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 **REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' OMNIBUS MOTION TO COMPEL TO THE INSTITUTIONAL INVESTORS**

PRELIMINARY STATEMENT

Under the Proposed Settlement, Certificateholders (and insurers like Ambac) stand to receive only $4.5 billion of the $65 billion in expected losses relating to over 300 JPMorgan trusts—a mere seven cents on the dollar.[1] Certificateholders and certificate insurers in the Accepting Trusts subject to the Haircut will receive only 0.8% of the projected losses—less than a penny per dollar lost. The Institutional Investors do not dispute that their holdings are disproportionately weighted to the non-Haircut Trusts, and therefore as a result of the Haircut they benefit in the allocation of settlement proceeds at the expense of investors in the Haircut Trusts. To this day, no one has offered a clear explanation for the Haircut, much less an argument for its reasonableness. If Petitioners are to be believed, the only documentary evidence as to how the Proposed Settlement—and the Haircut—came to be are in the hands of the Institutional Investors. Therefore, the Negotiation Documents are material and necessary to assess the reasonableness and fairness of the Proposed Settlement to *all* Certificateholders (and insurers like Ambac). Under New York law, which governs the discoverability of documents in New York proceedings, the Institutional Investors cannot shield the Negotiation Documents from Respondents' and the Court's view merely because they hired a mediator, Robert Meyer, located in the California office of an international law firm.

Moreover, the evidence now shows that the basis on which the Institutional Investors claim the documents are irrelevant—[redacted]—is not accurate. [redacted]

[1] Capitalized terms not defined herein have the same meaning as in the Respondents' opening brief, dated July 7, 2015 ("Opening Brief").

[redacted].[2]

Petitioners' argument for burying the Negotiation Documents therefore collapses. Even if the documents were subject to a valid privilege (and they are not), that privilege has been waived [redacted].

ARGUMENT

I. The Negotiation Documents Are Relevant

The Court's approval of a settlement negotiated by self-interested and conflicted parties requires at least minimal due diligence into how the settlement was negotiated. The Negotiation Documents are relevant (i) to explain the basis and reasons for the Proposed Settlement's allocation methodology, including the Haircut, (ii) to determine whether the Institutional Investors put their interests in front of other Certificateholders in the negotiation process and now stand to receive a disproportionately large share of the settlement proceeds, and (iii) to test the "exhaustive evaluation process" the Trustees claim to have employed in evaluating the Proposed Settlement. The Institutional Investors do not dispute that only a fraction of their holdings are in Accepting Trusts subject to the Haircut, nor do they contest that the Proposed Settlement's allocation methodology favors them to the detriment of other Certificateholders. In fact, the Institutional Investors make no attempt to justify the unfair benefit they stand to receive from the Proposed Settlement.

Instead, the Institutional Investors argue that Respondents and the Court do not need to see the documents because the Trustees chose not to.[3] Even if that were true ([redacted]

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[2] Exhibit 1 to the Affirmation of Michael C. Ledley in Further Support of Respondents' Omnibus Motion to Compel the Institutional Investors, dated July 17, 2015 ("Ledley Ex. 1").

[3] The Institutional Investors also contend that discovery of the Negotiation Documents to determine whether the Institutional Investors negotiated a side benefit to the detriment of other Certificateholders is irrelevant because the Proposed Settlement contains an integration clause. Opp. Br. at 8-9. This verges on absurdity: A "side-deal" by its nature is separate from the "main deal." An integration clause in the

[redacted]), the abdication of the Trustees is not binding on the Court. The Court must determine whether the Trustees' decisions were reasonable, which requires an evaluation of what the Trustees considered and what they failed to consider.[4] The Institutional Investors do not address, or even acknowledge, the Court's observation during the March 20, 2015 hearing, that "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.

Without the Negotiation Documents, the Court cannot evaluate whether it was reasonable for the Trustees to accept the Proposed Settlement. Indeed, the idea that the Court would or could approve a settlement, negotiated in total secrecy, that released $65 billion in claims beneficially owned by absent third-parties has no support in the law or basic fairness.

II. The Negotiation Documents Are Not Privileged

A. New York Law Governs Discovery of the Negotiation Documents

New York law applies to questions of privilege in New York proceedings. *People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195, 198-99 (1st Dep't 2008). The Institutional Investors contend that *Greenberg* does not compel application of New York law here because it does not contain the word "procedural," and therefore privilege issues are substantive and subject to a full "center of

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Proposed Settlement does not foreclose the possibility that the Institutional Investors negotiated an undisclosed, unilateral benefit at the expense of other parties whose claims would be released.

[4] According to the Institutional Investors, Respondents can argue it was an abuse of discretion for the Trustees not to have considered the Negotiation Documents without getting access to the documents. However, neither the Court nor Respondents can assess the materiality of the Negotiation Documents without seeing them. Without the discovery, the Petitioners undoubtedly will argue at trial that Respondents cannot prove that the Negotiation Documents would have made any difference in the Trustees' decision-making process. The Court should not permit Respondents to be whipsawed in that fashion.

gravity" test. Opp. Br. at 17, n. 36. This ignores the First Department's reasoning in *Greenberg*. The *Greenberg* court stated that "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," and then applied New York law. 50 A.D.3d at 198-99. That the court also considered other New York contacts to further support its choice-of-law decision does not alter the general principle it announced. This general principle is consistent with the Court of Appeals' determination that privilege issues "are best resolved in the State—and in the proceeding—in which the evidence is to be used." *Codey ex. rel. New Jersey v. Capital Cities, Am. Broadcasting Corp.*, 82 N.Y.2d 521, 530 (1993).

Even if the Court were to conduct a full "center of gravity" test, New York has the most substantial contacts. The Institutional Investors provide scant support for their argument that California contacts predominate, merely noting that the mediator is partner of an international law firm with a California office, one member of JPMorgan's counsel is located at the California office of a New York-based law firm, and three of the Institutional Investors are headquartered in California. Opp Br. at 18-19.[5] These contacts pale in comparison to the New York contacts. Notably, the Institutional Investors admit that some of the mediation meetings took place in New York. Affidavit of Kathy Patrick, dated July 14, 2015, ¶ 4. ("In person mediation sessions were held in both California and New York."). Further, they do not dispute that the Negotiation Documents concern matters arising under New York law relating to hundreds of New York trusts relating to a settlement that all parties intended to be submitted to a New York court for approval. And—perhaps most significantly—the Proposed Settlement seeks to resolve $65 billion of liabilities of a New York party.

[5] The fact that their mediation agreement has a California choice-of-law provision is self-serving and not a meaningful contact. Opp. Br. at 19.

B. The Negotiation Documents Are Not Privileged Under New York Law

The Institutional Investors admit that New York does not recognize a statutory mediation privilege. Opp. Br. at 11. New York courts are clear that documents relating to settlement negotiations are discoverable if they are (i) material and necessary and (ii) sought for purposes other than proving liability. In *American Re-Insurance Company v. United States Fidelity & Guaranty Company, et al.*, the First Department held that the trial court "properly ruled that the disputed documents relating to the settlement negotiations are discoverable since they are material and necessary to the reinsurers' defense of the action" that the settlement and allocation therefore were not in good faith. 19 A.D.3d 103, 104 (1st Dep't 2005). The court further noted that "[t]he so-called 'settlement privilege' is inapplicable since the reinsurers seek the settlement-related materials for a purpose other than proving [defendant's] liability in the underlying coverage action." *Id.*; *see also Newburgh v. Hauser*, 126 A.D.3d 926, 926-27 (2nd Dep't 2015) (affirming the trial court's order compelling discovery when mediation documents were "material and relevant" to the action); *Masterwear Corp. et al. v. Bernard, et al.*, 298 A.D.2d 249, 250 (1st Dep't 2002) (finding that trial court should have granted defendant's motion to compel disclosure of co-defendant's settlement agreement, in spite of confidentiality provision, when defendant had a "strong interest in disclosure" of the document).

Furthermore, the cases the Institutional Investors cite to argue that the Negotiation Documents are privileged are readily distinguishable. None of these cases involve situations in which the parties sought judicial approval of a settlement. In both *Chemical Bank v. Stahl*, 244 A.D.2d 234 (1st Dep't 1997) and *Randall Electric, Inc. v. New York*, 150 A.D.2d 875 (3rd Dep't 1989), a party to the settlement negotiation sought to compel disclosure of settlement negotiation documents in order to use those documents in litigation on the merits of the mediated claims. Here, however, the Respondents were not parties to the settlement negotiation and, in fact, were never allowed the opportunity to participate in the negotiations between the Institutional Investors and JPMorgan. Moreover, *NYP Holdings Inc. v. McClier Corporation* supports Respondents' position as the court held that because the defendant (like the Petitioners here) would have to prove the reasonableness of the settlement at trial of the indemnification claims, a third party was entitled to discovery on that issue. 2007 WL 519272, at *4 (N.Y. Sup. Ct. Jan. 10, 2007).[6]

The Institutional Investors are left with the argument that they and JPMorgan really wanted the negotiations to remain confidential, and it would be unfair to upset their expectations. However, it is apparent that the Institutional Investors, mindful that they were compelled to produce negotiation documents during the Countrywide Article 77 proceeding, elected to retain a California mediator in order to try to shield the negotiations from discovery. Because the Proposed Settlement has immense implications for absent third parties, the Institutional Investors and JPMorgan's desire to negotiate in secret is a reason to *compel* discovery, not a reason to *shield* the documents from discovery.

C. The Institutional Investors Waived Any Claim that the Negotiation Documents Are Privileged

Even assuming *arguendo* that the Negotiation Documents are privileged, the Institutional Investors waived that privilege [redacted]. In New York, voluntary disclosure of privileged communications to a third party waives that privilege as to all other communications on the same subject matter. *See*

[6] *Crow-Crimmins-Wolff & Munier v. Westchester* is inapposite and stands for the unremarkable proposition that parties to a settlement negotiation may agree to keep those discussions off-the-record. 125 A.D.2d 696, 697 (2nd Dep't 1987). In *Lynbrook Glass & Architectural Metals, Corporation v. Elite Associates, Inc.*, documents exchanged in a court-mandated mediation were ordered to be kept confidential and returned to the documents' owners at the end of mediation. 1996 WL 34450917 (N.Y. Sup. Ct. Aug. 20, 1996); *aff'd*, 656 N.Y.S.2d 291 (2nd Dep't 1997). That the *Lynbrook* court denied a third party's discovery request due to one party's inadvertent retention of a court-mandated confidential document is wholly inapplicable to this matter. *Id*.

Eisic Trading Corp. et al. v. Somerset Marine, Inc., 212 A.D.2d 451, 451 (1st Dep’t 1995); *Netherby Ltd. v. G.V. Trademark, Invs., Ltd.*, 261 A.D.2d 161, 161 (1st Dep’t 1999); *AFA Protective Sys., Inc. v. New York*, 13 A.D.3d 564, 565 (2nd Dep’t 2004); *see also Hauzinger v. Hauzinger*, 10 N.Y.3d 923, 924 (2008). [redacted], Ms. Patrick, counsel for the Institutional Investors, wrote:

> [redacted].[7]

Counsel for the Institutional Investors then stated that she “[redacted],” “[redacted] and [redacted][8] By [redacted], the Institutional Investors waived any claim of privilege.[9]

III. W&L’s Discovery Requests Go to the Heart of the Trustees’ Reasonableness in Relying on the Institutional Investors’ Support; and the Reasonableness of the Trustees’ Actions, as well as the Institutional Investors’ Support for the Settlement, have been Placed Directly at Issue

The Trustees assert—and ask the Court to find—that they were reasonable in accepting the proposed Settlement because (1) they relied on subject matter experts and (2) the Institutional

[7] Ledley Ex. 1 (emphasis added).

[8] Ledley Ex. 1.

[9] The Institutional Investors also argue that the Negotiation Documents should not be produced because doing so would be a “time consuming detour.” Opp. Br. at 20. While untrue, that is also irrelevant. The question is only whether the documents are material and necessary to assess the reasonableness and fairness of the Proposed Settlement, and they clearly are. The Institutional Investors cite no authority for a “waste of time” exception to CPLR 3101.

Investors support it. *See* Doc. No. 9 at 8-9; Doc. No. 194 at 10-11. But the Trustees never hired an expert to evaluate the distribution methodology, and the basis for the Institutional Investors' support of the proposed Settlement, and particularly the distribution methodology, remains hidden. Thus, W&L's discovery requests to the Institutional Investors go to two issues for the Court's consideration:

1. How can the Court test the reasonableness of the Trustees' reliance on the Institutional Investors' support if the Institutional Investors' potential self-interest and self-dealing is not disclosed?

2. Should the Court continue to allow the Trustees to rely on that support, and allow the Institutional Investors to advocate for the proposed Settlement, while the Institutional Investors refuse to disclose their own motivations and potential special benefits?

W&L has been transparent: It opposes the distribution methodology because it does not comport with the language and intent of the repurchase remedy in the Governing Agreements and subverts the purpose of the proposed Settlement by funneling the Settlement Payment away from the Certificates harmed by breaches of representations and warranties. W&L explained this in its objection (Doc. No. 148; *see also* Doc. No. 219) and in Court (Doc. No. 255 at 49-50). W&L has also provided detailed responses to discovery propounded by the Institutional Investors explaining why the Settlement Payment should not be treated as a "Subsequent Recovery" under the Governing Agreements and why, instead, it should be treated as "Repurchase Proceeds."[10] W&L has further explained how the distinction matters, and why, if distributed as contemplated by the Governing Agreements, the Settlement Payment would be paid proportionately to Certificates based on the harm caused by breaches of representations and warranties.

[10] The Institutional Investors' argument that the *Countrywide* Court approved the distribution methodology is both irrelevant and misleading. The distribution methodology was not challenged or decided in that case. *See In re The Bank of New York Mellon*, 42 Misc.3d 1237(A) (Sup. Ct. N.Y. Cty. Jan. 31, 2014). A matter "not directly advanced and not expressly decided[] cannot be regarded as precedent[]." *Empire Square Realty Co. v. Chase Nat. Bank of City of New York*, 181 Misc. 752, 755 (Sup. Ct. N.Y. Cty. 1943) citing *KVOS, Inc., v. Associated Press*, 299 U.S. 269, 279, 57 S.Ct. 197, 81 L.Ed. 183 (1936).

In stark contrast, the Institutional Investors categorically refuse to answer questions about their own analysis of and interests in the distribution methodology. These are matters that the Institutional Investors themselves must consider "material and necessary" because they were the subject of their own discovery requests to W&L. *See* C.P.L.R. § 3101(a). To now argue that W&L's requests on the same matters are irrelevant and even harassing (Doc. No. 445 at 24) is intellectually unsound.

To divert attention from their own failure to respond to W&L's discovery, the Institutional Investors have taken aim at W&L, falsely asserting in these proceedings that W&L had been "lying behind a log" by arguing that the Institutional Investors sought from W&L—and W&L refused to produce—communications with the Trustees concerning its objection to the distribution methodology. Doc. No. 354 at 32. Counsel went so far as to assert that W&L acted inequitably by not disclosing its objection to the distribution methodology. *Id*; *see also id*. at 33 ("[I]f [W&L] had made that objection at the time, the trustees could have considered it, whatever that objection is, they still won't say what it is, resolved it, and assessed it."). These accusations are false on all points:

> *First*, the Institutional Investors never sought W&L's communications with the Trustees. They served their requests for communications with the Trustees on Respondents *other than W&L*. Affirmation of Michael A Rollin ¶ 5.
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> *Second*, had they done so, W&L would have produced documents demonstrating that it made its objection to the Trustee for the W&L Accepting Trusts (*id.* ¶ 4), and it is now clear that the Trustees did nothing to consider the concern W&L raised (Doc. No. 459 at 23).
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> *Finally*, although the Institutional Investors said they did not know the nature of W&L's objection on March 20, 2015, W&L had by then explained it to them at least twice: once in its October 31, 2014 objection and again at the December 16, 2014 hearing.

It should be of keen interest to the Court that the Institutional Investors focus their counterfactual attacks on the one Respondent that objects to how the money is to be distributed, and that they do so while at the same time refusing to disclose their own analyses of and interests in the distribution methodology *they wrote* into the Settlement Agreement.

Moreover, the Trustees' decision to accept the proposed Settlement rests, in substantial part, on the Institutional Investors' support for the Settlement. The mere fact that the influential Institutional Investors vested in themselves the ability to determine who would receive how much of the Settlement Payment, and that the Trustees—as they now concede—did nothing to evaluate that most critical feature of the proposed Settlement, is troubling. If the Institutional Investors acted in their own self-interest by funneling the Settlement Payment to Certificates they held and away from Certificates that suffered the most harm from breaches of representations and warranties, the Trustees' reliance on their support could reasonably be called into question. Because the Trustees' decision-making and reasonableness is the ultimate question before the Court, the information W&L seeks is relevant and directly in issue.

For these reasons, the Institutional Investors' analyses of the distribution methodology they have placed before the Court for approval are discoverable, and their position in opposition is quintessential sword and shield. The Institutional Investors cannot stand before the Court and explain why they support the proposed Settlement (*see, e.g.*, Doc. No. 255 at 17-21), while at the same time withhold other information bearing on why they support the settlement. Moreover, whether the information requested may be confidential to the rest of the world, W&L and certain of the Institutional Investors are co-investors, and by contract the Institutional Investors may not seek to obtain a preferential position over W&L. *See* Doc. No 389 at 18 (quoting from the Common Benefit Clause). Thus, far from being—as the Institutional Investors contend—"lawless" (Doc. No 445 at 25), W&L's position is grounded firmly in the plain language of the Governing Agreements. The Institutional Investors provide no authority to the contrary.

W&L respectfully requests that the Court order the Institutional Investors to comply with its discovery requests.

IV. The Institutional Investors' Holdings Information Is Relevant to Whether the Trustees Acted Reasonably and Is Easy to Produce

The Court should compel the Institutional Investors to produce their holdings (if any) in the Covered Trusts as of September 1, 2008 and April 1, 2009. <u>The Institutional Investors do not dispute that they could easily produce this information</u>. They have already produced this information for 2013 and 2014, and they similarly requested Triaxx's holdings information for four separate dates, all of which Triaxx produced.

The Institutional Investors also do not dispute that the holdings information is relevant to (a) whether the Institutional Investors had a <u>conflict of interest</u> in negotiating the proposed settlement, (b) whether the proposed Settlement Allocation would unfairly provide <u>windfall profits</u> to the Institutional Investors but catastrophic losses to smaller investors like Triaxx, and (c) whether the proposed settlement amounts bear any relationship to the <u>actual value</u> of the trusts' various claims and their recoverable losses. Instead, despite the absence of burden, the Institutional Investors refuse to provide their 2008 and 2009 holdings information because they argue that these matters are irrelevant to whether the Trustees acted reasonably and in good faith by either failing to consider these factors or accepting the settlement in spite of them.

We are in the discovery stage of this proceeding. Whether "it was in the best interest of each Trust or Loan Group to accept the cash offer" (II Mem. at 22), whether the Trustees acted reasonably and whether this Court should give its imprimatur to the settlement are matters that the Court should decide on a full record. The Institutional Investors should not be permitted to block the Court from having a full record.

The Institutional Investors' argument that the Trustees decided whether to accept the settlement on a trust-by-trust basis misses the point. *First*, this argument is a *non sequitur* — even if the settlement agreement were to be treated as hundreds of separate, unrelated settlements, whether JPMorgan has offered significantly more money to settle significantly weaker claims is relevant to whether the Trustees' acceptance of the settlement was "in the best interest" of the Triaxx-held trusts. II Mem. at 22.

Second, the Institutional Investors' "trust-by-trust" argument assumes facts about how the Trustees evaluated the settlement — that the Trustees did not consider the overall fairness of the proposed settlement or Settlement Allocation and instead decided whether to accept the settlement for each trust in a vacuum.[11] The Institutional Investors' version of the facts created a conflict of interest for the Trustees. Under the Institutional Investors' confidential side agreement, JPMorgan could terminate the entire settlement if "a certain number of Trusts" did not accept by January 15, 2014. Settlement Agreement, § 2.03(e) (Dkt. 3).[12]

The Petitioners are asking the Court to approve the entire settlement, not pieces of it. The Institutional Investors' holdings information is relevant as set forth above, and undisputedly is not burdensome to produce. Disclosure of it should be ordered.

[11] Whether the Trustees actually or sufficiently considered the reasonableness of the Settlement Allocation is an issue of fact that is the subject of ongoing discovery — the Trustees have requested additional time to engage an expert on the issue of the Settlement Allocation, indicating that they did not do so previously when evaluating the settlement.

[12] The fact that JPMorgan might not go through with the settlement if it were just the Institutional Investors is further evidence that the Institutional Investors are seeking to fund their outsized settlements with undersized settlements to smaller investors.

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