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 –

TRIAXX PRIME COO 2006-1, LTD., TRIAXX PRIME COO 2006-2, LTD., TRIAXX PRIME COO 2007-1, LTD. (intervenors), QVT FUND V LP, QVT FUND IV LP, QUINTESSENCE FUND L.P., QVT FINANCIAL LP (intervenors), BREVAN HOWARD CREDIT CATALYSTS MASTER FUND LIMITED AND BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED (intervenor), THE NATIONAL CREDIT UNION ADMINISTRATION AS LIQUIDATING AGENT (intervenor), and AMBAC ASSURANCE CORPORATION, AND THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION (intervenors),

Respondents,

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

Index No. 652382/2014

Part 60

Marcy S. Friedman, J.S.C.

Motion Sequence No. 24

JPMORGAN CHASE & CO.'S RESPONSE TO
THE QVT FUNDS' MOTION FOR PARTIAL SUMMARY JUDGMENT

JPMorgan Chase & Co. ("JPMorgan") respectfully submits this response to the QVT Funds' Memorandum of Law in Support of Their Motion for Partial Summary Judgment, filed September 4, 2015 (the "QVT Brief").

ARGUMENT

QVT is not entitled to summary judgment for the reasons laid out in the opposition briefs filed by trustee U.S. Bank N.A. (the "Trustee") and the Institutional Investors. JPMorgan writes separately to correct certain misstatements in the QVT Brief and to explain four reasons why the Court cannot, in any event, properly grant the relief requested by QVT on this motion. QVT is wrong on its arguments that, as a matter of law, (i) the Trustee lacked the authority to enter into the Settlement Agreement on behalf of the JPMAC 2006-WMC1 Trust (the "WMC1 Trust") and (ii) the Trustee abused its discretion.

First, QVT is asking the Court to void the Settlement Agreement (which, if done, would void the significant protections in the Settlement Agreement running to the benefit of the WMC1 Trust and its investors) on the grounds that the Trustee was without power to accept in the face of its instruction. QVT's argument that the Trustee was without power to enter into the Settlement is simply incorrect. The WMC1 Pooling & Servicing Agreement (the "PSA") vests the Trustee with the authority to act on behalf of the WMC1 Trust, not QVT or any particular certificateholder. Even though the Trustee may often receive a formal direction and indemnity from investors who seek to compel the Trustee to act in a particular way, nothing about that negates the actual language of the PSA that vests any repurchase claims, and the related powers to litigate and to settle, in the Trustee for the benefit of the WMC1 Trust. *See In re Bank of N.Y. Mellon*, Index No. 651786/11, 42 Misc. 3d 1237(A), at *9 (Sup. Ct. N.Y. Cty. Jan. 31, 2014) ("[i]nherent in the Trustee's power to commence litigation is the power to settle litigation") (the "*Comm. Div. Countrywide Decision*"), *affirmed* 127 A.D.3d 120, 126 (1st Dep't 2015) (the

"*First Dep't Countrywide Decision*"); RESTATEMENT (SECOND) OF TRUSTS § 192 cmt. a (1959); *see also Asset Sec. Corp.* v. *Orix Capital Mkts LLC*, 12 A.D.3d 215 (1st Dep't 2004) (holding that authority to prosecute claims "is committed solely to the trustee of the pooled loans."); PSA §§ 8.02, 11.03.

No PSA provision strips the Trustee of its authority to settle claims. The Trustee could of course be potentially liable for breaching its duties to investors if, for example, it acted with bad intent or outside the bounds of reasonable discretion, but that is a different question than whether the Trustee has the authority to enter into a settlement. The PSA and precepts of New York trust law place the authority to settle in the Trustee and the Trustee represented that it had that authority when it accepted the Settlement Agreement. *See Comm. Div. Countrywide Decision*, 42 Misc.3d 1237(A), at *9; *LaSalle Bank, Nat'l Assoc.* v. *Nomura Asset Capital Corp.*, 180 F.Supp.2d 465, 470 (S.D.N.Y. 2001); *see also* Settlement Agreement §§ 2.03(c), 7.15. The existence of correspondence from an objecting investor (as well as correspondence from a plurality of investors supporting the Settlement)—none of which actually constituted a direction and indemnity as contemplated in the PSA—has absolutely no bearing on the Trustee's actual authority to settle the WMC1 Trust's claims.

Second, it is the settled law in New York that RMBS repurchase claims need to be made within six years from the close of the relevant transaction. As the Trustee's experts advised, there are no viable repurchase claims for the WMC1 Trust because they are barred by the statute of limitations. JPMorgan and the Institutional Investors entered into and presented the Settlement Agreement to the RMBS trustees before the state of law was decided on this issue, but by the time the Trustee and its experts considered the Settlement Agreement, it was clear in

this Department that JPMorgan's offer was the only recovery attainable for the WMC1 Trust.[1] The Trustee's experts, including retired Associate Justice Anthony Carpinello of the Appellate Division, Third Department, offered that exact opinion. (Carpinello Rep. at 6.) Faced with the choice of rejecting the Settlement and pursuing a time-barred suit as advocated by QVT or accepting the Settlement supported by approximately 39% of investors across the Trust (Joint St. of Facts ¶¶ 55, 57), there is little question that the Trustee acted reasonably.[2] In all events, QVT is not entitled to summary judgment in its favor based on the record before the Court.

Had the Trustee rejected the settlement for the WMC1 Trust, any lawsuit brought against JPMorgan and/or the originator, WMC Mortgage LLC ("WMC"), would be time barred, resulting in zero recovery to certificateholders. Justice Kornreich's recent dismissal of repurchase claims concerning the JPMAC 2006-WMC2 trust provides direct guidance here. *See Bank of N.Y. Mellon* v. *WMC Mortg. LLC*, Index No. 653831/2013, slip op. (Sept. 18, 2015) (the "WMC2 Decision"). In the WMC2 Decision, the court held that the "Plaintiff's remedy is the

---

[1] While the question is settled today, at the time that JPMorgan and the Institutional Investors entered into the Settlement Agreement and proposed it to the RMBS trustees in November 2013, it was an open question (with then-conflicting decisions in the Commercial Division) as to whether the statute of limitations ran from the closing date of the relevant RMBS transaction or from the time that an RMBS trustee demanded repurchase. After the Settlement Agreement was presented to the trustees, the First Department decided the statute of limitations question in December 2013 and the Court of Appeals unanimously upheld that decision in June 2015. *See ACE Sec. Corp.* v. *DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013), *affirmed by* 25 N.Y.3d 581 (2015). Thus, the RMBS trustees were considering the Settlement Agreement at a time when a unanimous panel in the First Department had weighed in but the Court of Appeals had granted *certiorari* and there was a significant chance that the state of the law might change. The trustees did the only thing that they could reasonably do in the circumstance: Rely upon the advice of their independent legal experts, who opined that the most likely outcome was that any contractual repurchase claims accrued at closing and that the statute of limitations expired six years later. (Carpinello Rep. at 3-5, 6; *see* Fischel Rep. at 123-26; Joint St. ¶ 57. The May 5, 2014 Carpinello Report and July 17, 2014 Fischel Report are available at the RMBS trustees' notice website: http://www.rmbstrusteesettlement.com/doc.php.)

[2] It bears mentioning that the standard of review is not whether the Trustee acted "reasonably," but rather "is limited to ensuring that the trustee has not acted in bad faith such that [its] conduct constituted an abuse of discretion." *First Dep't Countrywide Decision*, 127 A.D.3d at 125.

repurchase protocol, and under *ACE*, that remedy is no longer available since a claim for the underlying breach of the representations and warranties is time barred." *Id.* at 8. The WMC1 Trust is no different.

Third, QVT further overstates JPMorgan's potential liability relating to the WMC1 Trust because it mischaracterizes the scope of JPMorgan's representations and warranties. Under the terms of the governing contracts, WMC (as originator) made extensive representations and warranties regarding the quality and attributes of the underlying loans. (PSA § 2.06.) The Trustee or securities administrator has direct recourse against WMC for breaches of those representations and warranties and nothing in the Settlement Agreement impacts those rights. WMC—not JPMorgan—is primarily liable for such breaches.

Unlike WMC, J.P. Morgan Mortgage Acquisition Corporation ("JPMMAC") made certain temporally limited representations to cover the intervening "gap" period from when WMC transferred the loans to JPMMAC to the transaction closing date. (*See* PSA § 2.06.) A second JPMorgan affiliate, J.P. Morgan Acceptance Corporation I (together with JPMMAC, the "JPM Entities"), provided a so-called "backstop" in the event that WMC failed to perform its primary repurchase obligation. (PSA § 2.03.) Contrary to QVT's contention, the JPM Entities did not "directly represent[] that many of the WMC representations and warranties, including representations concerning compliance with underwriting guidelines . . . were accurate," and it is simply not true that "JPMorgan is primarily liable for repurchasing loans that breached these representations." (QVT Br. at 4-5.) The plain language of the PSA demonstrates that QVT is wrong. (PSA § 2.03.)[3]

[3] PSA § 2.03 unambiguously places the primary repurchase obligation on WMC: "If the Originator does not deliver such missing document or cure such defect or breach in all material respects during such period, the Securities Administrator on behalf of the Trustee shall enforce

Finally, QVT cites a 2012 news article about WMC's purported insolvency to argue that the JPM Entities would immediately be on the hook as the "backstop," but QVT points to no instance where WMC has failed to satisfy a judgment against it. Indeed, WMC recently settled repurchase litigation brought by the Bank of New York Mellon, the securities administrator for the WMC1 Trust, pending in New York. *See* Endorsed Letter, *Bank of N.Y. Mellon* v. *WMC Mortg. LLC*, No. 12-CV-7096, Dkt. No. 399 (S.D.N.Y. Sept. 21, 2015). Thus, there is no credible factual basis (let alone a record) to conclude that a repurchase suit could proceed against the JPM Entities for WMC's alleged repurchase obligations in the first instance. Even QVT seems to recognize this, as it argued "it would be premature to absolve JPMorgan from its obligations before *first pursuing claims against WMC Mortgage* and GE Capital." (QVT Br. at 9 (citing prior correspondence) (emphasis added).) In all events, there are no "facts," and certainly no undisputed facts, that support QVT's contention that WMC would necessarily fail to perform its primary contractual obligations.

Dated: October 5, 2015

/s/ Robert A. Sacks
SULLIVAN & CROMWELL LLP

Robert A. Sacks
Sharon L. Nelles
Darrell S. Cafasso
125 Broad Street
New York, New York 10004

Ryan J. McCauley
1870 Embarcadero Road
Palo Alto, California 94303

Counsel to JPMorgan Chase & Co.

---

the obligations of the Originator under the Mortgage Loan Purchase Agreement and the Assignment and Assumption Agreement to repurchase such Mortgage Loan[.]" QVT cites *Bank of N.Y. Mellon* v. *WMC Mortg. LLC*, 981 N.Y.S.2d 633 (Sup. Ct. N.Y. Cty. Nov. 21, 2013), a decision on appeal, as the sole support for its argument, but never confronts the plain language and structure of the PSA for the WMC1 Trust.