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,

-against-

AMBAC ASSURANCE CORPORATION, AND THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION (intervenors), AND W&L INVESTMENTS, LLC (intervenor),

Respondents,

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

Index No. 652382/2014

Part 60

The Honorable Marcy S. Friedman, J.S.C.

PETITIONERS' PRE-HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

The Trustees will show that they acted reasonably and in good faith in accepting the Proposed Settlement, and that the Court should enter the Proposed Order and Final Judgment (the "Proposed Order").

FACTUAL BACKGROUND[1]

On November 15, 2013, a group of twenty institutional investors (the "Institutional Investors") informed the Trustees that they had reached a proposed settlement (the "Proposed Settlement") with JPMorgan concerning 330 RMBS trusts sponsored by JPMorgan for which the Trustees are trustee, indenture trustee, successor trustee, or separate trustee. *See* Ex. 005 at 65. The Institutional Investors hold certificates representing approximately 32% of the unpaid principal balance in the trusts, and believe the Proposed Settlement to be in the best interests of all of the trusts. *See id.*

Under the Proposed Settlement, JPMorgan offered to make a $4.5 billion payment to the trusts, subject to adjustments for non-accepting trusts (the "Settlement Payment"), and perform the mortgage loan servicing improvements set forth therein (the "Subservicing Protocol") (collectively, the "Settlement Consideration"). *See* Ex. 003 § 3.01. In exchange for the Settlement Consideration, JPMorgan would receive a release from the trusts of claims related to breaches of mortgage loan representations and warranties and claims related to mortgage loan servicing (the "Released Claims"). *See* Ex. 003 § 3.02. The Settlement Payment would be allocated among the trusts pursuant to a formula based on the respective lifetime losses of the

[1] This factual background is based on the Trustees' respective affidavits. *See* NYSCEF Nos. 558-564. Citations to the Trustees' Exhibits ("Ex.") are provided for reference. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Proposed Settlement as memorialized in the RMBS Trust Settlement Agreement. *See* Ex. 003.

trusts. *See* Ex. 003 § 3.05.[2]

The Proposed Settlement initially set the last date to accept or reject it (the "Acceptance Date") as January 15, 2014, which the Trustees could (and did) extend for sixty days, as a matter of right. *See* Ex. 003 §§ 1.01, 2.03(b). The Acceptance Date was further extended to August 1, 2014 pursuant to successive negotiated extensions, with the exception of a group of trusts subject to a further negotiated extension to October 1, 2014. *See* Exs. 039-040. The Proposed Settlement required JPMorgan to pay the Trustees' evaluation and court approval expenses, and provide information requested by the Trustees in support of their respective evaluations. *See* Ex. 003.

While each Trustee conducted its own evaluation of the Proposed Settlement, all of the Trustees had personnel who, among other things, coordinated the evaluation, reviewed and selected experts, assisted in gathering relevant data and information, and communicated with investors. Additionally, each Trustee retained counsel to represent it in connection with, and assist in, its evaluation, and each Trustee had an individual or individuals who made the decision to accept or reject the Proposed Settlement for each trust.

To assist them in their evaluation of the Proposed Settlement, the Trustees considered approximately sixteen expert candidates, and ultimately retained the following experts:[3]

> **NERA Economic Consulting ("NERA")** NERA is a consultancy firm with substantial experience in structured finance that performs economic analysis of

[2] The Trustees were permitted to accept or reject the Proposed Settlement on a loan group basis. *See* Ex. 003 § 2.03(a). The terms "trusts" and "loan groups" are used interchangeably herein.

[3] Wells Fargo Bank, National Association ("Wells Fargo") did not participate in the consideration or retention of the valuation expert. Law Debenture Trust Company of New York ("Law Debenture") was appointed separate trustee for each of the thirty trusts subject to the Proposed Settlement for which Wells Fargo is trustee. As separate trustee, Law Debenture is solely responsible for enforcing or settling representation and warranty claims as to these trusts. Wells Fargo has no responsibility for the enforcement or settlement of such claims.

legal and business issues. The Trustees retained Dr. Faten Sabry of NERA in connection with valuation-related issues.

Boston Portfolio Advisors ("BPA") BPA is a consultancy firm specializing in analysis of servicing and financing of loan portfolios with decades of experience in structured finance. The Trustees retained Jeremy Reifsnyder of BPA in connection with servicing-related issues.

Justice Anthony Carpinello Justice Carpinello is a retired Justice of the New York State Supreme Court, Appellate Division. The Trustees retained him in connection with relevant legal issues.

Professor Alan Schwartz Prof. Schwartz is a Sterling Professor at Yale Law School. The Trustees retained him in connection with relevant legal issues.

Professor Daniel Fischel, Compass/Lexecon Compass is a consultancy firm specializing in economic analysis. Its President, Prof. Daniel Fischel, is a professor emeritus of law and business at the University of Chicago and at Northwestern University. The Trustees retained Prof. Fischel to provide an opinion concerning the reasonableness of the Proposed Settlement for each trust.

The Trustees and JPMorgan provided to the experts various documents and information requested by the experts in connection with their analyses, including investor correspondence concerning the Proposed Settlement, holdings and other information concerning the Institutional Investors, transaction closing sets, repurchase and other mortgage loan data, representation and warranty breach related correspondence, and information concerning JPMorgan's servicing. This information was voluminous—JPMorgan alone provided approximately 1.75 million pages of documents. *See* Ex. 129. And, JPMorgan arranged for meetings between the servicing expert and servicing and subservicing personnel. *See id.* The evaluation period extensions obtained by the Trustees ensured that the experts had sufficient time to conduct their analyses. *See* Exs. 037-039.

After the completion of their analyses, the experts provided written reports. Dr. Sabry's report included an estimate of lifetime losses and the Settlement Payment for each trust. *See* Ex. 021. Mr. Reifsnyder's report included an estimate of the potential losses associated with

JPMorgan servicing, and an estimate of the potential benefits of the Subservicing Protocol. *See* Ex. 019. Justice Carpinello and Prof. Schwartz's reports included analyses concerning pertinent legal issues, including an analysis of the applicable statute of limitations. *See* Exs. 015-018.

Prof. Fischel provided "an independent opinion of the reasonableness and adequacy of the Proposed Settlement for each [t]rust." Ex. 020 ¶ 12. Prof. Fischel considered relevant aspects of the other experts' reports and his report included: (a) a comparison of the Proposed Settlement to other similar settlements; (b) an analysis of investor support and opposition to the Proposed Settlement; (c) an estimate of the Settlement Consideration for each trust; (d) an estimate under six different models of the expected recovery for each trust if litigation were pursued in lieu of accepting the Proposed Settlement ("Expected Recovery"); and (e) an analysis of the impact of the applicable statute of limitations, relying on Justice Carpinello's analysis. *See* Ex. 020.

Prof. Fischel recommended rejection where each of the following criteria was true:

1. investors of a substantial proportion of the trust's certificates expressed opposition to accepting the Proposed Settlement and their holdings exceeded those of supporting investors;

2. there was an indication that the Expected Recovery for the trust would be greater than the Settlement Consideration; and

3. the trust's representation and warranty claims were not likely barred by the applicable statute of limitations or there was an indication that servicing claims alone exceeded the Settlement Consideration.

See Ex. 020 ¶ 29. Prof. Fischel further stated that even if all three criteria were satisfied, rejection was only appropriate if a Trustee was "confident there [was] a group of [investors] . . . willing and able to direct and indemnify the Trustee to complete the investigation and potential litigation that would likely be necessary to pursue claims against JPM[organ]." Ex. 020 ¶ 31. Each of the Trustees concluded the experts were well-qualified and that their reports were

reasonable and well-founded.

The Trustees also conducted an extensive investor notice program with the assistance of a notice agent. The Trustees provided a total of twelve notices concerning the Proposed Settlement, and established a website containing the notices and other information. *See* Exs. 010-013, 023-030. Four Trustees also provided notices seeking additional investor input concerning trusts for which the Acceptance Date was extended to October 1, 2014. *See, e.g.*, Exs. 106-118. Each Trustee communicated with investors who contacted them, and, in some cases, negotiated directions to reject the Proposed Settlement and pursue claims against JPMorgan.

Following the completion of the experts' reports, the Trustees determined on a trust-by-trust basis to either accept the Proposed Settlement subject to court approval, or reject it. Depending on the particular trust, the Trustees' decisions were made on either August 1 or October 1, 2014. *See* Exs. 012, 030. In making their decisions, each Trustee reviewed and considered, among other things, the terms of the Proposed Settlement, the experts' reports and recommendations, and communications with investors. The Trustees accepted the Proposed Settlement for 319 trusts. *See* Exs. 012 at Ex. B, 030 at Ex. B.

PROCEDURAL HISTORY

On August 3, 2014, the Trustees filed a petition pursuant to CPLR 7701 ("Article 77") seeking approval of their decisions to accept the Proposed Settlement, and later filed an amended petition. *See* NYSCEF Nos. 1, 57. On August 15 and October 9, 2014, the Court entered orders requiring the Trustees to institute a worldwide notice program. *See* NYSCEF Nos. 40, 68 (the "Notice Orders"). The notices informed investors of, among other things, the commencement of this proceeding and the deadline to file objections. *See* Exs. 013, 027. The Trustees complied with the Notice Orders. *See* NYSCEF Nos. 72, 168.

On August 5, 2014, the Institutional Investors intervened in this proceeding in support of the Proposed Settlement. *See* NYSCEF No. 23. JPMorgan also appeared. *See* NYSCEF No. 95. Of the eight parties that intervened for the purpose of asserting objections, only two remain. *See* NYSCEF Nos. 69, 84, 87, 96, 103, 118, 122, 148, 298, 352, 532, 540, 557, 567. The two remaining objectors are Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"), which partially insured eight of the trusts and is pursuing separate litigation against JPMorgan, and W&L Investments, LLC ("W&L"), which has holdings in two trusts. There is no objection for 309 of the 319 trusts. The Trustees are entitled to the entry of the Proposed Order.

ARGUMENT

A. The Court Has Jurisdiction To Hear This Article 77 Proceeding

Article 77 is appropriate for trustees seeking judicial instructions regarding discretionary actions, including approval of RMBS settlements. *See In re Bank of N.Y. Mellon ("Countrywide I")*, Index No. 651786/2011, 42 Misc. 3d 1237(A), 2014 NY Slip Op 50384(U) (Sup. Ct. N.Y. Cnty. Jan. 31, 2014), *aff'd as modified in In re Bank of N.Y. Mellon ("Countrywide II")*, 127 A.D.3d 120 (1st Dep't 2015); *In re U.S. Bank Nat'l Ass'n ("Citigroup")*, Index No. 653902/2014, 2015 WL 9271693 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 18, 2015).

B. The Standard Of Review Applicable To The Trustees' Discretionary Actions

As stated by the First Department in *Countrywide II*, and as recently applied by this Court in *Citigroup*, "[t]he ultimate issue for determination . . . is whether the trustee's discretionary power was exercised reasonably and in good faith." *Countrywide II* at 125. The Court's role is "limited to ensuring that the trustee has not acted in bad faith such that [its] conduct constituted

an abuse of discretion." *Id.* It is not the Court's role to "micromanage and second guess" the Trustees, and the Court need not agree with the Trustees' settlement decisions. *Id.* at 128.

The Trustees' affidavits and other evidence, including the testimony of Prof. Fischel, will establish that the Trustees have met this standard.

C. Each Trustee Acted Reasonably And In Good Faith

i. The Trustees Have The Discretionary Authority To Settle

The agreements governing the trusts assign the Trustees (or the trust on whose behalf the Trustees act) all "right, title and interest" in and to the mortgage loans.[4] This and other "Courts have held that such provisions 'effectively grant[] the Trustee the power and authority to commence litigation' and, with it, the discretionary 'power to settle litigation.'" *Citigroup*, at *6 (citing *Countrywide I*).

ii. The Trustees Relied On The Advice Of Highly Qualified Experts

A trustee's "reliance on the plausible reports and advice of outside experts is 'significantly probative of [the Trustees'] prudence.'" *Citigroup*, at *7 (citing *Countrywide II*); *see also Countrywide II* at 126 (citing Restatement (Third) of Trusts § 77, cmt. b). This is true even if the Court disagrees with the experts' advice (*see Countrywide II* at 126-27), or if the advice is incorrect (*see Cruden v. Bank of N.Y.*, 957 F.2d 961, 972 (2d Cir. 1992)).

Here, after a comprehensive vetting process, the Trustees retained highly-qualified experts with years of experience in their respective fields. The Trustees provided the experts with millions of pages of relevant documents and other information and took reasonable efforts to ensure that the experts had access to the information necessary to perform their analyses. *See* Restatement (Third) of Trusts § 93, cmt. c ("If . . . a trustee . . . provided . . . [a retained expert]

[4] The relevant provisions in the governing agreements are addressed in the Trustees' respective attorney affirmations filed herewith. *See also* Ex. 014.

adviser with relevant information . . . this conduct provides significant evidence of . . . prudence . . . ."). The Trustees' negotiation of successive extensions of the Acceptance Date ensured that the experts had sufficient time for their analyses.

The experts' reports are reasonable and sound. Prof. Fischel considered each of the other reports in making his recommendations to the Trustees concerning the reasonableness and adequacy of the Proposed Settlement for each trust. Prof. Fischel recognized "it is not possible to know with certainty whether a specific [t]rust would ultimately be better off accepting the Proposed Settlement or rejecting it." Ex. 020 ¶ 27. He thus "consider[ed] . . . a number of factors that are indicative of the likelihood that accepting the Proposed Settlement is superior to rejecting," and developed and applied the previously discussed three determinative criteria in rendering his recommendations. *Id*.

Prof. Fischel's work represents an array of complex considerations, including the estimated value of the Released Claims as compared to the Settlement Consideration, the views of investors concerning the Proposed Settlement, whether investors would be willing to support litigation, the risk that Released Claims could not be successfully pursued if the Proposed Settlement were rejected, and how the Proposed Settlement compares to other similar settlements, among other considerations. These factors, and by extension Prof. Fischel's trust-level recommendations, are relevant, rational, and well-designed and bear directly on the reasonableness and adequacy of the Proposed Settlement. *See, e.g.*, *Countrywide II* at 126-28 (recognizing settlement decisions include consideration and review of strength and weakness of claims, potential litigation recovery, and other factors); *In re AIG, Inc. Secs. Litig.*, 916 F. Supp. 2d 454, 469 (S.D.N.Y. 2013) (settlement "take[s] into account a number of variables that may impact the parties' expected gains from foregoing trial, including settlement awards in

comparable suits, the cost of delay, the value of potential verdicts in related suits, and changes in the bargaining position of the parties, among other factors"). Prof. Fischel's advice to the Trustees was certainly plausible, and the Trustees' reliance upon his advice is significantly probative of the Trustees' reasonableness and good faith.

iii. The Trustees Conducted A Comprehensive Investor Notice Program

Through the Trustees' numerous notices, investors were afforded every opportunity to provide the Trustees with their views on the Proposed Settlement and, as discussed above, the Trustees and their experts were able to take account of such views, further demonstrating that the Trustees acted reasonably and in good faith. *See Citigroup*, at *5 ("The Trustees also made substantial efforts to keep investors informed of their progress, and took their views into account in making their final decisions.") (citing Restatement (Third) of Trusts § 80, cmt. b).

iv. The Trustees' Decisions Were The Result Of A Reasonable Process

In making their acceptance and rejection decisions, the Trustees each considered the experts' reports and investor input, among other information. Thus, not only did the Trustees engage in a reasonable and good faith evaluation process, but they also used the results of that process to make their respective settlement decisions.

v. The Trustees Did Not Suffer From A Conflict Of Interest

The Trustees did not act in their own self-interest; indeed, none has received any individual benefit from the Proposed Settlement. *See Ellington Credit Fund, Ltd. v. Select Portfolio Serv., Inc.*, 837 F. Supp. 2d 162, 187 (S.D.N.Y. 2011) ("Because no evidence was offered in the instant case to suggest that [the trustee] benefitted . . . from its decision . . . [it . . .] thus did not engage in a conflict of interest . . . .") (citing *Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 73 (2d Cir. 1988)). The Proposed Settlement does not release any potential Trustee liability. The Proposed Order is limited to the Trustees' conduct in

connection with the Proposed Settlement. The Settlement Consideration flows entirely to the trusts, not the Trustees.

The indemnity provided by JPMorgan is limited to expenses that the Trustees incurred as a result of the Proposed Settlement, was not conditioned on any particular outcome, and as a matter of law does not create a conflict of interest. *See Citigroup*, at *7; *In re Bank of N.Y. Mellon*, 42 Misc. 3d 171, 181 n.3 (N.Y. Sup. Ct. N.Y. Cnty. 2013). Additionally, the Trustees already were entitled to indemnification under the agreements governing the trusts. *See CFIP Master Fund, Ltd. v. Citibank, NA.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (rejecting the claim that the trustee had a conflict based on acceptance of indemnity because "the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability").

D. Ambac And W&L's Objections Are Meritless[5]

Ambac asserts, first, that the value of the Proposed Settlement for its trusts is too low.[6] Second, Ambac claims there were widespread Events of Default in the Ambac Trusts. In light of these alleged Events of Default, Ambac asserts that Prof. Fischel's analysis was flawed.

Ambac asserts that the value of the cash payment and Subservicing Protocol as a percentage of projected lifetime losses is lower than other settlements. But the Proposed Settlement is not an abuse of discretion merely because other settlements are, by some measures, larger. Prof. Fischel emphasized that such comparisons "need to be undertaken with caution . . .

[5] Ambac and W&L allege no interests in any trusts for which U.S. Bank National Association, HSBC Bank USA, N.A., or Deutsche Bank National Trust Company are trustee and thus have no standing to challenge such Trustees' respective decisions to accept the Proposed Settlement. *See Leaman v. Ambrosio*, 224 A.D.2d 755, 756 (3d. Dep't 1996).

[6] Ambac claims objections on behalf of SAMI 2006-AR7, SAMI 2006-AR8, BSMF 2006-AR2, BSMF 2006-AR4, GPMF 2005-AR5, GPMF 2006-AR2, GPMF 2006-AR3, and BALTA 2006-4 (collectively, the "Ambac Trusts").

because it is typically impossible to find other cases where the facts, relative strengths of claims and defenses, and applicable law are identical." Ex. 020 ¶ 32. Moreover, Prof. Fischel was well aware of his own analysis of other settlements, but he ultimately recommended that the relevant Trustees accept the Proposed Settlement on behalf of all of the Ambac Trusts. These Trustees were entitled to rely on that recommendation. *See* Restatement (Third) of Trusts § 92, cmt. c. The question for the Court is not whether someone else might have concluded that the Proposed Settlement should be higher, but whether the Trustees acted in good faith in evaluating and accepting this Proposed Settlement.

Because repurchase claims in at least five of the Ambac Trusts are barred by the statute of limitations, Ambac also asserts that the statute of limitations analysis by the Trustees' legal expert, Justice Carpinello, was flawed. Initially, the issue for the Court is not, as Ambac tries to frame it, whether Justice Carpinello's opinion was right or wrong, but whether the Trustees relied upon the opinion in good faith and reasonably. Ambac advances alternative arguments intended to avoid the accrual rule articulated in *ACE*,[7] that governs mortgage loan representation and warranty breach claims arising out of a PSA. Ambac's assertion that a so-called "accrual" provision in certain PSAs contractually extends the statute of limitations has been rejected. *See Deutsche Bank Nat'l Trust Co. v. Quicken Loans Inc.*, No. 14-3373-cv, 2015 U.S. App. LEXIS 19874, 2015 WL 7146515, at *5 (2d Cir. Nov. 16, 2015).

Second, Ambac asserts that the Ambac Trusts may claim that JPMorgan, where acting as Servicer, breached the PSAs by failing to notify deal participants of breaches by other parties. As the Court is aware, the case law concerning "failure to notify" claims is unsettled in New York. *See Nomura Home Equity Loan, Inc., Series 2006–FM2 v. Nomura Credit & Capital, Inc.*,

[7] *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015).

133 A.D.3d 96 (1st Dep't 2015), *leave to appeal granted* (Jan. 5. 2016). However, New York law's ultimate resolution of this question is of no moment in evaluating whether the Trustees were reasonable in relying upon the advice of the experts and accepting the Proposed Settlement. Justice Carpinello evaluated the statute of limitations applicable to claims that "relate to allegations by the investors that JP[Morgan]breached its contractual obligations." Ex. 015 at 2. In reaching his conclusion, Justice Carpinello emphasized that:

> [t]he rule that the six year Statute of Limitations for claims relating to violations of representations and warranties accrues on the date of closing applies *regardless of how these claims are denominated*; that is regardless of whether they are characterized as a breach of the representations and warranties themselves, *or a breach of an obligation to give notice of the breach*, . . . because all such varied denominations for these claims were actionable as of the date of the closing . . . .

Id. at 7 (emphasis added).

Ambac further asserts that there were "widespread" Events of Default among the Ambac Trusts, thus undermining Prof. Fischel's analysis, which Ambac claims relied on the non-existence of an Event of Default. But Ambac never exercised its contractual right to send the relevant Trustee any notice of an Event of Default. The Ambac PSAs contain at least three provisions critical to the Event of Default question. First, Section 9.01(iv) states that in the absence of actual knowledge of an Event of Default (not a mere breach), the Trustees may "conclusively assume" that there is no Event of Default. *See, e.g.,* Ex. 014 (SAMI 2006-AR7, § 9.01). Second, Section 8.01(ii) states that for an Event of Default to occur there must be not only a "material breach" by a servicer or Master Servicer,[8] but a sixty-day cure period must expire

[8] In the three Ambac Trusts where the Event of Default definition refers to the conduct of the "Master Servicer," (BALTA 2006-4, SAMI 2006-AR8, and SAMI 2006-AR7), JPMorgan is not the Master Servicer. *See* Ex. 014. Therefore, breaches by JPMorgan could never form the basis of an Event of Default in these trusts. For these trusts, Ambac's Event of Default objection must be rejected because it has alleged no Master Servicer misconduct whatsoever.

uncured *after notice* to the servicer or Master Servicer, as applicable. *See, e.g.,* Ex. 014 (SAMI 2006-AR7, § 8.01). Absent notice commencing the sixty-day cure period, which is not alleged, there can be no Event of Default. *See Knights of Columbus v. Bank of N.Y. Mellon*, No. 651442/2011, 2015 N.Y. Misc. LEXIS 2626, 2015 WL 4501196, at *4 (Sup. Ct. N.Y. Cnty. July 10, 2015); *Commerce Bank v. Bank of N.Y. Mellon*, No. 651967/2014, 2015 WL 5770467, at *4 (Sup. Ct. N.Y. Cnty. Oct. 2, 2015). Finally, Section 9.02(v) states that a Trustee is not bound to make any investigation unless directed and indemnified by investors.[9] In particular, the Trustee has no duty to investigate *whether* an Event of Default occurred. *See Magten Asset Mgmt. Corp. v. The Bank of N.Y.*, Index No. 600410/2010, 2007 N.Y. Misc. LEXIS 3320, 2007 WL 1326795, at *7 (Sup. Ct. N.Y. Cnty. May 8, 2007) ("BNY's duty did not extend to undertaking a complicated and unavoidably speculative investigation in order to decide whether there was or would be an event of default.").

In reality, however, whether an Event of Default occurred is irrelevant: Prof. Fischel testified his analysis and opinions concerning the reasonableness of the Proposed Settlement would be unchanged, even if an Event of Default had occurred. *See* Fischel Dep. Tr. at 100:3-12.

W&L does not object to the Proposed Settlement; instead, it challenges solely the method

[9] *See, e.g.,* Ex. 014 (SAMI 2006-AR7, § 9.02) ("Neither the Trustee nor the Securities Administrator shall be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond or other paper or document, unless requested in writing to do so by Holders of Certificates evidencing Fractional Undivided Interests aggregating not less than 25% of the Trust Fund, and provided that the payment within a reasonable time to the Trustee or the Securities Administrator, as applicable, of the costs, expenses or liabilities likely to be incurred by it in the making of such investigation is, in the opinion of the Trustee or the Securities Administrator, as applicable, reasonably assured to the Trustee or the Securities Administrator, as applicable, by the security afforded to it by the terms of this Agreement. The Trustee or the Securities Administrator may require reasonable indemnity against such expense or liability as a condition to taking any such action.").

by which the Settlement Payment will be distributed in its two trusts. W&L's objection misreads both the governing PSAs and the Proposed Settlement.

W&L argues that the Settlement Payment is not a "Subsequent Recovery," so it should be "distributed to all of those Investors who suffered a loss as a result of the actions of Chase." NYSCEF No. 148. W&L identifies no provision of the PSAs that authorizes the distribution it advocates; instead, it asks the Court to write such a provision into the Proposed Settlement and the PSAs, overriding the Trustees' reasonable settlement decision and the expectations of the parties in the process. The Court cannot do so.

Section 3.06 of the Proposed Settlement sets forth how each allocable share should be treated for distribution purposes:

> Each Trust's Allocable Share shall be deposited into the related Trust's collection or distribution account pursuant to the terms of the Governing Agreements, for further distribution to Investors in accordance with the distribution provisions of the Governing Agreements (taking into account the Expert's determination under Section 3.05) *as though* such Allocable Share was a "subsequent recovery" relating to principal proceeds available for distribution . . . .

Ex. 003.

Regardless of what W&L might believe is a *better* distribution procedure, there was nothing *un*reasonable about this approach. In all material respects, it is the *same* language used in the Countrywide RMBS settlement, which was approved by the Commercial Division (before the Trustees accepted this Proposed Settlement) and subsequently confirmed by the Appellate Division.[10] The same method was also used in the recently-approved Citi RMBS settlement. W&L's suggested alternative, that the Court should distribute the Settlement Payment to "[i]nvestors who suffered a loss as a result of the actions of Chase" (NYSCEF No. 148) is

[10] *See Countrywide* NYSCEF No. 3 (Settlement Agreement at § 3(d)) (treating settlement proceeds as a subsequent recovery of principal in the payment waterfall).

inchoate and violates the PSAs. Requiring a distribution to investors who "suffered losses as a result of Chase's conduct," would substitute an ambiguous process for the reasonable and *clear* term the Trustees accepted. W&L is silent as to how the Trustees would determine which losses, incurred when, and by which investors, were "caused by" JPMorgan's conduct, as distinct from other events and macro-economic factors.

E. The Court Should Enter The Proposed Order

The Proposed Order contains rulings and findings reflecting issues and claims to be decided in this proceeding, including a ruling that "[e]ach of the Trustees acted within the bounds of its discretion, reasonably, and in good faith" and a ruling "bar[ring] [any party] from asserting claims against any Trustee with respect to such Trustee's evaluation and acceptance . . . and implementation of the [Proposed Settlement]." This type of relief is appropriate in trustee instruction proceedings. *See, e.g.*, *Citigroup*; *BlackRock Fin. Mgmt. Inc. v. Segregated Acct. of Ambac Assur. Corp.*, 673 F.3d 169, 174 (2d Cir. 2012); *In re Worldcom, Inc. ERISA Litig.*, 339 F. Supp. 2d 561, 568 (S.D.N.Y. 2004). In fact, this Court entered an identical order upon approving the Citigroup RMBS settlement. *See Citigroup* NYSCEF No. 154. As this Court has recognized (*see* Notice Orders), the whole purpose of this proceeding is to resolve claims related to the Proposed Settlement, *before* it is implemented, so that the Trustees cannot be sued afterward for accepting it or performing under its terms. *See BlackRock Financial Mgm't. Inc.*, 673 F.3d at 174 (Article 77 "proceedings are used by trustees to obtain instruction as to whether a *future* course of conduct is proper . . . ." (emphasis added)). Removing the bar order, as suggested by Ambac (*see* NYSCEF No. 548), would thus defeat the whole purpose of this proceeding.

CONCLUSION

The Court should approve the Proposed Settlement and enter the Proposed Order.

Dated: January 18, 2016
New York, New York

JONES DAY

By: s/ Robert C. Micheletto

Robert C. Micheletto
222 East 41st Street
New York, New York 10017
(212) 326-3939

Attorneys for U.S. Bank National Association

MAYER BROWN LLP

By: s/ Matthew D. Ingber

Matthew D. Ingber
Christopher J. Houpt
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Attorneys for The Bank of New York Mellon and The Bank of New York Mellon Trust Company, N.A.

FAEGRE BAKER DANIELS LLP

By: s/ Michael M. Krauss
Robert Schnell
Stephen M. Mertz
Michael M. Krauss
2200 Wells Fargo Center
90 S. Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

Attorneys for Wells Fargo Bank, National Association

SEWARD & KISSEL LLP

By: s/ M. William Munno

M. William Munno
Dale C. Christensen, Jr.
Thomas Ross Hooper
One Battery Park Plaza
New York, NY 10004
(212) 574-1200

Attorneys for Law Debenture Trust Company of New York

MORGAN, LEWIS & BOCKIUS LLP

By: s/ Kurt W. Rademacher

Michael S. Kraut
Kurt W. Rademacher
101 Park Avenue
New York, NY 10178-0060
(212) 309-6000

Attorneys for Deutsche Bank National Trust Company

MAYER BROWN LLP

By: s/ Jean-Marie L. Atamian

Jean-Marie L. Atamian
James Ancone
1221 Avenue of the Americas
New York, New York 10020
(212) 506-2500

Attorneys for HSBC Bank USA, N.A.

ALSTON & BIRD LLP

By: s/ Michael E. Johnson

Michael E. Johnson
90 Park Avenue
New York, NY 10016
(212) 210-9400

Attorneys for Wilmington Trust, National Association