

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

----- X

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-Wuerttemberg (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.

----- X

:
:
: Index No. 652382/2014
:
:
: Part 60
:
: Motion Sequence No. 22
:
: Hon. Marcy S. Friedman
:
: Oral Argument Requested
:
: **REPLY MEMORANDUM**
: **OF LAW IN FURTHER**
: **SUPPORT OF**
: **RESPONDENT-**
: **INVESTORS' MOTION TO**
: **COMPEL PRODUCTION OF**
: **DOCUMENTS FROM**
: **JPMORGAN**

Respondent-Investors¹ respectfully submit this reply memorandum of law, together with the Reply Affirmation of Niraj J. Parekh dated July 17, 2015 (“Parekh Reply Aff.”), in further support their Motion to Compel JPMorgan Chase & Co. (“JPMorgan”) to produce documents pursuant to Rule 3124 of the Civil Practice Law and Rules (“CPLR”).

ARGUMENT

In opposition to this motion, JPMorgan does not argue that it would be burdensome to produce the draft Department of Justice complaint and the documents referenced therein (the “DOJ Complaint”). It would not be. JPMorgan does not argue that the DOJ Complaint is subject to any recognized privilege. It is not. JPMorgan does not argue that the rights or interests of any third party—in particular the DOJ itself—would be implicated by production of the DOJ Complaint. They would not. JPMorgan does not argue that production of the DOJ Complaint would violate any significant public policy. It would not. If anything, significant public policy would support its production.

Instead, JPMorgan argues (1) that the Court has already ruled against the Respondent-Investors; and (2) the DOJ Complaint is irrelevant. Neither is correct.

Although the Court expressed a preliminary view that production of “DOJ documents” was “problematic,” it made clear that it was not making a ruling and would only do so upon a formal motion. Mar. 20, 2015 Tr. [Dkt. No. 354] at 93:20-24 (“if it comes down to it and I have to decide that, I will do so in response to formal proceedings”). Moreover, the reason the Court gave as to why it considered Respondent-Investors’ request for the DOJ Complaint to be “problematic”—that the DOJ would oppose its production—has proven to be unfounded. Prior to filing this motion, counsel for Ambac informed attorneys at the DOJ about this discovery

¹ Capitalized terms not defined herein have the meaning set forth in the Memorandum in Support of Respondent-Investors Motion to Compel Production of Documents from JPMorgan (“Mov. Br.”).

dispute and the DOJ took no position on the motion. Parekh Aff. ¶ 6. After filing the motion, counsel for Ambac provided the DOJ courtesy copies of Respondent-Investors' moving papers and informed the DOJ of the briefing schedule so that it could be heard on the matter if it chose to do so. Parekh Reply Aff. ¶ 3. The DOJ has expressed no objection to production of the DOJ Complaint, either on the record or privately. *Id.* This is consistent with the DOJ's position in the *FHLB Pittsburgh* matter, in which the court ordered the production of the DOJ Complaint. Parekh Aff., Ex. 3 at ¶ 5; *see* Mov. Br. at 11. Tellingly, JPM does not press this point in its opposition.

In addition, none of JPMorgan's relevance arguments has merit. Indeed, it is hard to imagine materials that are more relevant to this proceeding.

First, JPMorgan again argues that the Court is prohibited from even considering the "merits and value of the settled claims." Op. Br. at 6.² That is not the law. As set forth in the Moving Brief, the Court must determine that the Trustees' decision was a reasonable one, which necessarily entails a determination that the amount of the settlement is within the range of reasonableness. Mov. Br. at 7-8. JPMorgan offers no authority to the contrary. JPMorgan quotes the First Department's decision in the Countrywide proceeding, Op. Br. at 2, but that decision merely held that the trustees' decision to follow their counsels' recommendation with respect to settling certain claims was not an abuse of discretion. *In re The Bank of New York Mellon*, 127 A.D.3d 120, 128 (1st Dep't 2015). The court did not make any new law, reaffirming that although "[i]t is not the task of the court to decide whether we agree with the

² JPMorgan cherry picks out of context a phrase from Respondent-Investors' brief in support of its motion to compel against the Trustees as a purported "concession" that the Court cannot consider the amount of the Proposed Settlement. Op. Br. at 6. Respondent-Investors made no such concession. Respondent Investors have made clear, in the Moving Brief on this motion and consistently throughout this proceeding, that the Court must consider the reasonableness of the Trustees' evaluation process as well as the reasonableness of the settlement amount and its allocation.

Trustee's judgment,” the court must determine “whether the trustee's discretionary power was exercised reasonably.” *Id.* at 125.

Moreover, the DOJ Complaint—and the Trustees’ failure to request it from JPMorgan in diligencing the Proposed Settlement—goes directly to the reasonableness (or lack thereof) of the Trustees’ process. JPMorgan argues that Respondent-Investors can argue the Trustees abused their discretion “without access to the contents of the draft complaint.” Op. Br. at 9-10. However, that is only partially correct and in any event misses the point. Whether the Trustees and JPMorgan are correct that it was not necessary for the Trustees to obtain and review the DOJ Complaint because (they claim) such material “is not probative of anything” or whether the Respondent-Investors are correct that the DOJ Complaint contained information that would have made a difference to the Trustees’ and their experts’ evaluation depends entirely on the content of the DOJ Complaint. Respondent-Investors cannot rebut the Trustees’ and JPMorgan’s arguments without access to it.³

Second, JPMorgan argues that “the draft complaint has no relation to the settled claims” because the settled claims are claims for breach of contractual representations but the DOJ Complaint asserts claims for misrepresentations in RMBS offering materials. Op. Br. at 7. This is a distinction without a difference. What the DOJ investigated—and what JPMorgan admitted—were misrepresentations in offering materials *relating to the compliance of the mortgage loans with the applicable underwriting guidelines*.⁴ That is exactly what JPMorgan

³ JPMorgan also argues that only information “available” to the Trustees “at that time” is relevant. Op. Br. at 10. But the DOJ Complaint *was* available to the Trustees. As set forth in the Moving Brief, JPMorgan agreed in the Settlement Agreement to provide the Trustees’ any material they reasonably requested to inform their evaluation. Mov. Br. at 4.

⁴ See <http://www.justice.gov/iso/opa/resources/94320131119151031990622.pdf> at 1 (JPMorgan admission that it knew that “loans that did not comply with underwriting guidelines were included in the RMBS sold and marketed to investors” but “did not disclose this to securitization investors”).

misrepresented to the Trustees and Certificateholders in the PSAs and related documents.⁵

Indeed, even the Trustees' expert, Professor Fischel, acknowledged that the DOJ settlement was "relevant":

As part of the [DOJ] Settlement, JPM acknowledged, among other things, that it retained due diligence firms to review samples of loans it purchased for the purpose of securitization, but that it included in its securitizations loans these firms found neither complied with the originators' underwriting guidelines nor had sufficient compensating factors. JPM also acknowledged that, even though its due diligence on the samples of loans that were reviewed "indicated that the un-sampled portion of a pool likely contained additional loans with exceptions, JPMorgan purchased and securitized the loan pools without reviewing and eliminating those loans from the un-sampled portions of the pools.

See Fischel Rep. ¶ 48.⁶ In short, JPMorgan's culpable conduct, both with respect to the claims to be settled here and the claims settled with the DOJ, was that it systematically securitized loans that did not comply with underwriting guidelines. Respondent-Investors' statement that the DOJ Complaint "relates to the exact conduct for which JPMorgan would be released in the Proposed Settlement," Mov. Br. at 2, was therefore accurate, and it is JPMorgan that is engaging in "misdirection." Op. Br. at 2.

Third, JPMorgan argues that the DOJ Complaint is "replete with unproven allegations" that "have no real evidentiary value in any case." JPMorgan expects the Court to take its word on this. The reality, however, is that the DOJ Complaint was the culmination of a lengthy investigation by the DOJ with the benefit of subpoena power. It therefore certainly contains detailed references to documents and other evidence. JPMorgan effectively concedes as much

⁵ Compare *id.* with Petition [Dkt. No. 1] ¶ 9 ("[T]he Governing Agreements each contain a series of representations and warranties made by each Seller for the benefit of the Trust. These typically include representations that the Mortgage Loans were underwritten in all material respects in accordance with certain underwriting guidelines.").

⁶ Professor Fischel also notes the close proximity of the announcement of the DOJ Settlement to the announcement of this Proposed Settlement. *See* Fischel Rep. ¶ 48.

by arguing that Respondent-Investors' request for "any documents attached or referenced" in the draft complaint "would significantly expand the scope of discovery beyond the four corners of the draft complaint." Moreover, articles by journalists who specialize in the coverage of RMBS litigation indicate that the DOJ Complaint amplifies the general admissions in the "statement of facts" attached to the DOJ settlement.⁷ Thus, as one would expect, the DOJ Complaint consists of much more than bare, unproven allegations of no value and references a significant amount of evidence of JPMorgan's wrongdoing. Presumably, that is why JPMorgan has resisted producing it for so long.

Moreover, the fact that the information of JPMorgan's securitization of defective loans is contained in a complaint does not make it irrelevant to the Trustees' or their experts' evaluations. Professor Fischel reviewed and considered other complaints against JPMorgan, as well as breach rates provided by Quinn Emanuel that were based on the results of loan file reviews alleged in complaints, in making his recommendations. *See, e.g.*, Fischel Rep. ¶¶ 26, 49, 113, and Ex. Q-1 ("Breach Rates from Loan File Reviews Reported in Complaints"). There is no reason to believe Professor Fischel would not have considered the DOJ Complaint if the Trustees had made it available to him. In fact, because the DOJ had the benefit of the results of its extensive investigation and "its formidable regulatory pressure" (Op. Br. at 10, n. 5) in drafting the DOJ Complaint, it likely contains the most detailed and exhaustive account of JPMorgan's securitization of defective loans available to the Trustees. It is exactly what any reasonable trustee would have wanted to see in evaluating the value of misrepresentation claims it was being

⁷ *See, e.g.*, Alison Frankel, *FHLB demands DOJ draft complaint: 'What is JPMorgan trying to hide?'*, REUTERS (Dec. 10, 2013) (describing the draft DOJ complaint as "a much more detailed account of JPMorgan's fraudulent conduct" and "far more enlightening than the statement of facts" attached to the DOJ settlement), <http://blogs.reuters.com/alison-frankel/2013/12/10/fhlab-demands-doj-draft-complaint-what-is-jpmorgan-trying-to-hide/>; *see also* Mov. Br. at 10-11, n. 12, 13.

asked to release. Respondent-Investors should be entitled, at the very least, to show it to Professor Fischel to see whether it would have impacted his recommendations.

* * *

Ultimately, JPMorgan's relevance arguments really go to the weight which the Court should give the DOJ Complaint. As discussed above, there are good reasons to believe it would have been highly relevant to a reasonable trustee's analysis. The Court should not be forced to make a relevance determination without the benefit of seeing the documents themselves. In the absence of any undue burden, privilege, objection by the DOJ or other third-party, or any other argument that might support a protective order, there is no reason the DOJ Complaint should not be produced.

CONCLUSION

For the reasons set forth herein and in the Moving Brief, Respondent-Investors respectfully request that the Court grant their motion and issue an order compelling JPMorgan to produce the DOJ Complaint.

DATED: New York, NY
July 17, 2015

WOLLMUTH MAHER & DEUTSCH LLP

KOREIN TILLERY LLC

By /s/ Michael C. Ledley

David H. Wollmuth
dwollmuth@wmd-law.com
Michael C. Ledley
mledley@wmd-law.com
Niraj J. Parekh
nparekh@wmd-law.com
Samantha C. Glazer
sglazer@wmd-law.com
500 Fifth Avenue
New York, New York 10110
Telephone: 212-382-3300
Facsimile: 212-382-0050

Attorneys for Ambac and the QVT Funds

By /s/ John A. Libra

George A. Zelcs
gzelcs@koreintillery.com
John A. Libra
jlibra@koreintillery.com
Max C. Gibbons
mgibbons@koreintillery.com
Matthew C. Davies
mdavies@koreintillery.com
205 North Michigan Avenue, Suite 1950
Chicago, Illinois 60601
Telephone: 312-641-9760
Facsimile: 312-641-9751

Attorneys for NCUA

MILLER & WRUBEL, P.C.

AXINN, VELTROP & HARKRIDER LLP

By /s/ John G. Moon

John G. Moon
jmoon@mw-law.com
570 Lexington Avenue
New York, New York 10022
Telephone: 212-336-3500
Facsimile: 212-336-3555

Attorneys for the Triaxx Entities

By /s/ Donald W. Hawthorne

Donald W. Hawthorne
dhawthorne@axinn.com
Magdalena H. Spencer
mspencer@axinn.com
114 West 47th Street
New York, New York 10036
Telephone: 212-728-2200
Facsimile: 212-728-2201

Attorneys for The DW Funds