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

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures), AEGON USA Investment Management, LLC (intervenor), Bayerische Landesbank (intervenor), BlackRock Financial Management, Inc. (intervenor), Cascade Investment, LLC (intervenor), the Federal Home Loan Bank of Atlanta (intervenor), the Federal Home Loan Mortgage Corporation (Freddie Mac) (intervenor), the Federal National Mortgage Association (Fannie Mae) (intervenor), Goldman Sachs Asset Management L.P. (intervenor), Voya Investment Management LLC (f/k/a lNG Investment LLC) (intervenor), Invesco Advisers, Inc. (intervenor), Kore Advisors, L.P. (intervenor), Landesbank Baden-Wurttemberg (intervenor), Metropolitan Life Insurance Company (intervenor), Pacific Investment Management Company LLC (intervenor), Sealink Funding Limited (intervenor), Teachers Insurance and Annuity Association of America (intervenor), The Prudential Insurance Company of America (intervenor), the TCW Group, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to CPLR § 7701, seeking judicial instruction, and approval of a proposed settlement.

Index No. 652382/2014

Friedman, J.

Motion Sequence No. __

THE TRUSTEES' MEMORANDUM OF LAW IN OPPOSITION TO OBJECTORS' MOTION TO COMPEL DISCLOSURE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Petitioners 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,[1] HSBC Bank USA, N.A., and Deutsche Bank National Trust Company, solely in their respective capacities as trustees, indenture trustees, successor trustees, and/or separate trustees (collectively, the "Trustees") of residential mortgage-backed securitization trusts (the "Accepting Trusts"), respectfully submit this opposition to the motion to compel filed by the QVT Funds, Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited ("DW Funds"), the National Credit Union Administration Board As Liquidating Agent ("NCUA"), Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"), W&L Investments, LLC, and the Triaxx Entities ("Triaxx") (collectively, the "Objectors").

PRELIMINARY STATEMENT

The Trustees have already produced over a million pages of non-privileged Settlement-related documents from nearly 100 relevant custodians,[2] a universe of documents that far exceeds that which is relevant in this special proceeding. The Settlement Documents include, among other things, all of the Trustee communications concerning the Settlement with JPMorgan

[1] For the 30 Accepting Trusts for which Wells Fargo Bank, National Association ("Wells Fargo"), is Trustee, Law Debenture Trust Company of New York ("Law Debenture") is the appointed Separate Trustee for the purpose of enforcing mortgage loan repurchase claims. Each of Wells Fargo and Law Debenture submits this Opposition to the extent of its respective obligations as Trustee or Separate Trustee for those 30 Accepting Trusts.

[2] The documents produced by the Trustees are outlined *infra* pages 5-6 and in the Trustees' 3/6/2015 Letter to the Objectors (Ingber Aff. Ex. 1) (the "Settlement Documents").

("JPM"), the Institutional Investors, and the Trustees' retained Financial Advisors,[3] as well as a voluminous amount of information that related to problems in the underlying loans. The Trustees should not be required to produce additional documents.

The Objectors' submission is primarily a restatement of their objections to the Settlement, not an explanation for why the Court should order further discovery. The Trustees' productions necessarily would encompass any documents that support the Objectors' speculative conflict-of-interest theories or their complaints about the Settlement evaluation. As the Objectors themselves conceded in a letter to the Trustees, the existing productions from the Trustees show that the Trustees' employees who were responsible for the Settlement decision did not consider any potentially conflicting interests in determining whether to accept the Settlement.

The Trustees also have already produced many documents pre-dating the Settlement because the Trustees provided such documents to their Financial Advisors and have produced to the Objectors all documents and information provided to the Financial Advisors in connection with their evaluation of the Settlement. The Objectors argue, for instance, that evidence of underwriting breaches was relevant to the Settlement evaluation. The Trustees figured this out a long time ago: they sent those documents to their advisors, and all of those documents have now been produced to the Objectors. The Trustees also produced additional pre-Settlement documents, including all final document exception reports for the Accepting Trusts in which the Objectors have holdings (the "Subject Trusts") and informational notices to investors in the Subject Trusts.

[3] The term "Financial Advisors" refers to Jeremy E. Reifsnyder, Boston Portfolio Advisors, Inc.; Faten Sabry, PhD, National Economic Research Associates, Inc.; and Daniel R. Fischel, Compass Lexecon LLC.

The Objectors previously assured the Court that they wished to receive only "summaries," and that "what we have said repeatedly is that if you think this question requires you to produce some massive volume of data, that's not what we want." 2/23/2015 Hr'g Tr. (Dkt. 305) at 18-19. It is impossible to square that assertion with the sweeping requests that they now pursue. For example, the Objectors demand all emails of numerous administrators who had no involvement with the Settlement, dating back to 2010, that simply mention the common terms "loan" and "indemnify," without regard to context or relation to JPM or the Trusts at issue in this case. *See* App. A to Obj. Mem., Doc. Req. 3.

Even if further discovery were appropriate (which it is not), the Objectors have failed to establish that their actual requests are supported by any of the arguments that they make in the motion. It is not clear, for example, how *non*-Settlement communications with investors or with JPM (the first two requests) could bear on the Trustees' evaluation of the Settlement. The third request does not even describe the kinds of documents that it seeks; it is merely a long list of search terms, to be applied going back years before the Settlement was proposed. This Court has emphasized that the Objectors' "need to have very specific examples of documents that they are requesting." *See* 3/20/2015 Hr'g Tr. (Dkt. 354) at 94; *see also id.* at 52 (the Court asserting that any further discovery request "has to be narrow"). The Objectors have not heeded the Court's directive.

For these reasons, and because the substantive objections are often incoherent or legally invalid, the Court should deny the motion to compel.

ARGUMENT

I. THE TRUSTEES HAVE AGREED TO PRODUCE ALL RELEVANT DOCUMENTS.

A. These Proceedings Concern Only The Trustees' Settlement Conduct.

The Objectors agree that the Trustees seek only "a declaratory judgment that would absolve them of liability for their actions regarding the proposed Settlement." Obj. Mem. 1. "The ultimate issue for determination . . . is whether the [Trustees'] discretionary power [to settle] was exercised reasonably and in good faith." *In re Bank of New York Mellon*, 127 A.D.3d 120, 125 (1st Dep't 2015) (citing *Haynes v. Haynes*, 72 A.D.3d 535, 536 (1st Dep't 2010)); *see also In re IBJ Schroder*, No. 101580/98, slip op. at 6 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) (Ex. 1). Yet, the Objectors' discovery requests exceed what the First Department has held is relevant and what was produced in the *Countrywide* case. *See In re Bank of New York Mellon*, No. 651786/11, 2014 WL 1057187, at *9 (Sup. Ct. N.Y. Cnty. Jan. 31, 2014) ("It is clear then that judicial intervention is warranted only when there is an abuse of discretionary authority."), *aff'd in substantial part*, 127 A.D.3d 120 (1st Dep't 2015).

As in any case, courts in Article 77 proceedings deny discovery that is no more than an inquiry into possible claims and that is not relevant to the claims actually at issue. *See, e.g.*, *Andrews v. Trustco Bank, N.A.*, 289 A.D.2d 910, 913 (3d Dep't 2001) (denying discovery demands for all documents related to trust administration as overbroad, irrelevant, and unduly burdensome in an Article 77 proceeding); *In re Beeman*, 108 A.D.2d 1010, 1012 (3d Dep't 1985) (denying discovery related to the trust corpus because it extended beyond the scope of the Article 77 proceeding). The Objectors have no right to discovery that will "unnecessarily broaden the scope of the litigation and invite extraneous inquiries." *Andon ex rel. Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 (2000) (citations omitted). Instead, discovery must be confined to

information that is "material and necessary" to evaluating the reasonableness and good faith basis for the Trustees' decision to settle. *See* Trustee Mem. re: Scope of Discovery (Dkt. 231) at 1-2 (citing CPLR 3101(a)).

This Court already has made clear that the Objectors "are not entitled to the kind of documentation that would be provided in an RMBS breach of contract or fraud action where re-underwriting was going to be done." 6/19/2015 Hr'g Tr. (Dkt. 436) at 62. As shown below, the additional documents sought far exceed the scope of fact discovery.

B. The Settlement Documents Produced By The Trustees Include All Of The Documents And Information That Could Conceivably Be Relevant In This Special Proceeding.

The Objectors acknowledge that this Article 77 proceeding is about the Trustees' decision to settle. *See* Obj. Mem. 2 (referring to their requests as "directly addressed to the process by which the Trustees evaluated and accepted the proposed Settlement"). What the Objectors entirely fail to recognize, however, is that the Settlement Documents produced by the Trustees include all of the documents that could conceivably be relevant in this proceeding. If, as the Objectors implicitly concede, the Settlement Documents do not support any of their claims, then *a fortiori* documents created years before the Settlement would be entirely unavailing.

As confirmed in a letter sent months ago, the Settlement-related documents that have been produced include (to the extent that they exist and are not privileged):

- all documents provided to the Financial Advisors in connection with their evaluations of the Settlement (including, among other things, loan repurchase notices for the life of each trust);
- all other communications between the Trustees and their Financial Advisors (or the advisors' staff) concerning the Settlement;
- all communications within and between the Trustees concerning the selection of the documents and information provided to the Trustees' Financial Advisors;

- all documents concerning the Trustees' evaluation and retention of their Financial Advisors;
- all communications within and between the Trustees identifying the assignments of the Trustees' Financial Advisors;
- all correspondence between the Trustees and investors in the Subject Trusts concerning the Settlement;
- all communications between the Trustees and the Institutional Investors concerning the Settlement;
- all documents considered by each Trustee's committee or other relevant decision maker(s) when determining whether to accept the Settlement;
- all documents concerning the selection of material provided to each Trustee's committee or other relevant decision maker(s);
- any analyses prepared by the Trustees concerning the adequacy of the Settlement Payment; and
- any analyses concerning the rationale for Section 3.05(b)(ii) of the Settlement Agreement (the so-called "haircut" provision).

3/6/2015 Ltr. (Ingber Aff. Ex. 1) at 2-4.

In addition, in compliance with this Court's directive, the Trustees have also endeavored to provide the Objectors with "appropriately limited discovery with respect to [potential] problems with the underlying loans." 6/19/2015 Hr'g Tr. at 62. A substantial number of the documents provided to the Financial Advisors relate to such problems. Furthermore, the Trustees agreed to produce the following additional documents:

- all notices to investors in the Subject Trusts;
- all final document exception reports for the Subject Trusts;
- any mortgage loan diligence reports concerning loans in the Subject Trusts in addition to the reports provided to the Trustees' Financial Advisors; and
- identification of any lawsuits against any Trustee with regard to the Settlement Trusts, excluding any loan-level lawsuits.

3/6/2015 Ltr. at 2-4.

To date, the Trustees have produced well over a million pages of documents from almost 100 custodians. *See* 6/19/2015 Hr'g Tr. at 53-54. Indeed, one Objector even complains that the tiny subset of documents that could be relevant to its objection are too hard to find in the "haystack" that the Objectors already have insisted that the Trustees produce, and it wants the Trustees to re-review their own productions to cull out the documents in which it is interested. Obj. Mem. 26-27. However, the Trustees are under no duty to undertake the Objectors' responsibilities in reviewing the documents they requested in discovery.

The Objectors responded to these massive productions by complaining that the relevant documents did not support any of their speculative theories. They wrote, for instance, "[i]t appears that the 'settlement custodians' identified and produced by the Trustees"—that is, the bank employees who decided whether to accept the Settlement—"had no involvement in (or did [not] bother to consider) other business relationships with JPMorgan or the Institutional Investors." Obj. 6/17/15 Ltr. (Ingber Aff. Ex. 2) at 2. Of course, that is just what one would hope to see—a Trustee making a good faith decision would not "bother to consider" possible conflicting interests—and the absence of such documents, disappointing though it must be to the Objectors, does not point to any shortcoming in the Trustees' productions.

II. THE OBJECTORS' DISCOVERY REQUESTS ARE UNNECESSARY, IRRELEVANT, AND OVERBROAD.

Where, as here, all relevant materials have been or shortly will be produced, there is no entitlement to further discovery. *Cf. Williams v. City of New York*, 41 A.D.3d 468, 469 (2d Dep't 2007) (refusing to delay disposition of a case to allow further discovery where the parties seeking the discovery "ha[d] advanced no nonspeculative basis to believe that additional discovery might yield evidence warranting a different disposition"). This is particularly true in a special proceeding, where "requested disclosure [should be] carefully tailored so as to clarify the

disputed facts" and should not be unduly burdensome. *Georgetown Unsold Shares, LLC v. Ledet*, 2015 WL 3756873, at *5 (2d Dep't June 17, 2015); *see also Lonray, Inc. v. Newhouse*, 229 A.D.2d 440, 440-41 (2d Dep't 1996) (same); *Capoccia v. Spiro*, 88 A.D.2d 1100, 1101 (3d Dep't 1982) ("[T]hose demands which are unduly burdensome or lack specificity or seek privileged matter or seek irrelevant information or are otherwise improper must be denied."); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1071 (Sup. Ct. N.Y. Cnty. 2010) (stating that appropriate limitations on discovery "strike[] a balance between compelling relevant information that is unduly burdensome to produce and information that is material and necessary"). The Objectors are entitled to discovery that is relevant to the claims in this case, but they are not entitled to fish for documents to make claims that they cannot even articulate, much less support, or claims that are not legally cognizable. The Objectors' demands for documents that have nothing to do with the Settlement are not "carefully tailored" to meet that standard.[4]

A. Alleged Conflicts of Interest

The Objectors argue a host of conflict-of-interest theories. *See* Obj. Mem. 10-15. They fail, however, to tie these alleged "conflicts" to the operative legal duty—the duty of loyalty. The relevant duty of loyalty is "the duty of a trustee[] not to profit at the possible expense of his beneficiary." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952). In *Dabney*, the

[4] One Trustee (with only 46 of the 319 Accepting Trusts) undertook to test the burden associated with responding to the Objectors' discovery requests. Wilmington Trust, National Association has to date produced over 4,200 documents. Considering only request number 3 and only for the period dating back to the end of 2012 (not the full period proposed by Objectors, which dates back to April 2010), Wilmington Trust determined that it would be required to export and review approximately 28,500 additional documents that either did not contain the newly proposed search terms or were outside the initial date range. The burden on other Trustees would be considerably greater, given that Wilmington Trust did not become Trustee until December 2012 and therefore has documents for only approximately one quarter of the Objectors' proposed additional time period.

Second Circuit warned against just the kind of speculative conflict accusations that the Objectors raise here:

> a possible conflict of interest can be conjured up out of all sorts of situations in which persons of normal scruple would feel no hesitation to go ahead. The law ought not make trusteeship so hazardous that responsible individuals and corporations will shy away from it. . . . Merely vague or remote possible selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question.

Id. at 675 (internal quotation marks omitted).

Courts thus "disregard[] bald assertions of conflict" and instead "require[] a showing that the trustee personally benefitted *from the disputed action*." *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (emphasis added and internal quotation marks omitted); *Dabney*, 196 F.2d at 670 (same). The "disputed action" here is, of course, the Trustees' decision to accept the Settlement, not the administration of the trusts over many years. Because merely identifying a "possible conflict" like those rejected in *Dabney* would get the Objectors nowhere, boundless discovery into such issues is not appropriate here. The question here is whether the Trustees *actually profited* from their independent decisions to settle. None of the Objectors' theories even suggests that this is so. Nor do any of the Objectors' requests seek additional materials that might even arguably demonstrate such an actual conflict exists.

Alleged Reduction of Trustee Liability for Untimely Trusts. The Objectors allege that the Trustees had an incentive to favor trusts for which they supposedly failed to bring timely repurchase claims in considering a settlement, because favorable recovery by such trusts could offset the Trustees' purported liability for failing to bring the claims before the statute of limitations expired. Obj. Mem. 10-12. As an initial matter, this is not a "conflicting" interest—if the Trustees really were required to reimburse investor losses, then that requirement would push them toward maximizing investor recoveries. Agreeing to a *worse* settlement would have

reduced the "offset" to that hypothetical liability. The Objectors should not be permitted additional discovery based on an incoherent legal theory. *See, e.g.*, *Carver v. Bank of New York Mellon*, No. 13-10005-MLW, 2014 WL 6983431, at *6 (D. Mass. Dec. 10, 2014) (rejecting the plaintiffs' motion to compel in part because it "sought discovery on an incorrect legal theory").

More importantly for present purposes, if any documents showed that the Trustees entered into this Settlement to minimize their own liability, they would be within the Settlement Documents that the Trustees have already produced. *See* 3/6/2015 Ltr. at 2-4. In any event, the discovery requests that the Objectors claim are associated with their conflict theory have nothing to do with the theory itself. The Objectors assert that "Document Requests 1 and 3 seek a limited set of documents, from a narrow group of custodians, to confirm whether the Trustees ever considered this issue and, if so, how they determined that (i) it was appropriate to treat timely and untimely Trusts equally and (ii) doing so, in the face of their obvious conflict of interest on the matter, was consistent with their duties to the Trusts." Obj. Mem. 12. They give no explanation as to what these requests have to do with this, or any other, conflict theory.

Indeed, Document Request 1 requests only communications between the Trustees and the investors in the trusts. *See* App. A to Obj. Mem. But because the Trustees have already produced all of their communications with investors in the Subject Trusts "concerning the Settlement" (3/6/2015 Ltr. at 2-3), other investor communications sought by Document Request 1 have *nothing to do with the Settlement*. The Objectors fail to explain how the additional documents sought could possibly have anything to do with a supposed conflict in accepting the Settlement.

As to Document Request 3, which is nothing more than a set of search terms, the only hint that it relates to the timeliness of the Trusts' claims is the word "limitations" as a member of a disjunctive set in "Search string 1." *See* App. A to Obj. Mem. The Objectors propose running

this search for a period starting in April 2010, a date that predates the Settlement by well over three years, and including many custodians who had nothing to do with the Settlement. The Objectors have never articulated an actual "request," just a list of search terms, and there is no reason to think that all documents that include the word "limitations" will have anything to do with the Trustees' consideration of the Settlement. By definition, documents created years before the Settlement was announced, by people who had nothing to do with the Settlement evaluation, will not be related to the Settlement.

Alleged Reduction of Trustee Liability by Foregoing Loan File Review. The Objectors also allege that the Trustees had some incentive to forego loan file review because "review of . . . loans in the JPM Trusts would likely have increased the Trustees' own exposure" as loan originators and securitization sponsors. Obj. Mem. 12-14. The Objectors have not done even the most basic homework, which would have revealed that many of the Trustees neither originated mortgage loans nor sponsored securitizations at all.

As above, documents describing the evaluation of the Settlement—which would encompass any documents supporting this theory—have already been produced. The documents produced include "all correspondence between the Trustees and their Financial Advisors or professional staff of the Trustees' Financial Advisors concerning the Settlement." 3/6/2015 Ltr. at 3. What those documents show is that it was *the experts* who determined that loan file review was not warranted. Far from supporting a claim that the experts discarded loan file review at the instruction of the Trustees, Professor Fischel spends several pages discussing how he actually did incorporate the results of loan file reviews disclosed in litigation ("I use the highest Material Breach Rate found in a loan file review for each Trust."), and explaining why the defect rates in those reviews may be overstated and why further reviews were not appropriate. Fischel Report

¶¶ 107-11; *id.* ¶ 26 (discussing loan file reviews finding "breach rates ranging from 79% to 98%"). The suggestion that the Trustees somehow suppressed loan file review has no basis in this record.

The Objectors disagree with Professor Fischel's recommendation, but their response is no more than an attempt to "micromanage" the Trustees' evaluation, an approach that the First Department soundly rejected in the *Countrywide* Article 77 proceeding. *See In re Bank of New York Mellon*, 127 A.D.3d at 127-28. In fact, the trustee in the *Countrywide* case decided to forego loan file review, and dissenting investors' objections on this point were overruled. *See In re Bank of New York Mellon*, 2014 WL 1057187, at *16, *20. The Objectors' claim requires finding that Professor Fischel's conclusion was a subterfuge, covering up a secret instruction from the Trustees to avoid loan file review because it somehow would increase trustee liability. They offer nothing beyond overblown rhetoric ("a staggering claim"; "not a remotely rational position"; "an abandonment of responsibility and logic" (Obj. Mem. 13)) to support that purely speculative inference. Indeed, the Objectors have not even waited to depose Professor Fischel to level their reckless allegations, likely because they know full well that there will never be any evidence to support their theory.

Moreover, the Objectors' actual discovery requests again stray far afield from the purported claim. The Objectors assert that "Document Request 3 seeks a limited set of documents, from a narrow group of custodians, to confirm whether the Trustees ever considered th[e] issue [of the Trustees' conflict in foregoing loan file review] and, if so, how they determined that avoiding loan file review was consistent with their duties to the Trust." Obj. Mem. 14. The words "file" and "review" appear *nowhere* in the two searches included in Document Request 3. Even "loan" is just one member of a disjunctive set in each of the two

proposed searches. Document Request 3 would capture documents related to loan file review—but only because it would capture nearly everything. Even then, it would not capture anything new related to the decision to forego loan file review in connection with the Settlement; all of those documents have been produced, because the Trustees have already delivered to the Objectors every communication they had with Professor Fischel (and other Financial Advisors).

JPM and Institutional Investor Business Relationships. The Objectors next contend that the Trustees were conflicted because of JPM's interests in the Trustees (or vice versa) and the ongoing business relationships between JPM and the Trustees. Obj. Mem. 14. This is, again, exactly the kind of vacuous "conflict" that courts have consistently rejected. *See, e.g.*, *Royal Park Invs. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, No. 14-cv-8175 (SAS), 2015 WL 3466121, at *13 (S.D.N.Y. June 1, 2015) ("The mere fact that an indenture trustee does repeat business with an entity does not create a conflict of interest."); *CFIP Master Fund*, 738 F. Supp. 2d at 475 (rejecting the theory that there was a conflict of interest based on a trustee's continuing relationship with another party where there was no evidence that the relationship "in any way affected [the trustee]'s actions"); *Page Mill Asset Mgmt. v. Credit Suisse First Boston Corp.*, No. 98-cv-6907 (MBM), 2000 WL 877004, at *2 (S.D.N.Y. June 30, 2000) ("[T]he existence of a conflict of interest cannot be inferred solely from a relationship between an issuer and an indenture trustee that is mutually beneficial and increasingly lucrative.").

Yet again, even if the Objectors had described a real violation of the duty of loyalty, and even if they had ascertained some improper motive, any documents discussing that motive would have already been produced because, among other things, the Trustees produced all of their communications with JPM and the Institutional Investors concerning evaluation of the Settlement. Having reviewed the documents produced thus far, the Objectors observed (quite

accurately) that the Trustees "did not even recognize the potential for [this] conflict of interest" (Obj. Mem. 14), and that the Settlement decisionmakers "had no involvement in (or did [not] bother to consider) other business relationships with JPMorgan or the Institutional Investors" (Obj. 6/17/15 Ltr. at 2). In short, the Objectors complain that the documents produced thus far have not yielded evidence to support their fanciful accusations because they are devoid of *any indication at all* that the decision to accept the Settlement was influenced by business relationships the Trustees might have with JPM. The Objectors' argument supports dismissal of their baseless conflict-of-interest claim, not entry of an order requiring the Trustees to conjure up non-existent evidence.

The Objectors seek answers to interrogatories 4(e)-4(g) in connection with their claim that JPM's ownership interests in, and business relationships with, Trustees yielded a conflict in the Trustees' consideration of the Settlement. Obj. Mem. 14. According to the Objectors, these interrogatories "seek to quantify in simple terms the extent of financial influence that JPM could [not "did"] exercise on each of the Trustees." *Id.* The Objectors similarly seek answers to interrogatories 4(h)-4(j) "to quantify in simple terms the extent of financial influence that the largest institutional investors could exercise on each of the Trustees." Obj. Mem. 15.

As a threshold matter, the interrogatories violate the Commercial Division's rule limiting interrogatories (absent consent) to those concerning: (1) the "names of witnesses with knowledge of information relevant to the subject matter of the action"; (2) "the computation of each category of damage alleged"; and (3) "the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence." Comm. Div. Rule of Practice 11-a. That alone is reason enough to deny them.

It is not the only reason, though. Even if couched in "simple terms," as the Objectors contend, the burden of these interrogatories should not be understated. For Trustees that engage in businesses such as originating and securitizing mortgage loans, identifying, for example, every securitization that contained a loan that the Trustee bank originated would be an enormous undertaking, assuming that the bank even has access to the necessary information.[5] Similarly, identifying "Trustee revenues" and securities holdings from JPM and various of the Institutional Investors would require canvassing unrelated business units around the world to support conflict theories that can be dismissed as a matter of law. Far-flung relationships with JPM that, as the Objectors have acknowledged, the documents demonstrate had no bearing on the Trustees' decisions regarding the Settlement are patently irrelevant to any issue in this proceeding.

B. Alleged Bad Faith

The Objectors present two theories of the Settlement's purported bad faith. One is that the Trustees supposedly hamstrung their experts by providing only the information that the experts actually wanted. The other is that the Trustees did not do enough to help investors direct rejection of the Settlement. How either of these allegations evinces bad faith is never explained. Indeed, the argument that the Trustees should have provided a specific category of documents to their advisors (unsolicited by the advisors) or that the Trustees should have sent out one more notice to investors or modified their proposed indemnities are exactly the kind of "micromanaging" that the First Department rejected in the *Countrywide* appeal. *See In re Bank of New York Mellon*, 127 A.D.3d at 127-28. Further, documents relevant to both categories would already have been swept up in the existing productions, as both relate directly to the Settlement decision.

[5] For certain of the Trustees, these interrogatories seek information about lines of business (such as originating and securitizing mortgage loans) that do not exist.

a. As the Trustees disclosed to investors long before their acceptance of the Settlement, their evaluation was assisted by a set of legal and financial advisors. That was necessary, in part, because the Trustees' day-to-day responsibilities do not include investigating loan underwriting, assessing collateral performance, keeping abreast of legal developments, or monitoring the servicer. *See, e.g.*, PSA § 3.03 (trustee has no obligation to monitor servicer); § 7.04(e) (trustee has no obligation to investigate); § 7.04(b) (trustee may rely conclusively on statements and documents provided by other parties).[6] Thus, even at the threshold, the assumption that "the Trustees knew about facts relevant to the acceptance of the proposed Settlement" (Obj. Mem. 15) before they commissioned advisors to investigate those facts is unsupportable speculation.

The experts asked for, and the Trustees provided and have produced to the Objectors, specific types of documents. Those included, among other things, loan-repurchase data, including breach notices, loan diligence reports, loan modification data, loan tapes, servicing-related ratings agency information, sub-servicing-related documents and information, loan servicing database extracts, and document exception reports. *See* 3/6/2015 Ltr. at 2-3. The Objectors' assertion that "the Trustees have never claimed that they took reasonable measures to convey to their experts what the Trustee banks knew about the representation and warranty breaches in the loans in the trusts, or the deficiencies of JPM's servicing, or the evidence supporting Events of Default" (Obj. Mem. 16) is belied by the wealth of materials regarding the underlying loans provided to their experts.

To the extent the Objectors contend that the Trustees and their advisors failed to locate certain public data, they are free to argue that such a shortcoming somehow renders the

[6] Citations to "PSA" refer to the BALTA 2005-1 Pooling and Servicing Agreement.

evaluation unreasonable; they do not need to search the emails of bank employees having nothing to do with the Settlement evaluation to generate public information. What the Objectors have (and can obtain from public sources) is more than sufficient to make the limited inquiry into whether "it was reasonable for the Trustee[s] to rely" on their advisors. *In re Bank of New York Mellon*, 127 A.D.3d at 126.

The Objectors' demand for further "discovery into what [the] Trustees knew and should have, but did not convey, to their experts" (Obj. Mem. 16) inadvertently illustrates the folly of using email searches to evaluate a settlement. The document request that they propose (Document Request 3) would capture, for example, any email in a four-year period containing such generic groups of words as: "JPM," "loan," and "RW"; "JP Morgan," "mortgage," and "underwrite"; or "JP," "RMBS," and "diligence." App. A to Obj. Mem. Needless to say, the Trustees did not undertake a litigation-style internal document sweep of files to make the narrow business decision to accept or reject the Settlement. Instead, they hired subject-matter experts, whose first task was to determine what information they needed to investigate the Settlement. The Objectors' own proposed search only proves that it was reasonable for the Trustees not to pursue this costly and time-consuming alternative path.

b. The Objectors also argue that the Trustees acted in bad faith by basing their acceptance of the Settlement on the absence of Certificateholder opposition, because they purportedly "*prevent[ed]* groups of opposing Certificateholders from forming." Obj. Mem. 17-20 (emphasis added). To the contrary, the Trustees issued numerous notices concerning the Settlement to Certificateholders, and Certificateholders were free to form any groups they wished. What the Objectors really mean is that the Trustees "were unhelpful in *assisting* prospective objecting Certificateholders to identify each other." *Id.* at 18 (emphasis added). But

the Trustees are under no duty to affirmatively assist Certificateholders in forming groups and, in fact, Certificateholders often request that their identities be kept confidential.

The Objectors further assert that the Trustees "imposed incredibly onerous indemnification requirements on Certificateholders to direct the Trustees to reject the proposed Settlement." *Id.* at 18-19. But they do not argue that any Objector actually responded with a counter-offer that any Trustee declined. Moreover, the public record shows that several Trustees did accept directions to reject the Settlement and litigate on trusts that were subject to the settlement offer, a reality that puts the lie to the Objectors' suggestion that the Trustees somehow made it impossible for investors to direct rejection of the Settlement.

Finally, any need for "documents to investigate the extent to which the Trustees considered . . . the views of Certificateholders opposing the Settlement and . . . their own rights and obligations regarding notice and indemnification from Certificateholders" (Obj. Mem. 20) has already been satisfied. Such documents would bear directly on the Trustees' assessment of the Settlement and therefore would be included in the existing productions. The Objectors' own discussion confirms as much: they cite to Bates-numbered documents produced by HSBC and U.S. Bank in support of their argument. *Id.* at 19.

By contrast, the documents that the Objectors demand be produced have nothing at all to do with consideration of investor views on the Settlement. They seek, for example, "all communications between the Trustees and investors in the JPM Trusts" going back to April 2010. App. A to Obj. Mem. That was three and a half years before the Settlement was even presented to the Trustees for their consideration.

C. Alleged Unreasonable Investigation

The Objectors also claim that the Trustees' investigation was not thorough enough because: (1) they did not consider the Institutional Investors' motivations and negotiations with

JPM; and (2) they "apparently never considered the possibility of further negotiation with JPM." Obj. Mem. 20-22. If it was error for the Trustees not to insist upon disclosure of settlement communications or (supposedly) not to negotiate with JPM, the Objectors already have all the evidence they need, since all communications among the Trustees and with JPM have already been produced. Of course, the reality, which the Objectors are free to explore in depositions, is more nuanced. But the relevant universe of documents is already in the Objectors' hands.

Any claim that Document Request 3 will produce discovery that supports their arguments about the thoroughness of the investigation (Obj. Mem. 21-22) fails. The timeframe covered by Document Request 3 largely predates consideration of the Settlement, the proposed custodian list includes many employees who had no involvement with the Settlement, and the search terms are irrelevant to the Objectors' arguments.

D. Alleged Events of Default

An "Event of Default" is a specifically defined term under the Governing Agreements. The Objectors seek wide-ranging discovery as to JPM's servicing of the mortgage loans in hopes of proving that an Event of Default occurred on some or all of the trusts. "[B]ased on publicly available information about the practices of RMBS sellers and originators," the Objectors argue that widespread servicing breaches must have gone uncured and resulted in the occurrence of an Event of Default that imposed on the Trustees heightened duties—undermining Professor Fischel's assumption to the contrary. Obj. Mem. 6-8. The Objectors' approach to identifying Events of Default based on servicing breaches, however, is inconsistent with the Governing Agreements and does not justify more discovery than has already been provided. It is exactly the sort of freewheeling discovery this Court has already told them they cannot have.

Under the Governing Agreements, a servicer's "fail[ure] to observe or perform in any material respect any other material covenants and agreements set forth in [the] Agreement" that

"materially affect[s] the rights of Certificateholders" becomes an Event of Default only when either the trustee or a large enough group of investors (copying the trustee) notifies the servicer of the breach and then a cure period (usually 60-90 days) elapses without a remedy. PSA § 8.01(ii). Although a notice from the trustee to the servicer can start the cure period running, the trustee generally has no obligation to send the notice, or to investigate possible servicer breaches in the first place. *See id.* § 3.03(a) (no duty to monitor servicer); § 7.04(e) (no duty to investigate); *see also Argonaut P'ship L.P. v. Bankers Tr. Co.*, No. 96 Civ.1970 (LLS), 2001 WL 585519, at *2 (S.D.N.Y. May 30, 2001) (stating that a trustee "had no duty to exercise its rights and powers as a prudent person until [it] was given particular written notice of an Event of Default"). Thus, the kind of general servicing breaches that the Objectors allege cannot become an Event of Default without an express notice.

Ignoring the Governing Agreements, the Objectors seem to assume that whether an Event of Default occurred (and then, separately, whether the Trustee knew or had notice of it) requires a subjective assessment of what information the Trustee had, or could have or should have had. That is not consistent with New York law. "Allegations . . . concerning [the trustee]'s knowledge of facts from news reports" are not "sufficient to put [it] on notice that an event of default had occurred and was continuing." *Arrowgrass Master Fund Ltd. v. Bank of New York Mellon*, No. 651497/10, 2012 WL 8700416, at *9-*10 (Sup. Ct. N.Y. Cnty. Feb. 24, 2012) (reliance on news articles "blatantly attempts to excise [the] 'actual knowledge' requirement and replace it with 'notice as that term is defined in contexts outside of a trust indenture"). Trustees are not subject to an inquiry notice standard—their "duty d[oes] not extend to undertaking a complicated and unavoidably speculative investigation in order to decide whether there was or would be an event of default." *Magten Asset Mgmt. Corp. v. Bank of New York*, No. 600410/10, 2007 WL 1326795,

at *7 (Sup. Ct. N.Y. Cnty. May 8, 2007) (Fried, J.); *see also Arrowgrass*, 2012 WL 8700416, at *9-*10 ("Indeed, as BNY observes, it had no independent duty to inquire as to whether, as part of the Lyondell acquisition, any default had occurred under the Indenture."). That principle applies even where "such an investigation might have been an 'inordinately simple' one to perform," limited to comparing documents that the trustee had in its possession. *Nacional Financiera, S.N.C. v. Bankers Trustee Co.*, Index No. C121131-98 (Sup. Ct. N.Y. Cnty. Nov. 13, 2000), at *13-*14 (Gammerman, J.) (Ex. 2).

Contrary to the Objectors' argument, then, the relevant question under the Governing Agreements is not whether events amounting to a material servicing breach occurred. It is whether the Trustees actually knew (or, for many trusts, received written notice) both that material servicing breaches had occurred *and* that the servicer received notice of those breaches and did not address them within the cure period. *See Putman High Yield Trust v. Bank of New York*, 7 A.D.3d 439, 439 (1st Dep't 2004) ("[T]he terms of the Indenture did not require defendant to act unless it had written notice of default. . . . With regard to defendant's alleged failure to act prudently upon occurrence of a default, no such duty was ever triggered in the absence of written notification of default."); *Millennium Partners v. US Bank Nat'l Ass'n*, No. 12-cv-7581, 2013 U.S. Dist. LEXIS 55729, at *12 (S.D.N.Y. Apr. 17, 2013) ("Plaintiffs, however, do not plead that the requisite written notice was given to trigger an Event of Default because they do not allege that they owned 50% of the Aggregate Voting Interests necessary to satisfy the notice requirement.").

Each Trustee reviewed its records and information to confirm that none of the trusts was in Event of Default status. Based on the contract terms and the caselaw cited above, determining whether an Event of Default has occurred does not require rummaging through years of emails to

determine what inferences may be made about the likelihood of servicing breaches. Thus, the kinds of documents that the Objectors now seek could not have been relevant to Professor Fischel's assumption.

The Objectors also are incorrect to suggest that evidence of *underwriting* defects—as opposed to mortgage loan servicing issues—would have both proved Events of Default and shown the extent of the Trustees' liability for "conduct indistinguishable from" that of JPM. New York courts have consistently held that underwriting breaches are not Events of Default. *See, e.g.*, *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012) (holding that loan-repurchase claim did not arise out of Event of Default); *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 112 A.D.3d 522, 523 (1st Dep't 2013) ("the defaults enumerated in the PSA concern failures of performance by the servicer or master servicer only"), *aff'd*, --- N.Y. ---, 2015 WL 3616244 (2015); *HEAT 2006-5 ex rel. U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, No. 652344/12, 2014 WL 27961, at *4 (Sup. Ct. N.Y. Cnty. Jan. 3, 2014) ("[T]hese repurchase requests did not give notice of an Event of Default, as defined in Section 7.01 of the Trusts' PSAs. The Events of Default defined in the PSAs all pertain to actions, or inactions, by the Servicer. The representation and warranty breaches asserted by the Trustee in its repurchase requests, however, fall outside the servicing-related Event of Default categories enumerated in the PSAs."). Moreover, it is unclear how evidence that JPM or Bear Stearns breached underwriting representations could imply, let alone prove, that other banks did so as well. Tellingly, the Objectors offer no explanation.

E. Distribution

W&L stands alone in its request for additional documents and interrogatory responses related to the Settlement's provisions for distributing proceeds to holders within each trust. *See* Obj. Mem. 22-28. The restraint exercised by all other Objectors could well be because the

Settlement uses the same method as the BNYM/Countrywide settlement, which was just "approve[d] . . . in all respects" by the First Department. *In re Bank of New York Mellon*, 127 A.D.3d at 128. The rationale for that method is its consistency with the PSAs, with which all investors agreed at the outset—the settlement payment most closely resembles either a Subsequent Recovery (if the PSA provides for that category) or an unscheduled principal payment. W&L, however, seeks documents regarding "the effect" that different distribution approaches would have on different groups of investors. It is no surprise that the Trustees did not consider which *investors* would get the most money, because a trustee's duties are to each trust as a whole. Indeed, it would have been unusual for a Trustee to propose changing the distribution methodology from that suggested by the Governing Agreements in order to reallocate money from one investor to another.

And, as with each of the Objectors' requests, the relevant documents have already been produced. W&L readily admits that BNYM—the trustee for each of W&L's two Accepting Trusts—has responded to its document request and interrogatories. *Id.* at 23. The answer was straightforward: BNYM has already produced all non-privileged documents responsive to W&L's request, and it has confirmed in writing that it did not conduct the analysis that W&L asked about. *See* 7/2/2015 Ltr. (Ingber Aff. Ex. 3) at 1; Obj. Mem. 23. W&L may find it "remarkable" that the Trustees did not investigate further (Obj. Mem. 23) a distribution methodology already approved in a similar context, but that does not change the fact that it is now simply demanding documents that do not exist.[7]

[7] W&L also demands that BNYM be compelled to identify the relevant documents for it. *See* Obj. Mem. 26-27. BNYM has produced its documents as they were kept in the ordinary course of business, fully satisfying its obligations under CPLR 3122(c).

W&L cannot explain the relevance of its demand for responses from Trustees other than BNYM. It claims that "all analyses and/or investigations, if any, were likely performed in the aggregate" (Obj. Mem. 24 n.7), but any "aggregate" analysis that BNYM saw would have been produced. Any further discovery would relate, necessarily, to documents that were not seen by the relevant Trustee.

* * *

The Objectors have already received the documents and information they need to evaluate the Trustees' consideration of the Settlement. They use their "motion to compel" to reiterate merits arguments that they have made before, connecting these arguments to incredibly broad requests for further discovery that are at best tangentially related to the arguments and even further removed from the actual substantive issues for this Court's consideration. To the extent any request may cover a modicum of material that is arguably relevant to the issues in this proceeding and not yet produced, that is only because the requests are so fundamentally overbroad; even a broken clock is right twice a day. Complying with even a sliver of these requests would be unduly burdensome given the limited nature of this proceeding and the extensive materials the Trustees have already produced.

CONCLUSION

For the foregoing reasons, the Court should deny the Objectors' motion to compel Trustees to respond to additional discovery requests.

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