BSMF 2007-AR2, this is not always the case.

In contrast, the Scratch and Dent Trusts disclose in their prospectuses that investors take heightened risks in purchasing their loans, while the Prime Trusts do not. *E.g. id.*, Ex. I, BSABS 2006-3 Prospectus Supplement, S-19, S-20 (disclosing "[a]pproximately 17.25% of the mortgage loans" actually "were 30 days or more contractually delinquent" by cut-off date principal balance, and that the mortgage pool included impaired mortgage loans owing to "violated . . . underwriting guidelines," "missing or defective loan documentation," "previous[] [loan delinquency]," and/or borrowers with "credit write-offs, outstanding judgments, current or prior bankruptcies," among other reasons).

B. The Allocation Formula Is Irrational and Unfair Because Very Different Trusts Are Treated Identically Without Regard to Causation of Losses

As discussed more fully in the Tang Aff., the proposed settlement produces an irrational and unfair result because investors in riskier trusts that suffered losses for economic reasons, rather than because of breaches of representations and warranties — the claims governed by the Allocation

Formula — are compensated equally (or as shown below, even more favorably) than investors in less risky trusts that actually suffered losses from the claims being settled. This irrational and unfair result is compounded by the substantial windfall profits that the settlement will create for certain Institutional Investors, as discussed below.

C. The Institutional Investors Have Refused to Disclose Their Holdings as of the Dates Requested

The Institutional Investors requested holdings information from the respondents, including Triaxx, as of four dates: November 1, 2013; December 11, 2013; August 1, 2014; and October 1, 2014. Despite its objections as to two of those dates, Triaxx provided its holdings information for all four dates that the Institutional Investors requested. Jacob Aff. ¶¶ 3-6.

In its First Set of Interrogatories, Triaxx, like the Institutional Investors, requested holdings information as of four dates. Two of the dates (November 1, 2013 and August 1, 2014) were the same as in the Institutional Investors' requests. The other two dates — September 1, 2008 and April 1, 2009 — were different. Triaxx requested the Institutional Investors' holdings information as of September 1, 2008 and April 1, 2009 because those dates marked or closely preceded important points in the financial crisis, as more fully set in the Tang Aff., and the Institutional Investors' holdings — or lack of holdings — on those dates are relevant to the Allocation Formula. *Id.* ¶ 8. The Institutional Investors have refused to produce their holdings information as of September 1, 2008 and April 1, 2009. *See id.* Ex. 4 at 2.

D. The Requested Information Is Well Within the Scope of Appropriate Discovery in this Article 77 Proceeding

Nothing in the record shows that the Petitioners investigated the use of losses as a proxy for R&W Claims[20] or adequately examined distinguishing features of applicable PSAs.

[20] In opining upon the proposed settlement, Petitioners' experts did not assess whether estimated losses was an adequate proxy for R&W Claims. The Reports of Judge Carpinello, Professor Schwartz, and Mr.

Significantly, the record does not show that the Petitioners even considered certain of the Institutional Investors' ***windfall profits*** in evaluating whether the Institutional Investors had a conflict of interest with other investors in negotiating the settlement as to all. Judicial intervention is warranted when a trustee "acts in good faith but for a reason other than to further the purpose of the trust." Restatement (Third) of Trusts: Judicial Control of Discretionary Powers § 87, cmt. c (2007); *cf. Cobalt Multifamily Inv. I v. Shapiro*, 9 F. Supp. 3d 399, 411 (S.D.N.Y. 2014) ("[W]here a trustee is found to have mismanaged the trust, the question of good faith and honesty of purpose is unimportant.").

Here, recompensing investor losses from economic circumstances, without regard to whether such losses were caused by breaches of representations and warranties, is not a purpose of the Covered Trusts, nor is providing windfall profits. A settlement should not be approved if it gives windfall profits to some investors while undercompensating others. *Cf. In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186 (2d Cir. 2001) (reissued 2005) ("Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims."); *In re Metlife Litig.*, 689 F. Supp. 2d 297, 344 (E.D.N.Y. 2010) ("[r]elative strength and value of different categories of claims may be considered" in evaluating fairness of class settlement because "[n]othing requires a settlement to benefit all class members equally. Such a rule would itself result in an inequitable windfall to certain class members, to the detriment of others."); *In*

Reifsnyder do not touch upon the matter. Dr. Sabry, who does, merely states, "I have been asked by counsel for the Trustees to calculate the lifetime Net Losses for the 330 Trusts at issue and apply the Allocation Formula set out in the Settlement Agreement to estimate the Allocable Share of the Gross Settlement Amount for each Trust." Sabry Report, dated Nov. 15, 2013, ¶ 11. Professor Fischel concedes that "this [Allocation] formula does not take into account, among other things . . . the Material Breach Rate for the Trust." Fischel Report, ¶ 25. Although Professor Fischel repeatedly refers to Material Breach Rate to argue the proposed settlement is reasonable, *e.g. id.* ¶¶ 106-21, he did not consider (or at least explain) whether "estimated lifetime losses" are a proxy for Material Breach Rates.

re WorldCom Sec. Litig., 388 F. Supp. 2d 319, 348 (S.D.N.Y. 2005) ("[S]ettlement proceeds may be allocated with respect to the strengths and weaknesses of various claims.").

The Institutional Investors' holdings on Sept. 1, 2008, Apr. 1, 2009, Nov. 1, 2013, and Aug. 1, 2014 are relevant to show whether some or all of the Institutional Investors would receive windfall profits from the Proposed Settlement. Publicly available records establish that some of the largest Institutional Investors — *e.g.*, PIMCO and Goldman Sachs — purchased large positions in the Trusts after RMBS prices bottomed out in April 2009. Tang Aff. ¶ 30.[21]

The windfall profits not only render the proposed settlement unfair to more prudent buy-and-hold investors such as Triaxx, but raise a question as to whether the Institutional Investors, as the parties that negotiated this settlement, purportedly on behalf of all bondholders however situated, had and have a conflict of interest in negotiating the proposed settlement. The information sought by this motion to compel is relevant to both the fairness and conflict aspects of the settlement, and therefore is information that the Court should consider.

E. The Allocation Formula Is a Proper Subject of this Court's Review as the ResCap RMBS Settlement Proceeding Demonstrates

The Institutional Investors cannot argue that the Allocation Formula is not a proper subject of examination by this Court. In ResCap, Triaxx raised the same allocation issue as it does here and the result was that the allocation formula was ***changed***, as recommended after an independent analysis by a qualified expert. *See* Moon Aff. ¶ 5.

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[21] Several of the Institutional Investors have already disclosed a portion of their positions on the covered dates to the public. For example, Pimco Total Return Fund (ticker "PTTRX") has $106 billion in assets. Extracting from public filings, it had $1.7 billion in the covered trusts before the financial crisis (April 2009) and $5.3 billion after the financial crisis (Dec. 2014). Similarly, Goldman Sachs Asset Management Strategic Income Fund (ticker "GSZAX") had no exposure at the peak of the financial crisis (April 2009) and $268 million after the financial crisis (Dec. 2014). Tang Aff. Exhibit J graphically illustrates how, as an example, Goldman Sachs will have windfall profits of approximately $60 to $100 million whereas Triaxx will suffer a loss of approximately $72 million from the settlement. Tang Aff. ¶ 30.

In ResCap, Triaxx was the leading objector to the original allocation methodology. Triaxx's Objections and other submissions brought to the attention of the Court important distinctions among the types of Settling Trusts (*e.g.,* prime, alt-A, sub-prime, POAs, second lien). Indeed, each type of Settling Trust presents different credit risk and security risk, and they exhibit different sensitivities to economic conditions that cause losses in the absence of a representation or warranty breach. Triaxx also showed that Settling Trusts vary with respect to the types of representations and warranties that were made concerning fraud in the origination of the Mortgage Loans.

Triaxx advocated to rationalize the allocation methodology based upon applicable legal principles, unlike the Proposed Settlement here. Revision of the allocation methodology benefitted all of the Settling Trusts, because it caused each Trust to be allocated a lawful share, rather than certain Settling Trusts with outsize losses unjustly benefitting at the expense of other Trusts.

The Institutional Investors' holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009 are relevant to this analysis because this information will assist the Court in (i) understanding the actual economic outcome of the proposed settlement relative to actual losses caused (or not caused) by the breaches of representations and warranties that are the subject of the claims being settled, (ii) evaluating whether the Institutional Investors had a conflict of interest in negotiating the proposed settlement, and (iii) determining whether an independent expert would assist the Court in evaluating and possibly revising the Allocation Formula.

F. Producing the Requested Information Is Not Burdensome

Producing documents is not burdensome for the Institutional Investors, especially since in many cases the answer may just be "none." All of the Institutional Investors will have precise records of their purchases and sales and of their portfolio positions over time. Production will require only extraction of existing data. Tang Aff. ¶ 32.

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