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

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| In the matter of the application of | Index No. 652382/2014 |
| U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., AND DEUTSCHE BANK NATIONAL TRUST COMPANY (as trustees under various Pooling and Servicing Agreements and indenture trustees under various Indentures), AEGON USA Investment Management, LLC (intervenor), Bayerische Landesbank (intervenor), BlackRock Financial Management, Inc. (intervenor), Cascade Investment, LLC (intervenor), the Federal Home Loan Bank of Atlanta (intervenor), the Federal Home Loan Mortgage Corporation (Freddie Mac) (intervenor), the Federal National Mortgage Association (Fannie Mae) (intervenor), Goldman Sachs Asset Management L.P. (intervenor), Voya Investment Management LLC (f/k/a ING Investment LLC) (intervenor), Invesco Advisers, Inc. (intervenor), Kore Advisors, L.P. (intervenor), Landesbank Baden-Wurttemberg (intervenor), Metropolitan Life Insurance Company (intervenor), Pacific Investment Management Company LLC (intervenor), Sealink Funding Limited (intervenor), Teachers Insurance and Annuity Association of America (intervenor), The Prudential Insurance Company of America (intervenor), the TCW Group, Inc. (intervenor),Thrivent Financial for Lutherans (intervenor), and Western Asset Management Company (intervenor),<br><br>Petitioners,<br><br>for an order, pursuant to CPLR § 7701, seeking judicial instruction. | Part 60<br><br>Motion Sequence No. 20<br><br>Hon. Marcy S. Friedman<br><br>Oral Argument Requested<br><br>**REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' OMNIBUS MOTION TO COMPEL THE TRUSTEES** |

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Respondents[1] respectfully submit this reply memorandum of law, together with the Reply Affidavit of Felix J. Gilman dated July 17, 2015 ("Gilman Reply Aff."), in further support their Motion to Compel Disclosure from the Trustees.

## PRELIMINARY STATEMENT

In this motion, Respondents seek to compel production of a limited set of documents from the Trustees directly relevant to the relief that the Trustees seek in this Article 77 proceeding, as defined in Appendix A to the Memorandum of Law in Support of Respondents' Omnibus Motion to Compel the Trustees ("Appendix A"). Every discovery response that Respondents seek to compel from the Trustees is directly addressed to whether the Trustees are entitled to the relief they seek in this proceeding, given (i) the possibility of an Event of Default; (ii) the existence of conflicts of interest between the Trustees and Trust beneficiaries; (iii) the evidence of bad faith conduct by the Trustees in approving the Settlement; and (iv) the evidence that the Trustees failed to conduct a thorough and reasonable investigation before accepting the Settlement.

The Trustees' principal response to Respondents' arguments has been to insist that they need provide nothing other than documents relating to the settlement created by the "decision-makers" who approved the settlement – every one of which was obviously prepared with the

[1] For purposes of this motion, "Respondents" are National Credit Union Administration Board as Liquidating Agent for U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union and Constitution Corporate Federal Credit Union; the QVT Fund V LP, QVT Fund IV LP and Quintessence Fund L.P.; Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation; DW Catalyst Master Fund, Ltd. and DW Value Master Fund, Ltd. (formerly Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited); and Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. Respondents join in each part of this reply memorandum in support of the omnibus motion with the exception of Section V. W&L Investments, LLC ("W&L") joins in this reply only as it concerns the specific discovery requests W&L has made and is seeking to compel herein in Argument, Section V.

knowledge that it would be produced in this litigation. The Court has repeatedly rejected the Trustees' position, stating as recently as the last conference that "the objectors should not necessarily be limited to receipt or production only of the documents that were provided to those who evaluated the settlement." Still, the Trustees have refused to budge from the position that only documents actually exchanged among the people who were considering the Proposed Settlement could be relevant to whether the Trustees had complied with their obligations to the Trusts in accepting the Settlement. As discussed in Respondents' opening brief and further below, and as already recognized by the Court, that position is inconsistent with the well-recognized duties of an indenture trustee to its beneficiaries.

Discovery into the existence of Events of Default is essential in this proceeding because if any Event of Default exists as to a given Trust, the Trustees could not reasonably have accepted the Proposed Settlement for that Trust, because the rationale for the accepting the Proposed Settlement was that no Event of Default had occurred. It is now settled law that actual knowledge by the Trustees of systematic document delivery failures and breaches of representations and warranties may be sufficient to trigger an Event of Default. Respondents therefore seek investor and servicer correspondence with the Trustees, as well as targeted internal emails, in order to demonstrate that the Trustees had such knowledge. The Trustees bury their response on this point at the back of their brief, mischaracterize the terms of PSAs, and ignore the wealth of recent authorities sustaining allegations of Events of Default against RMBS trustees. In short, their opposition to this discovery is wrong as a matter of law.

Similarly, the Trustees should be compelled to respond to Respondents' discovery requests concerning the Trustees' conflicts of interest, bad faith and unreasonableness in accepting the Settlement. The Trustees' other principal excuse for refusing to produce such

relevant materials is to claim that Respondents' narrowly-tailored document requests are imprecise and unduly burdensome. It is frankly outrageous for the Trustees to claim at this point that Respondents' requests are overbroad. Respondents have attempted for *over half a year* to engage in a simple meet and confer with the Trustees to agree on the basic protocols for a discovery plan, including identification of relevant custodians and appropriate search terms. The Trustees have steadfastly refused to participate in any such discussions, even in the face of the Court's admonition that this proceeding will require broader discovery than the Trustees proposed. Given the Court's direction that discovery demands should be narrowly tailored, Respondents have – with no help from the Trustees – proposed a clear, limited, and easily implemented search protocol that does not put the Trustees to any excessive burden. The Trustees' absolute refusal to engage in a good faith discussion with Respondents on how to implement their search leaves the Court with a clear choice. Given the clear relevance of the topics on which Respondents seek discovery, and the Trustees' refusal to acknowledge the relevance of Respondents' discovery demands, the Court should order the Trustees to provide the limited and obviously relevant discovery set forth in Appendix A.

## ARGUMENT

### I. The Trustees' Productions to Date Are Insufficient to Provide the Evidence Necessary for the Court to Rule on This Article 77 Proceeding

The Trustees go to considerable length attempting to create the illusion that they have made "massive productions." The reality is very different. Of the million pages of discovery documents that the Trustees continually trumpet (*see* Opp. 7), at least 700,000 are materials that JPMorgan voluntarily provided to the Trustees to review the Settlement. Much more of the production, amounting to well over another 100,000 pages, consists of deal documents, such as PSAs. Thus, the seven Trustees, in the aggregate, have produced at most a few hundred

thousand pages from their own files; and, on average, no more than 30,000 pages from each Trustee. That is not an irrelevant number; but it is far too small to show any significant burden. These banks surely produce a far larger number of documents in response to the average third party subpoena, much less in a proceeding where they are a party, and indeed have brought the suit themselves.

## II. The Trustees Should Be Compelled to Produce the Limited Discovery Sought by Respondents Concerning Events of Default

### A. Where Events of Default Occurred, Acceptance of the Proposed Settlement Was an Abuse of Discretion

As Respondents showed in their opening brief (Br. 4-6), if an Event of Default ("EOD") had occurred as to any Trust, the Trustees would be compelled to reject the Proposed Settlement for such Trust:

- The Settlement was far worse (as a percentage of losses) than comparable settlements. Professor Fischel, the Trustees' principal expert, concluded that there were indications that the Settlement was inadequate for *98% of the Trusts*.

- Fischel nonetheless recommended that the Trustees accept the Settlement for most Trusts solely because he assumed that an EOD had not occurred, and hence that the Trustees had no obligation to bring suit. On that basis, he concluded that the Settlement should be accepted because something was more than nothing.

- If an EOD had occurred as to a given Trust, the fundamental premise for Fischel's analysis – that the Trustees had no obligation to do anything – was wrong. If an EOD occurred, the Trustees were required to bring suit on behalf of that Trust's beneficiaries when a reasonable person would do so.

- If an EOD had occurred, no reasonable person could decide to accept the Settlement based on Fischel's recommendations, because his central premise was invalid; indeed, a reasonable person likely would have decided to bring suit on many, and probably the great majority of the 98% of Trusts for which Fischel found the Settlement inadequate.

The Trustees do not disagree with any of this reasoning.

### B. Respondents Are Entitled to Discovery into Events of Default

The Trustees' only basis for resisting Respondents' EOD-related discovery requests is their claim that they can show, prior to any discovery, that no EOD occurred. (Opp. 19-22). Their argument, however, is based on a clear misreading of the PSAs and well-settled New York law.

An Event of Default means "any failure on the part of the Servicer duly to observe or perform in any material respect any of the convenants or agreements on the part of the Servicer contained this [sic] Agreement . . . ." JPAMC 2006-WMCI PSA [Dkt. No. 304 § 7.01(ii)]. Industrywide, Servicers are widely alleged (in complaints that have withstood motions to dismiss) to have systematically breached numerous obligations under the applicable PSAs.[2]

The Trustees claim that the PSAs require "actual knowledge" of servicing breaches on the part of the Trustees. (Opp. 21). Respondents discovery demands seek to show that the Trustees had such "actual knowledge." The Trustees also claim that an Event of Default requires "express notice" to the Servicer and that the Trustee must "actually kn[o]w . . . that the servicer received notice of those breaches." (Opp. 20, 21). That is incorrect. When a Trustee has knowledge of circumstances giving rise to an Event of Default, it has an obligation *itself* to provide notice to the Servicer and obviously cannot escape heightened fiduciary duties by failing

[2] For example, the PSAs require the Servicers to notify the Trustee and Depositor of breaches of representations and warranties. *Id.* § 2.02. Despite the large number of representation and warranty breaches acknowledged by Professor Fischel, the Servicers here (usually JPMorgan or its affiliates) have systematically failed to give notice of the breaches. This failure constitutes an Event of Default. Servicers are also required to service the loans "in accordance with Accepted Servicing Practices" defined as procedures "employed by prudent mortgage servicers" and "in compliance with all federal, state, and local laws." *Id.* § 3.01. The Servicers breached this duty in many ways. In particular, in 2012 the SEC found that EMC – the sponsor and servicer for many of the Trusts – engaged in a practice in which it would negotiate "bulk settlements" of repurchase claims against loan originators and then pocket the proceeds for itself without repurchasing the same defective loans from, or providing compensation to, the securitization trusts. *See* http://www.sec.gov/liligalion/lilreleases/2012/1r22533.him

to give such notice. "[I]t has been established for over a century that a party may not insist upon performance of a condition precedent when its non-performance has been caused by the party itself." *Royal Park Invs. SA/NV v. HSBC Bank USA, Nat. Ass'n*, No. 14-CV-10101 SAS, 2015 WL 3466121, at *9 (S.D.N.Y. June 1, 2015).[3] Therefore, the Trustees' claim that no notice of an EOD was provided to the servicers of the Trusts does not preclude a finding that an EOD occurred.

It is hardly a stretch to suggest that EODs occurred here. It is now settled law – in cases brought by many of the Institutional Investors and other plaintiffs – that allegations of systemic breaches of mortgage loan representations and warranties are sufficient to plead Events of Default in RMBS securitization trusts. *Royal Park Invs.*, 2015 WL 3466121, at *9; *Ret. Bd. of the Policemen's Annuity and Benefit Fund of Chicago v. Bank of New York Mellon*, 914 F. Supp. 422, 431 (S.D.N.Y. 2012); *Oklahoma Police Pension & Ret. Sys.*, 291 F.R.D. at 67; *American Fid. Assurance Co. v. Bank of New York Mellon*, No. CIV-11-1284-D, 2013 WL 6835277, at *5-6 (W.D. Okla. Dec. 26, 2013); *Policemen's Annuity and Benefit Fund of Chicago v. Bank of America N.A.*, 907 F. Supp. 2d. 536, 547 (S.D.N.Y. 2012); *VNB Reality, Inc. v. U.S. Bank, N.A.*, No. 2:13-04743 (WJM), 2014 WL 1628441, at *4 (D.N.J. Apr. 23, 2014). The Trustees ignore this settled law. None of the cases that the Trustees cite even address this issue, and most of the cases are unpublished slip opinions involving trustees for other types of securities that do not relate to RMBS at all.

Similar allegations could be plead here. The evidence of systemic breaches of representations and warranties by JPMorgan and its affiliates is indisputable, as recognized by

[3] *See also, e.g., Oklahoma Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n*, 291 F.R.D. 47, 70 (S.D.N.Y. 2013), *abrogated on other grounds by Ret. Bd. of the Policemen's Annuity & Ben. Fund of Chicago v. Bank of New York Mellon*, 775 F.3d 154 (2d Cir. 2014) ("the trustee cannot rely on its own failure to give notice to escape its own liability").

Professor Fischel (Fischel Rep. ¶¶ 48-49). JPMorgan also has admitted to the Department of Justice that it knowingly securitized loans that violated representations and warranties concerning the underwriting quality of the loans.[4] Just last month, the Institutional Investors defeated a motion to dismiss, and obtained access to full-blown discovery in a case asserting that HSBC had breached its duties to Trust noteholders by failing to bring suit on repurchase claims after an EOD occurred. *Royal Park Invs.*, 2015 WL 3466121, at *9. The allegations in that case, which the court found sufficient to allege the Trustee's (HSBC) knowledge of the existence of an EOD, could be made for every Trustee here.[5] *See* Gilman Reply Aff. (attaching excerpts from complaint alleging existence of EOD).

In order to show the existence of an EOD, Respondents seek correspondence between the Trustees and Certificateholders since Congressional investigations into the mortgage crisis began in 2010, correspondence between the Trustees and the Servicers, and documents from a limited set of custodians identified through a well-defined search protocol. *See* Appendix A. Respondents respectfully request that the Court compel the Trustees to produce this limited set of materials, which is far more circumscribed than the discovery afforded to the Institutional Investors and other plaintiffs suing RMBS trustees for neglecting their contractual and fiduciary duties.[6]

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[4] *See* http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

[5] The Court found that the Trustee's actual knowledge of EODs was adequately stated, for purposes of gaining access to broader discovery, by allegations that the Trustee was aware of representation and warranty breaches because of, e.g., "reports and litigation concerning common originators' systemic abandonment of underwriting standards" and "HSBC's involvement in putback efforts involving the same Sellers;" that the Trustee had been "the target of government investigations, prosecutions and settlements with many of the Servicers to the Trusts for the same alleged improper servicing practices;" that the Trustee had received "written notice from Holders to other RMBS trusts regarding the same servicing violations by the same servicers to the Trusts here." Slip Op. at 22, 30.

[6] The Trustees also should have provided this material to their experts. The Trustees' only excuse for not doing so is that the experts did not ask for it. (Opp. 15-17). Even if that is true, it does not absolve the

## III. The Trustees Should be Compelled to Produce the Limited Discovery Sought by Respondents Concerning Conflicts of Interest

The Trustees acknowledge that, even in the absence of an Event of Default, they owe the Certificateholders a fiduciary duty of loyalty. Opp. at 8-9; *see generally Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 11, 632 N.Y.S.2d 520 (1st Dep't 1995). The Trustees' suggestion that this duty of loyalty requires only that they refrain from "profiting" at the expense of Certificateholders is incorrect. The Trustees are prohibited from acting in any respect for their own interests rather than for those of the Certificateholders. *See generally Dabney v. Chase Nat'l Bank of New York*, 196 F.2d 668, 671 (2d Cir. 1952) (indenture trustee has "duty to discharge whatever obligations he does assume with absolute singleness of purpose").

The Trustees have three general objections to providing discovery on conflicts of interest. *First*, the Trustees claim they had no conflicts of interest, a proposition that is untenable. To cite only one example, the Trustees are being sued for billions of dollars in numerous cases on the theory that an EOD occurred. An admission by the Trustees that an EOD *had* occurred in any Trust would open the Trustees to enormous exposure. The Trustees are therefore obviously conflicted in evaluating whether an EOD had occurred in the Trusts.

*Second*, the Trustees insist that only documents from the decision-makers on the settlement can have any relevance to conflicts of interest raised by Respondents. It would certainly be relevant if others beside the carefully selected "decision-makers" – *e.g.*, a bank's credit officers, internal auditors, or Board of Directors – recognized that the settlement review

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Trustees of the responsibility to make decisions for the Trust beneficiaries based on the Trustees' *own knowledge*. If the Trustees were well aware that they possessed information relevant to the consideration of the Proposed Settlement, but failed to consider it because their experts had not asked for it, that would not be a reasonable exercise of the Trustees' discretion.

process could increase the Trustee's own liability, or that the Trustee's interests otherwise diverged from those of Trust beneficiaries.

*Third*, the Trustees claim that only documents provided to their experts are relevant. But that cannot be right. It was the banks, not their experts, who were retained to serve as Trustee, and it was a group of bank employees who made the final decision to accept the settlement. Information known to the Trustees, whether or not it was transmitted to their experts, is relevant to the Trustees' performance of their duties.

### A. The Trustees Should Be Compelled To Produce Documents Regarding Their Liability For Untimely Trusts

Respondents seek documents that could show that the Trustees were influenced in accepting the Settlement because the payment of the same settlement consideration for untimely and timely trusts would reduce the Trustees' own liability for untimely claims. (Br. 10-12). The Trustees' principal objection – that the Trustees' incentive to reduce its liability served the interests of untimely Trusts to maximize their recovery (Opp. 9-10) – misses the point. The conflict of interest exists with *timely* trusts. The Trustees have still not explained how *timely* trusts should receive the same recovery as *untimely* trusts, whose claims the Trustees contend are "worthless." The overwhelming inference is that the Trustees sold short the interests of timely trusts in order to reduce the Trustees' own liability to untimely trusts, and therefore approved a Settlement that was unfair to timely trusts.

Respondents seek to explore the extent of this conflict of interest through limited discovery of individuals who were likely to have been aware of and commented on the implications of the settlement – if accepted or if rejected – to the bank's own liability.

### B. The Trustees Should Be Compelled to Produce Documents Regarding Their Own Exposure from Loan File Review

The Trustees do not dispute that loan file review would have increased the risk of liability for banks that originated loans or sponsored securitizations. (Opp. 11-12). Had the Trustees conducted loan file review, they would have increased their own risk of being sued, as well as their liability, for not taking action sooner. The Trustees claim, however, that they did not make the decision to avoid loan file review; their experts did. *Id.*

Even if the experts independently came to a decision not to review loan files, that did not relieve the Trustees of their responsibility to exercise their own judgment, in light of their own knowledge, to accept this "recommendation," and review the Settlement without bothering to review loans. In making that decision, the Trustees were necessarily conflicted. Respondents seek limited discovery to confirm whether the banks recognized the risk of their own liability that could arise from loan file review. Evidence of such a conflict is relevant for evaluating the decision not to conduct any loan file review.

### C. The Trustees Should Be Compelled to Produce Interrogatory Responses Concerning Their Mutual Ownership and Ongoing Business Relationships with JPMorgan and the Institutional Investors

Respondents seek extremely limited information to quantify the extent of the Trustees' business relationships with JPMorgan and the Institutional Investors, in order to establish their influence over the Trustees' decisions. The Trustees object that such relationships, standing alone, are generally insufficient to establish a conflict of interest. (Opp. 13-15). But Respondents do not intend to rely on this evidence alone. Rather, as it clearly supports the possibility of influence, it is a relevant part of the evidence that should be available to the Court in considering this Article 77 proceeding. While not necessarily determinative by itself, it may help the Court to understand why the Trustees ignored other conflicts of interest, and reached

decisions that were more in the interests of JPMorgan and the Institutional Trustees than their own Trust beneficiaries.

## IV. The Trustees Should Be Compelled to Produce Documents Demonstrating Their Opposition to Certificateholders' Efforts to Form Directing Groups, Including Through the Imposition of Excessive Indemnification Requirements

The Trustees do not deny that their pro forma indemnification requirements were excessive; they only claim that no one sought to renegotiate them. (Opp. 17-18). That argument only further shows that the Trustees actively prevented certificateholders from bringing claims. Respondents seek limited discovery relevant to demonstrating the Trustees' bad faith in preventing formation of directing groups of certificateholders. The Trustees provide no reason why this obviously relevant information should not be produced.

## V. The Trustees' Responses to W&L's Portion of the Motion Finally Reveal Their Failure to Investigate the Distribution Methodology but Still Obscure Whether Documents Responsive to W&L's Request Exist at All

The Trustees' responses to W&L's portion of the Motion to Compel are far more revealing than their responses to discovery: "[T]he Trustees did not consider which *investors* would get the most money…." Doc. No. 459 at 23. And "BNYM…has confirmed in writing that it did not conduct the analysis that W&L asked about … [and] the Trustees did not investigate further…." *Id.* These are critical admissions, as they demonstrate that the Trustees' decision-making is outside of the safe harbor they claim for themselves by having referred certain settlement topics to their advisors. *See* Doc. No. 194 at 10 ("If…a trustee has selected an advisor prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction on the matter at issue.") (quoting RESTATEMENT (THIRD) OF TORTS § 93 cmt. C (2012)); *see also id*. at 4 ("The essential question before the Court is whether it was *reasonable* for the Trustees to rely on the Expert

Reports in making their decision to accept the Settlement."); *id*. at 9 ("The question is…whether the Trustees acted within the bounds of reasonable discretion by relying on carefully chosen experts and their recommendations."). Thus, the Trustees' failure to evaluate the propriety and effect of the distribution methodology goes to the heart of this matter.

The Trustees' omission is all the more important in light of the fact that, contrary to the Trustees' assertion, the Settlement Payment should not be treated as a "Subsequent Recovery" under the Governing Agreements, but rather as "Repurchase Proceeds."[7] This distinction, as W&L has described to the parties in its interrogatory response and will demonstrate at the merits stage, is critical because it determines whether the Settlement Payment should be paid to compensate Certificates harmed by breaches of representations and warranties or to enrich Certificates that were not. Failing to consider this issue renders the Trustees' settlement decision-making on this point unreasonable. It also underscores the fact that the Court may—and should—"determine that the distribution of the…Allocable Shares as though such Allocable Share was a 'subsequent recovery'…does not conform to the terms of the Governing Agreement[s]…." Settlement Agreement § 3.06(d).

Had the Trustees merely conceded that they failed to investigate the reasonableness or appropriateness of the distribution methodology before necessitating W&L's participation in the Motion to Compel, W&L's portion of the Motion would have been far narrower. Nevertheless, the Trustees still fail to adequately respond to W&L's discovery in one important—and

[7] The Trustees' argument that the *Countrywide* Court approved the distribution methodology is both irrelevant and misleading. The distribution methodology was not challenged, and a matter "not directly advanced and not expressly decided[] cannot be regarded as precedent[]." *Empire Square Realty Co. v. Chase Nat. Bank 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)).

curable—respect: They continue to obscure *whether* responsive documents exist and to bury responsive documents, *if any*, in a massive, unwieldy production.

It is difficult to reconcile the Trustees' contradictory assertions that "the relevant documents have already been produced" (Doc. No. 459 at 23) and that the documents W&L demands "do not exist" (*id*.). Further obscuring the point, the Trustees use indefinite phraseology such as, "[A]ny 'aggregate' analysis that BNYM saw *would have been* produced." *Id.* at 24. (emphasis added). Accordingly, W&L respectfully requests that the Court order the Trustees to state definitively *whether* responsive documents exist. Requiring W&L to continue to search the production to determine whether responsive documents exist is inconsistent with the "just, speedy, and inexpensive determination" of W&L's objection and this matter. *See* C.P.L.R. § 104.

If responsive documents exist, the Trustees should further be required to state where they may be found. The Trustees lump W&L and its narrowly-tailored discovery requests into their responses to the larger Respondent group's requests. But W&L is a separate party that propounded separate discovery and is entitled to separate, intelligible responses. While the C.P.L.R. generally permits a party to avoid providing Bates numbers where documents are produced as they are maintained in the ordinary course of business, this is an unusual, multi-party matter. The W&L requests at issue were not propounded as part of the larger Respondent group's requests, but were intentionally narrowed and propounded separately. The Trustees' insistence on putting W&L to needless waste of time and resources is contrary to the mandate of C.P.L.R. § 104. W&L continues to request, and now asks the Court to order, that the Trustees identify documents responsive to W&L's discovery requests with sufficient particularity to allow

W&L to cull them from within the larger production. Of course, this will be unnecessary if the Trustees state that no responsive documents exist at all.

## CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Court grant their motion to compel the Trustees to produce the documents and responses listed in Appendix A.

DATED: New York, NY
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