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),

Petitioners,

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

Index No. 652382/2014

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE WHY BREVAN HOWARD CREDIT CATALYSTS MASTER FUND LIMITED AND BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED SHOULD NOT BE ENTITLED TO INTERVENE

Assigned to: Friedman, J.

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Pursuant to the Court's October 9, 2014 Order, proposed intervenors Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited, two funds for which DW Investment Management, LP serves as investment manager (such funds, collectively, the "DW Funds") submit this memorandum of law in support of their motion to intervene pursuant to CPLR 401, 1012, 1013, and 7701.

I. INTRODUCTION

Each of the Petitioners in this Article 77 proceeding, 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 U.S.A., N.A., and Deutsche Bank National Trust Company (collectively, the "Trustees"), acts as a Trustee for numerous securitizations of residential mortgage-backed loans sponsored by J.P. Morgan Chase & Co. or its affiliates (collectively, "JPMorgan"). On August 1, 2014, the Trustees collectively announced that they intended to accept a proposed settlement on behalf of over 300 trusts, negotiated between JPMorgan and a group of certificateholders, that would extinguish the repurchase and servicing claims of those trusts against JPMorgan (the "Proposed Settlement").

The Trustees' acceptance on behalf of their trusts was contingent on judicial approval of the settlement. Accordingly, on August 3, 2014, the Trustees collectively filed this Article 77 proceeding, seeking a declaration that their acceptance of the Proposed Settlement "comports with all applicable duties" to the trusts that they represent, and an order immunizing the Trustees from any claims certificateholders might bring against them with respect to their decision to accept the Proposed Settlement. Trustees' Petition at ¶ 75 (Docket No. 1, Aug. 3, 2014).

The DW Funds hold securities in over 80 of the trusts whose claims will be extinguished if the Proposed Settlement is approved. The DW Funds thus have an interest in the

outcome of this proceeding – as the Trustees have recognized, when, in their Petition, they consented to intervention in this proceeding by "any investor with current holdings in any of the Accepting Trusts." Trustees' Petition at ¶ 29.

As set forth below, the DW Funds believe that it is not sufficient for the Court and investors to assess whether the Proposed Settlement is fair and reasonable based solely on the information provided by the Trustees and the Proposed Settlement's proponents. In fact, the information that has been provided raises serious questions as to the adequacy of the Trustees' basis for accepting the Proposed Settlement. Additionally, the DW Funds believe that discovery would uncover evidence that the settlement and approval process was not conducted fairly and in the best interest of investors. The DW Funds therefore move for permission to intervene as a respondent in this proceeding. By separate notice, the DW Funds have stated their intention to appear and object. If permitted to intervene, the DW Funds intend to seek the discovery that would permit them and the Court to evaluate the Proposed Settlement and the Trustees' basis for accepting it, including by an examination of the Trustees "as to any matter relating to their administration of the trust," as provided by CPLR 7701.

II. THE PROPOSED SETTLEMENT AND THE TRUSTEES' PETITION

A. The Proposed Settlement

The Proposed Settlement applies to over 300 JPMorgan-sponsored trusts. The affected trusts have a total original face value of over $295 billion. By the calculations of the Trustees' experts, the trusts have net losses (past and projected) of approximately $60 billion. *See* Expert Report of Faten Sabry, PhD (July 17, 2014) at ¶ 5 ("Sabry Report"). In return for $4.5 billion in cash and certain servicing improvements, valued by the Trustees' experts at approximately $31 million, *see* Expert Report of Daniel R. Fischel, PhD (July 17, 2014) at ¶ 10 ("Fischel Report"), the Proposed Settlement releases all of the trusts' claims against JPMorgan that "arise

under or are based upon the Governing Agreements and that relate to the origination, sale and or servicing of Mortgage Loans to or in the [trusts]." Across the trusts as a whole, the Proposed Settlement thus represents a recovery of approximately 7 cents on the dollar of losses, an extremely low number on its face, although the impact of the settlement varies from trust to trust.

The Proposed Settlement was negotiated by a group of certificateholders represented by Gibbs & Bruns, LLP, the architect of the recent settlement of the claims of over 500 Countrywide-sponsored trusts (the "Gibbs & Bruns Group). On October 17, 2011, the Gibbs & Bruns Group sent a letter to JPMorgan's general counsel notifying JPMorgan that "large numbers" of loans in those trusts were "sold or deposited [into the trusts] based on false and/or fraudulent representations and warranties," and that JPMorgan "as servicer and/or master servicer [had] failed to observe and perform the covenants and agreements imposed on it by the governing agreements." Fischel Report at ¶ 10. On November 15, 2103, the Gibbs & Bruns Group informed the Trustees of JPMorgan's $4.5 billion settlement offer, and requested that the Trustees accept it on behalf of the trusts that they represented. The Trustees were not involved in the negotiations that led up to this offer, and no record of those negotiations has been made public or presented to the Court. Fischel Report at ¶ 56. Nor were the DW Funds involved in those negotiations.

Between November 2013 and July 2014, the Trustees retained various experts to opine on the reasonableness and adequacy of the Proposed Settlement. Pursuant to the terms of the Proposed Settlement, these experts were retained at JPMorgan's expense. Settlement Agreement, Art. 2.06. The Trustees' experts were also not provided with the record of negotiations between the Gibbs Group and JPMorgan. Fischel Report at ¶ 56. Nevertheless, they recommended that the Proposed Settlement, with certain exceptions, be approved.

In July 2014, the Trustees made their experts' findings public – in particular, the report of Daniel Fischel, which purports to set out a trust-by-trust analysis of whether each trust should accept the Proposed Settlement or opt out. On August 1, **just two weeks later**, the Trustees accepted the Proposed Settlement, subject to judicial approval, for the great majority of affected trusts. As to a small number of trusts (the "Extended Acceptance Trusts") the Trustees sought and obtained an extension of the acceptance date for the settlement, purportedly "for the limited purpose of proceeding with a solicitation for investor direction." Letter from Trustees to Robert Sacks (July 31, 2014). In October 2014, the Trustees for the majority of the Extended Acceptance Trusts accepted the settlement, purportedly "following an evaluation process including, among other things, consideration of the expert reports," rather than based on the results of any solicitation for investor direction. Extended Acceptance Date RMBS Trustees' Notice (Oct.1, 2014), *available at* http://www.rmbstrusteesettlement.com/docs/Oct.1_Notice.pdf.

B. The Trustees' Purported Basis for Accepting the Settlement Raises Serious Questions Regarding the Adequacy of the Settlement and of their Decision to Accept It

On August 3, 2014, the Trustees petitioned this Court for approval of their decision to accept the settlement. The Trustees argue that their decision was "based on a thorough and reasonable investigation," and that it was "a reasonable and good faith exercise of [their] authority under the applicable Governing Agreements." Trustees' Petition at ¶¶ 73, 74. In support of their contention that their decision was based on thorough and reasonable investigation, the Trustees' Petition relies on their "consideration of the views of various Certificateholders," and on the Trustees' "review and analysis" of the reports prepared by their experts. *Id*. at ¶ 71. The expert reports are thus the only documented basis for the Trustees' decision. Unfortunately, the reports raise more questions than they answer, and do more to undermine the basis for the Trustees' decision than to support it.

In particular, the Trustees' petition relies on the report of Daniel Fischel and Compass Lexicon, which ultimately "recommended that the proposed Settlement be accepted for 314 of the Trusts." *Id*. at ¶ 70. Like the Trustees' other experts, Fischel did not conduct any review of loan origination or servicing files, although such file review is now routine, forming the basis for dozens of repurchase litigations and settlements in courts around the country. Instead, Fischel relied on a variety of public benchmarks to assess the adequacy of the settlement. Comparing the Proposed Settlement to other reported RMBS settlements, Fischel found that the Proposed Settlement was "lower than other RMBS related settlements." Fischel Report at ¶ 28. For example, the Proposed Settlement, at approximately 7 cents on the dollar, is substantially lower than the Countrywide RMBS settlement – itself widely criticized as too low – which Fischel estimates at between 10.2% and 17% of lifetime losses. Similarly, Fischel found that the Proposed Settlement is significantly lower than settlements obtained by the Federal Housing Finance Authority and by Syncora in litigation against JPMorgan. Only one of Fischel's comparable settlements resulted in a lower recovery, and that was with a bankrupt entity (ResCap). Fischel's report does not adequately evaluate the rationale of the parties for reaching such a low settlement.

In an attempt to explain away the Proposed Settlement's relatively low dollar value, Fischel offered various purported distinctions between the Proposed Settlement and his comparables. For example, he distinguished Syncora's settlement with JPMorgan on the hypothesis that trustees might be subject to a requirement to prove that a breach caused a default in order to prevail on a repurchase claim, whereas monolines exercising the same contractual language are not – a theory that is contradicted elsewhere in Fischel's report and by the Trustees' own legal expert Alan Schwartz. *Compare* Fischel Report at ¶ 47 *with* Fischel Report at ¶ 24

n.31 ("I understand from Professor Alan Schwartz that it is not necessary to establish such a causal link.").

Primarily, however, Fischel relied on the fact that the Gibbs & Bruns Group support the Proposed Settlement. But as Fischel himself conceded, little weight can be given to the Gibbs & Bruns Group's support of the Proposed Settlement, for reasons including:

- First, as Fischel acknowledged, "in contrast to the Countrywide Settlement," "we lack adequate information about the process by which the Proposed Settlement was negotiated," and have no record to show that "the negotiations were arm's length." Fischel Report at ¶ 56. This is critical because the interests of the Gibbs & Bruns Group in brokering the settlement may diverge from those of other investors. Among other things, the implicit credit in brokering a low-ball settlement with the major banks may be remembered on Wall Street for a generation; these benefits are not shared with other investors. Hence, and in any event, the Trustees cannot simply rely on the support of the Gibbs & Bruns Group, but must independently assess the reasonableness of the Proposed Settlement.
- Second, Fischel acknowledged that there is "another group of investors, the QE investors, who oppose the Proposed Settlement." Fischel Report at ¶ 57. Fischel gave the QE group "little weight" because their holdings were lower than those of the Gibbs & Bruns Group, without evaluating the merits of the opposing positions or the deal level holdings. It is unclear whether Fischel or the Trustees took into account the views of other investors, although the "QE investors" are clearly not exhaustive of all investors with concerns regarding the Proposed Settlement.

It is therefore impossible to assess what weight to be given to this element of Fischel's reasoning, and the Trustees' reliance on it, without more information regarding, at least: (1) the settlement negotiations, and (2) communications between the Trustees and investors, including but not limited to the Gibbs & Bruns Group.

More troubling still is Fischel's trust-by-trust analysis of the value of the Proposed Settlement. In this analysis, Fischel first considered whether each trust's claim was timely. Second, Fischel looked to various publicly-reported sources of information to form an estimate of each trust's potential recovery if it were to litigate its repurchase claims. For a small number of trusts, Fischel's analysis included loan file reviews that had been conducted by other parties. For the great majority of trusts, the analysis relied on proxies for the rate of breaching loans such as the rate of early payment defaults. Even though Fischel's method is likely to result in a gross underestimate of the potential breach rate compared to a loan file review, he nevertheless found that ***the majority of trusts had claims which, if litigated, would likely result in higher recoveries than the Proposed Settlement.*** Many of the trusts in which the DW Funds have holdings fall into this category. And yet, as the Trustees note in their petition, Fischel ultimately recommended acceptance of the Proposed Settlement for all but a handful of these trusts.

For the majority of trusts, the decisive factor in Fischel's analysis was whether or not a group of investors in excess of 15% had *already* formed in opposition to the Proposed Settlement. Unless such a group had *already* formed for a particular trust, Fischel's analysis assumed that no group of investors *would* form to direct litigation, and the trustee for that trust would therefore not litigate. ***In short, the decisive factor is the assumption that the Proposed Settlement should be accepted regardless of its low value relative to the value of litigation, wherever the Trustees were not already likely to be compelled to litigate.*** There was no

consideration given to what procedural and other impediments had been created to dissuade investors from compelling the Trustees to litigate, or whether the Trustees should litigate, in any event, based on the validity of the claims and the inadequacy of the Settlement Offer.

Fischel's analysis, and the Trustees' reliance on it, thus turns on the existence or absence of investor opposition to the settlement, and it puts at issue questions regarding the Trustees' knowledge of (or attempts to obtain knowledge of) the positions of investors. Once again, it appears that Fischel's estimate of investor opposition is based largely or solely (other than for trusts already in litigation) on the "QE investors." It is unclear whether other investors were polled, or their views taken into consideration. Significantly, the Trustees announced their acceptance of the Proposed Settlement just two weeks after Fischel's report was made public. As Fischel himself notes, Fischel Report at ¶¶ 19-21, there are significant practical hurdles to organizing investor groups; by indicating that their acceptance of the Proposed Settlement turned on some purported absence of organized investor opposition, and then promptly settling, the Trustees left no time for such opposition to form. Even as to the trusts which were granted an extension of the acceptance date, there is no information regarding efforts to determine the extent of investor opposition, and the Trustees' October 1, 2014 notice merely indicates that they accepted on behalf of those trusts based on further review of the expert reports.

The Trustees' conduct in creating obstacles to litigation must be viewed in light of the fact that many of the Trustees and their affiliates are themselves RMBS sponsors, sellers and/or servicers, with an interest in avoiding litigation that may increase their own exposure. Conversely, while approval of the Proposed Settlement extinguishes the trusts' and investors' claims, it provides a substantial benefit to the Trustees, protecting them from the risk that inaction may lead to litigation against them.

In light of these and other deficiencies in the Trustees' analysis, the DW Funds believe that insufficient evidence has been presented to the Trustees and the Court to demonstrate that the settlement is reasonable and that investors' interests were adequately protected in the settlement negotiations or in the Trustees' evaluation of the proposed settlement. Therefore, the DW Funds seek to intervene to pursue discovery that would enable them and the Court to further assess the Proposed Settlement and the Trustees' evaluation of it.

III. THE DW FUNDS SHOULD BE PERMITTED TO INTERVENE AS A RESPONDENT

A. The Trustees have Consented to Intervention by Investors

In their Petition, the Trustees recognized "that some Certificateholders or parties to the various transactions may wish to be heard in support of, or in opposition to, the Petition," and stated that "[t]he Trustees will consent to timely appearances or motions to intervene filed by any investor with current holdings in any of the Accepting Trusts." Trustees' Petition at ¶ 29. The Trustees have thus consented to the DW Funds' right to intervene. Similarly, the Institutional Investors have recognized that holders of certificates have standing to seek leave to intervene to test the basis for the Trustees' decision. Letter of Kenneth E. Warner to the Court (Oct. 28, 2014).

B. The DW Funds are Entitled to Intervene as of Right Under CPLR 1012

CPLR 1012 permits a party to intervene in an action as of right upon a timely motion if (1) "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property, and the person may be affected adversely by the judgment" *or* if (2) "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1012(a). "Generally, intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an

issue involved in that action." *CMS Life Ins. Opportunity Fund, L.P. v. Progressive Capital Solutions, LLC*, 2014 WL 939303 at *2 (N.Y. Sup. March 6, 2014) (quoting *Yuppie Puppy Pet Prods., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010)).

The DW Funds' motion to intervene is timely, having been filed in accordance with the Court's scheduling order for appearances by objectors. Permitting the DW Funds to intervene will neither "cause a delay in resolution of the action [n]or otherwise prejudice a party." *Yuppie Puppy Pet Products*, 77 A.D.3d at 201.

There can be no question that the DW Funds have a bona fide interest in the outcome of this proceeding. If the Proposed Settlement is approved, the repurchase and servicing claims of over 80 trusts in which the DW Funds have holdings will be extinguished. Moreover, the proceeding directly affects the DW Funds' rights, as the Trustees seek an order that will bar claims by investors, including the DW Funds, against the Trustees. The DW Funds are thus entitled to intervene as of right because this proceeding involves "the disposition or distribution of . . . a claim for damages" and the Funds "may be adversely affected" by it. CPLR 1012(a)(1).

The DW Funds are also entitled to intervene as of right pursuant to CPLR 1012(a)(2) because they will be bound by the judgment, and because the representation of their interests by the Trustees "is or may be inadequate." As discussed above, the interests of the Trustees are not aligned with those of investors; the Trustees have interests in avoiding litigation that differ significantly from those of investors. The fact that the Trustees are seeking relief against investors, barring them from bringing claims against the Trustees, also makes it clear that the Trustees cannot also represent the interests of all investors.

Moreover, as the Trustees have recognized, different investors may have different interests. *See* Trustees' Petition at ¶¶ 18-20 ("The Trustees also recognize that different groups

of Certificateholders may wish to pursue remedies for the alleged breaches in different ways, creating the potential for disagreements among Certificateholders within the same trusts"); *see also* Fischel Report at ¶ 54 (recognizing that because of differences between trusts, a settlement "may provide some Trusts with a windfall . . . while simultaneously undercompensating other Trusts."). The DW Funds therefore cannot rely either on the Trustees, or on other proposed investor-intervenors such as the Gibbs & Bruns Group, to protect their interests. In fact, both the Trustees and the Gibbs & Bruns Group are contractually obliged, pursuant to Section 2.03(d) of the Proposed Settlement, to continue to support the settlement even if they "discover[] facts that are additional to, inconsistent with, or different from those which they knew at the time they entered into this Settlement Agreement" – a disability that in itself renders them incapable of adequately representing the DW Funds' interests in this proceeding.

C. The DW Funds are Entitled to Discretionary Intervention Pursuant to CPLR 1013

Additionally, pursuant to CPLR 1013, "a court, in its discretion, may permit a person to intervene . . . when the person's claim or defense and the main action have a common question of law or fact." *Global Team Vernon, LLC v. Vernon Realty Holding, LLC*, 93 A.D.3d 819, 820 (2d Dep't 2012). "Whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Id.* For the reasons stated above, the DW Funds have a real and substantial interest in the outcome of the proceedings, and should be permitted discretionary intervention. Intervention is particularly appropriate here, where "in the absence of [intervenors in opposition to the Proposed Settlement], there is, as a practical matter, no real adversary proceeding before the court. . . . Obviously, the court will be assisted materially by a presentation of relevant facts

by the intervenors who propose to contest the petitioner's application." *In re the Petroleum Research Fund*, 157 N.Y.S.2d 693, 696 (1st Dep't 1956).

D. If Permitted to Intervene, the DW Funds Will Seek Targeted Discovery to Properly Assess the Proposed Settlement and the Trustees' Decision to Accept It

The DW Funds seek to intervene to protect their interests, and to pursue the information necessary to properly assess the Proposed Settlement and the Trustees' decision to accept it. In order to do that, the Funds intend, if permitted to intervene, to pursue targeted discovery into topics including:

- The settlement negotiations between the Gibbs & Bruns Group and JPMorgan, and any other communications regarding the Proposed Settlement between JPMorgan and investors.
- Any polling or solicitation, or other communications between the Trustees and investors regarding the Proposed Settlement or the potential claims of the trusts.

IV. CONCLUSION

For the foregoing reasons, the DW Funds respectfully request that the Court grant their motion to intervene as a respondent in this proceeding.

Dated: New York, New York
October 31, 2014

Respectfully submitted,

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