January 4, 2016

ECF and Hand Delivery
Justice Marcy S. Friedman, Part 60
New York State Supreme Court
60 Centre Street, Courtroom 248
New York, New York 10007

Re: *In the Matter of U.S. Bank Nat'l Ass'n, et al.*, Index No. 652382/2014

Dear Justice Friedman:

Pursuant to the Court's instructions during the December 14, 2015 teleconference, the parties jointly write to identify the issues that will be the subject of motions *in limine*.

Respondents' Motions *In Limine*: Respondents Ambac and the QVT Funds presently intend to submit two pre-trial motions *in limine* to preclude the Trustees from offering evidence in support of the proposed settlement.[1]

Motion No. 1 (Fischel's Opinions). The Court should preclude the Trustees from offering expert testimony and reports from Professor Daniel R. Fischel ("Fischel") because he lacks the requisite qualifications and trial foundation for the opinions expressed. While the Trustees may, in some circumstances, obtain and consider the advice of experts, the advice must be "plausible," "competent," and concern "a matter within [the advisor's] expertise" and outside a trustee's "normal knowledge and experience." Restatement (Third) of Trusts § 77, cmt. b & b(2); *see also In re U.S. Bank N.A.*, No. 653902/2014, 2015 WL 9271693, at *7-8 (Order) (N.Y. Sup. Ct. 12/18/15). First, the subject matter of Fischel's opinion concerns the exercise of "business judgment," (Fischel Report ¶ 17), which is a matter within the Trustees' "normal knowledge and experience" and thus not an appropriate subject for expert opinion here. Second, although Fischel is a well-credentialed academic in the field of law and economics, his opinions fall outside any expertise he holds. He is not an expert in trustee business judgment, trustee duties, or RMBS in general, and therefore his reports and testimony lack foundation and are improper. Fischel's opinions concerning whether or not to accept the settlement for individual Trusts or Loan Groups also turn on legal conclusions concerning the Trustees' duties under the governing agreements for which he is not qualified to opine and disclaims any intent to offer an opinion. Finally, although the Trustees are designating Fischel as a "fact witness," they acknowledge he will testify about the opinions in his "expert" report. Labeling him a fact witness does not change the nature of his testimony. The Court must apply the same scrutiny to Fischel as any other expert witness and exclude his testimony for the reasons noted above. *See Logan v. Cooper Tire & Rubber Co.*, 2011 WL 5245373, at *3 (E.D. Ky. Nov. 2, 2011) (parties may not evade "rules relating to expert witnesses . . . by merely labeling the witnesses 'fact witnesses'"); *Ireland v. Suffolk Cty. of New York*, 2007 WL 4688412, at *2 (E.D.N.Y. Dec. 11, 2007) (excluding testimony from experts "disguised . . . as factual witnesses").

Motion No. 2 (Advice of Counsel). The Court should preclude the Trustees from offering evidence of their reliance on counsel in evaluating and accepting the proposed settlement. Discovery has revealed that the Trustees relied extensively on the advice of counsel in evaluating the settlement. For example, certain Trustee representatives testified that they outsourced the identification of issues for

[1] While the principal bases for the contemplated motions are set forth in this letter, Ambac and the QVT Funds reserve the right to raise additional or different grounds for the exclusion of the evidence.

expert advice and the selection of experts entirely to their litigation counsel. The Trustees also relied on advice of litigation counsel concerning their duties under the governing agreements rather than consult legal experts (and make public their reports) as they did for other legal issues.[2] Despite relying on advice of counsel, the Trustees have asserted privilege to prevent full discovery of the substance of that advice. The Trustees have withheld over 15,000 documents as privileged on several key issues, including the evaluation of the proposed settlement, the retention and assignments of their experts, the Trustees' duties, and the release of claims against JPMorgan.[3] Similarly, Trustee witnesses were instructed not to answer questions during their depositions that would reveal the details of advice on which the Trustees' relied. It is hornbook law "that privilege is a shield and must not be used as a sword." *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 837 N.Y.S.2d 616, 622 (1st Dep't 2007). A party asserting a defense of reliance on advice of counsel or making selective disclosure of such advice will not be permitted to shield communications with counsel on the same subject matter, which it has placed at issue. *See, e.g.*, *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 837 N.Y.S.2d 15, 23 (1st Dep't 2007). Similarly, a party cannot present evidence of reliance on advice of counsel at trial to show good faith where it has previously invoked the privilege in discovery. *See, e.g.*, *Arista Records LLC v. Lime Grp. LLC*, 2011 WL 1642434, at *2 (S.D.N.Y. Apr. 20, 2011) ("a party 'who intends to rely at trial' on a good faith defense 'must make a full disclosure during discovery; failure to do so constitutes a waiver' of that defense"); *Quiles v. Term Equities*, No. 2001-114083, 2006 WL 8201831 at *1-2 (Trial Order) (N.Y. Sup. Ct. Mar. 1, 2006).

Trustees' Statement: The Trustees do not intend to file any motions *in limine*. The Trustees write to address briefly the objectors' proposed motions.

I. The objectors' request to preclude Professor Daniel Fischel's testimony and reports should be denied. The Trustees are not offering the testimony of Professor Fischel as a "testifying expert witness," as the objectors suggest. Instead, we are offering him to testify to the *facts* concerning the work he performed to aid the Trustees in evaluating the merits of the settlement offer presented to them. Insofar as the objectors seek to preclude Professor Fischel from testifying about his personal knowledge of his engagement, including by recounting the scope of his engagement, the recommendations that he gave in his report and in oral presentations to the Trustees, and the support for his recommendations – all grounded in economic analysis – that motion should be denied. Professor Fischel provided two reports to the Trustees, recommending that the Trustees accept the Settlement Agreement on behalf of certain loan groups and reject it on behalf of others. Because he in fact provided those reports to the Trustees, and the Trustees in fact relied on them, there can hardly be (and it does not appear that there is) any dispute that he has personal knowledge of relevant facts, including his retention, the information that he received from the Trustees, the advice that he provided to them, and the support for such advice. His testimony about those facts is, therefore, plainly admissible.[4] In any event, Professor Fischel was more than qualified to provide his opinions. He is a

[2] The Trustees also recently indicated that they intend to submit written direct testimony similar to the affidavit submitted by U.S. Bank in the Citigroup proceeding, which is replete with references to the Trustees' consultation with counsel. *See* Taraila Aff. ¶¶ 14-16, 19-20, 23, 29, 32-33, 40, 43-44, 53-58 (Citigroup Article 77 NYECF 92).

[3] For example, Wells Fargo has withheld a memorandum describing "the proposed Settlement, the Trustee's evaluation of the proposed Settlement,[and] the experts' recommendations." *See* WF000000007.

[4] Notably, in both prior Article 77 proceedings in connection with global RMBS settlements, trustees have similarly offered – and this Court has accepted – the reports and testimony of expert advisors. See *In re Bank of New York Mellon*, No. 651786/11, 2014 WL 1057187 (N.Y. Sup. Ct. Jan. 31, 2014), *affirmed as modified by In re The Bank of New York Mellon, et al.*, No. 651786-11, 2015 WL 921625 (1st Dep't, March 5, 2015); *In the Matter of the Application of U.S. Bank National*

professor emeritus of law and business at The University of Chicago and at Northwestern University and is the former Dean of The University of Chicago Law School. *The Economic Structure of Corporate Law*, which Professor Fischel wrote with Seventh Circuit Judge Frank Easterbrook, is one of the leading sources in its field. Professor Fischel has published approximately 50 articles, which have been cited by various courts, including the U.S. Supreme Court. Professor Fischel has written expert reports and testified in federal and state courts across the country, including a report and testimony in the Countrywide Article 77 proceeding. The objectors are free to argue that the Trustees should have hired a different expert, but it is difficult to see how the Court could make findings—one way or the other—about the Trustees' settlement decisions if it excludes all evidence about analyses on which those decisions were made. This case is about the reasonableness and good faith of the Trustees' decision to enter into the Settlement, and the fact that the Trustees relied on expert advisors "is significantly probative of the Trustees' prudence" in evaluating and accepting the proposed settlement. *Matter of U.S. Bank Nat'l. Ass'n. et al.*, Index No. 653902/2014 Slip Op. at 10. Accordingly, Professor Fischel's testimony about his engagement by the Trustees is relevant and admissible.

II. Respondents' request to preclude the Trustees from offering evidence of their reliance on counsel should be denied, because in these proceedings the Trustees do not intend to (in the objectors' words) "present evidence of reliance on advice of counsel at trial to show good faith." The Trustees intend to present evidence of the fact that the Trustees' counsel was involved in the evaluation of the settlement,[5] and the facts that the Trustees learned from their counsel.[6] These facts are not privileged and, accordingly, the objectors have received voluminous discovery into non-privileged aspects of the Trustees' counsels' work, including by receiving all of the documents that the Trustees and their counsel exchanged with the expert advisors and other parties. That the Trustees should be permitted to put forward this evidence is not at all novel or controversial. As the objectors' own authority—*Deutsche Bank v. Tri-Links*—holds, a party's "testif[ying] to the fact that, in deciding to settle [a case], [the party] (not surprisingly) considered the advice of its attorneys . . . does not constitute a waiver of privilege" (43 A.D.3d at 69); thus, the party may present such testimony while also claiming privilege over the contents of legal advice. *See also CFIP Master Fund, Ltd., v. Citibank*, 2010 WL 3622286 at *20 (S.D.N.Y. September 18, 2010) ("U.S. Bank is not asserting an 'advice of counsel' defense, which would require the waiver of attorney-client privilege, by referring to the fact of its communication with counsel in the context of demonstrating its good faith."). The objectors' sword-and-shield assertion displays a fundamental misperception of the evidence to be presented concerning the involvement of the Trustees' counsel in the settlement process. Privileged communications must be disclosed only if the party "sought to justify the decision to settle . . . on the ground that it was based on the advice of counsel, [or] divulge[d] the contents of any of the advice [that the party] received from its counsel." *Id.* at 68-69. The Trustees intend only to present evidence of non-privileged facts concerning the involvement of Trustee counsel in the evaluation of the settlement.

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Association, Deutsche Bank National Trust Company, HSBC Bank USA, N.A., and Law Debenture Trust Company of New York, Index No. 653902/2014.

[5] *See* M. Barr, M. Altman, B. Lipshie, and S. Stern Gerstman, *Attorney* New York Pretrial Practice §25.90 ("The privilege prohibits the disclosure of a confidential communication. This means that it is the *substance*, not the *fact* of the communication that is protected.").

[6] *See Spectrum Systems Int'l. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (N.Y. 1991) ("The privilege is of course limited to communications—not underlying facts.").

No additional motions *in limine* are contemplated by any other party at this time.

Respectfully submitted,

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