

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 YOUR 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.

MOTION SEQUENCE NO. 001

Index No. 652382/2014

MEMORANDUM OF LAW IN SUPPORT
OF CONSTRUCTION LABORERS
PENSION TRUST FOR SOUTHERN
CALIFORNIA AND LABORERS PENSION
TRUST FUND FOR NORTHERN
CALIFORNIA'S OBJECTION TO THE
PROPOSED SETTLEMENT

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On August 3, 2014, certain financial institutions, in their respective capacities as trustees, separate trustees and/or successor trustees (collectively, “the Trustees”), filed this Article 77 proceeding seeking judicial approval of a proposed settlement of the claims of 330 residential mortgage-backed securitization trusts (the “RMBS Trusts”) against J.P. Morgan Chase & Co. and its subsidiaries (collectively, “JPMorgan”) (“Proposed Settlement”). Construction Laborers Pension Trust for Southern California and Laborers Pension Trust Fund for Northern California (together, “the California Funds” or “Class Representative Objectors”) are the court-appointed Class Representatives in *Fort Worth Employees’ Retirement Fund v. J.P. Morgan Chase & Co., et. al.*, No. 1:09-cv-03701-JPO-JCF (S.D.N.Y.) (the “Securities Class Action”), a certified securities class action which is currently pending in the Southern District of New York before the Honorable J. Paul Oetken. The California Funds object to the Proposed Settlement on two grounds.

First, the California Funds object to the Proposed Settlement because the RMBS Trust Settlement Agreement contains an exceptionally broad release provision. Such release improperly purports to extinguish the direct and representative securities fraud claims alleged in the Securities Class Action. These claims are entirely separate from the claims brought by the Trustees and resolved by the Proposed Settlement. This is an obvious attempt by JPMorgan to evade liability to the class in contravention of the law, and could be easily remedied by specifically excluding the claims alleged in the Securities Class Action from the claims released by the Proposed Settlement.

Second, the California Funds object to the Proposed Settlement to the extent that it allows JPMorgan to offset, credit, or reduce the damages alleged or recovered in the Securities Class Action by amounts paid in the settlement here. Allowing JPMorgan to take such action would directly impair the rights of the Class Representative Objectors and the certified class despite that they did

not have an opportunity to participate in the negotiation of the Proposed Settlement, and the class claims have no legal connection to the settled claims.

For these reasons the Class Representative Objectors respectfully request that the Court reject approval of the Proposed Settlement unless and until: (1) the release provision is modified to specifically and explicitly exclude the claims at issue in the Securities Class Action; and (2) the language allowing any offset, credit or reduction in damages in other actions, including the Securities Class Action, as a result of the settlement here is removed from the RMBS Trust Settlement Agreement.

I. FACTUAL BACKGROUND

A. The Securities Class Action

As previously stated, the California Funds are the court-appointed Class Representatives in the Securities Class Action in which they bring claims under §11 of the Securities Act of 1933 against J.P. Morgan Acceptance Corporation I (“JP Morgan Acceptance”), J.P. Morgan Securities, Inc. (now known as J.P. Morgan Securities LLC), and several individuals who are or were affiliated with JPMorgan during the relevant time period.¹ The Class Representative Objectors allege in the Securities Class Action that the defendants violated §11 of the Securities Act of 1933, by making materially false and misleading statements, and omitting material information in the Offering Documents² used to sell class members securities from the following nine RMBS trusts:

¹ Specifically, the defendants in the Securities Class Action also include individual defendants Brian Bernard, Louis Schioppo Jr., Christine E. Cole, David M. Duzyk, William King and Edwin F. McMichael, who are all former officers and directors of JP Morgan Acceptance.

² The “Offering Documents” are defined in the Securities Class Action as the registration statement, prospectuses and prospectus supplements for each RMBS offering. The Offering Documents for each RMBS trust are alleged to contain essentially identical misrepresentations and omissions about loan quality and underwriting standards.

JPALT 2007-S1

JPALT 2007-A2

JPMAC 2007-CH3

JPMAC 2007-CH4

JPMAC 2007-CH5

JPMMT 2007-A3

JPMMT 2007-A4

JPMMT 2007-S2

JPMMT 2007-S3

The Class Representative Objectors specifically allege in the Securities Class Action that defendants falsely stated in the Offering Documents that: (1) the mortgage loans underlying the RMBS were originated in accordance with underwriting guidelines designed to evaluate each borrower's ability to repay the loan; (2) appraisals of the subject properties underlying the loans in the trust were accurate and conducted in conformance with the Uniform Standards of Professional Appraisal Practice; and (3) the mortgage loans included in the RMBS trusts at issue had certain loan-to-value ratios, important indicators of loan quality.

The claims in the Securities Class Action arise from and are based solely on alleged false statements and omissions in the Offering Documents. The Securities Class Action contains no allegations that there were false statements or omissions in any of the trust documents from which the RMBS Trust Settlement Agreement arose, or that JP Morgan breached or violated those trust documents. In addition, the Class Representative Objectors allege that they and the class suffered substantial damages solely as a result of defendants' false and misleading statements and omissions made only in the Offering Documents. A full copy of the operative complaint in the Securities Class Action is attached to the Affirmation of Samuel H. Rudman in Support of Construction Laborers Pension Trust for Southern California and Laborers Pension Trust Fund for Northern California's Objection to the Proposed Settlement ("Rudman Aff.") as Exhibit 1.

B. The Trustee Action

On November, 15, 2013, during the pendency of the Securities Class Action, JPMorgan and certain investors (the “Institutional Investors”)³ entered into the RMBS Trust Settlement Agreement on behalf of the Trustees to resolve claims related to 330 RMBS Trusts (“Trustee Action”), including the nine RMBS trusts that are the subject of the Securities Class Action. The Proposed Settlement resolves the Trustees’ claims that JPMorgan, the “Seller” for all of the trusts,⁴ breached numerous representations and warranties it made in the Governing Agreements.⁵ NYSCEF Doc. No. 9 at 3 (stating that “the representations and warranties of the seller – JPMorgan – are at the *core* of this proceeding”) (emphasis added). Under the Governing Agreements, JPMorgan was obligated upon discovery and/or notice of a material breach with respect to a mortgage loan to cure the breach within a certain period of time or repurchase the loan. *Id.* The Proposed Settlement also resolved claims that the JPMorgan defendants “failed to service the loans properly.” *Id.* at 1. The Proposed Settlement thus requires the JPMorgan defendants “to implement detailed mortgage-loan servicing standards that are intended to improve loan servicing.” *Id.* All of the claims resolved by the

³ The Institutional Investors include AEGON USA Investment Management, LLC, Bayerische Landesbank, New York Branch, BlackRock Financial Management Inc., Cascade Investment, L.L.C., Federal Home Loan Bank of Atlanta, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Goldman Sachs Asset Management, L.P., Voya Investment Management LLC (formerly known as ING Investment Management LLC), Invesco Advisers, Inc., Kore Advisors, L.P., Landesbank Baden-Wuerttemberg, Metropolitan Life Insurance Company, Pacific Investment Management Company, LLC, Sealink Funding Limited, through its investment manager Neuberger Berman Europe Limited, Teachers Insurance and Annuity Association of America, The Prudential Insurance Company of America, The TCW Group, Inc. on behalf of itself and its subsidiaries, Thrivent Financial for Lutherans, and Western Asset Management Company.

⁴ As the Seller, JPMorgan sold portfolios of residential mortgage loans to another entity, the Depositor, which then conveyed the loans to the trusts or a trustee for the benefit of investors.

⁵ The “Governing Agreements” at issue in the Trustee Action include the Pooling and Servicing Agreements governing most of the trusts and the Indentures and Sale and Servicing Agreements governing the remainder. *See* NYSCEF Doc. No. 9, The Trustees’ Brief in Support of the Settlement, at 3 n.1.

Proposed Settlement arose from and are based on statements made in or conduct required by the Governing Agreements. The Proposed Settlement does not involve any alleged misrepresentations or omission in, or misconduct arising out of, the Offering Documents at issue in the Securities Class Action.

II. ARGUMENT

A. **The RMBS Trust Settlement Agreement Improperly Purports to Release the Class Representative Objectors' Claims in the Securities Class Action**

As part of the Proposed Settlement, the JPMorgan defendants negotiated a broad release for liability related to the trusts. However, not all claims relating to the trusts were released. In particular, and relevant to the Securities Class Action, “any *direct individual claims* for securities fraud or other alleged disclosure violations” are expressly carved out of the release. NYSCEF Doc. No. 3, RMBS Trust Settlement Agreement, at 15, §4.04 (emphasis added). The provision excluding such claims from the release is set forth in pertinent part below:

Disclosure Claims. The releases and waivers in [the Settlement Agreement] do not include any *direct individual claims* for securities fraud or other alleged disclosure violations (“Disclosure Claims”) that *an Investor* may seek to assert based upon *such Investor’s* purchase or sale of Securities; provided, however, that *the question of the extent to which any payment made or benefit conferred pursuant to this Settlement Agreement may constitute an offset or credit against, or a reduction in the gross amount of, any such claim shall be determined in the action in which such claim is raised*, and, notwithstanding any other provision in this Settlement Agreement, the Parties reserve all rights with respect to the position they may take on that question in those actions and acknowledge that all other Persons similarly reserve such rights.

Id. (emphasis added).

Although certain claims were excluded from the broad release that JPMorgan obtained from the Trustees, the exclusion is overly narrow and restrictive. Specifically, while “*direct individual claims* for securities fraud or other alleged disclosure violations” are carved out of the release,

nowhere does the provision exclude claims for securities fraud brought as part of a class action. *See id.* (emphasis added). The Class Representative Objectors identified this issue upon reviewing the terms of the RMBS Trust Settlement Agreement and immediately contacted counsel representing defendants in the Securities Class Action for confirmation from the JPMorgan defendants that they did not intend to release the claims asserted in the Securities Class Action. *See Rudman Aff., Ex. 2.* Defense counsel declined to confirm anything. *See id.* This behavior further substantiated the Class Representative Objectors' concerns that the release in the RMBS Trust Settlement Agreement appears to be specifically designed to extinguish class claims like those alleged in the Securities Class Action. This is improper for several reasons.

First, the Class Representative Objectors' claims were never intended to be part of the Proposed Settlement. The RMBS Trust Settlement Agreement clearly states that the claims released are those "that arise under or are based upon the Governing Agreements." NYSCEF Doc. No. 3 at 11, §3.02. Additionally, the Trustees' own brief in support of approval of the Proposed Settlement argues only that "the Trustees have the power to enforce and settle the *repurchase and servicing claims at issue here.*" *See* NYSCEF Doc. No. 9 at 6 (emphasis added). The Trustees never express an intention to settle additional federal securities law claims, such as those in the Securities Class Action. Nor could they credibly do so. The Proposed Settlement could release the Securities Class Action claims *only* if they were based upon the identical factual predicate of the underlying claims in the Trustee Action. *In re Lehman Sec. & ERISA Litig.*, No. 08 Civ. 5523 (LAK) (GWG), 2012 U.S. Dist. LEXIS 90796, at *57-*58 (S.D.N.Y. June 26, 2012).

Here, the core operating facts in the Securities Class Action are simply different than those in the Trustee Action, making any argument that the Proposed Settlement should also resolve the Securities Class Action claims untenable. In *Lehman*, the court examined the facts in a settled class

action and claims involved in a FINRA arbitration to determine whether the FINRA claims had been released by the settlement. The court determined that the class action involved claims regarding defendants' responsibility for material misstatements and omissions in the offering documents for a particular security, and the FINRA claims would require proof, *inter alia*, regarding governing FDIC regulations and interpretations. Thus, there were many differences in the factual predicates between the two cases and the release in the class action **could not** extinguish the FINRA claims. *Id.* at *59-*61.

Likewise here, the claims in the Trustee Action revolve around alleged breaches of warranty and misrepresentations in the Governing Agreements. The claims in the Securities Class Action arise from misrepresentations made in a **wholly separate set of documents** – the registration statements, prospectuses and prospectus supplements for each of the nine trusts at issue. The claims in each action also arise out of distinct instances of misconduct by JPMorgan that share no legal connection. The Class Representative Objectors' claims in the Securities Class Action are based on misrepresentations JPMorgan made to investors **before** the RMBS were sold. The Trustees' claims, however, involve JPMorgan's alleged breaches of representations and warranties or failures to properly service the loans **after** the public offerings of the RMBS in the trusts. Thus, there is no identical factual predicate between the Securities Class Action and the Trustee Action, making the Proposed Settlement's purported release of securities law class claims improper. *Id.* at *65-*66 (“[I]f the courts’ sole mission were to encourage class action settlements, courts would not have imposed the ‘identical factual predicate’ limitation at all and we would instead allow broad class action settlement releases to bar claims that in any way relate to facts alleged in the class action complaint. That is not the law however”); *see also Deylii v. Novartis Pharms. Corp.*, No. 13-CV-06669 (NSR), 2014 U.S. Dist. LEXIS 82442, at *18 (S.D.N.Y. June 16, 2014) (holding that

similarities between class action and plaintiff's individual action were too attenuated to satisfy identical factual predicate doctrine).

The Class Representative Objectors' claims have no relationship to the claims in the Trustee Action beyond the fact that the nine trusts at issue in the Securities Class Action are also the subject of certain unconnected claims in the Trustee Action, thereby invalidating any attempt at release. *See Lehman*, 2012 U.S. Dist. LEXIS 90796, at *59 (“[B]oth involve claims concerning losses from Series J Shares of Lehman and both are brought against SunTrust. But the overlap begins and ends there.”). Indeed, the intent to distinguish between the Trustee claims and those based on false or misleading disclosures, such as those in the Securities Class Action, is plainly expressed by the parties to the RMBS Trust Settlement Agreement through the inclusion of a provision excepting individual disclosure claims from release.

This exception is incomplete, however, because while stating that individuals' *direct* claims are not released, it lacks similar language releasing *class* or *representative* disclosure claims. This omission is irreconcilable with the apparent intent of the parties to distinguish disclosure claims from those being released, and invites the inference that the provision was deliberately designed to extinguish class action claims against JPMorgan. Clearly, there is no logical reason to exempt individual disclosure claims from release, but at the same time prohibit those same individuals from pursuing a remedy for identical claims as members of a class. After all, a primary purpose of the class action mechanism is to vindicate the rights of individuals with direct claims too small to justify individual suit. *See, e.g., Thomas v. Meyers Assoc., L.P.*, 39 Misc. 3d 1217(A), 2013 N.Y. Misc. LEXIS 1680, at *33 (Sup. Ct. N.Y. Cnty. 2013) (finding class action mechanism superior to individual litigation because “given the relatively small size of each claim . . . many members of the class would be reluctant and unable to pursue redress of their claims absent class certification” and

stating that class action is ““a means of inducing socially and ethically responsible behavior on the part of large and wealthy institutions””) (citation omitted). JPMorgan cannot impede the rights of class members in the Securities Class Action by requiring them to prosecute their claims on an individual basis or not at all. Such a rule would not only contravene extant law, it would lead to duplicative litigation and a waste of judicial resources.

Finally, even if the Court were to find that the claims in the Trustee Action and Securities Class Action litigations are related, the release of the Class Representative Objectors’ claims as part of the Proposed Settlement would still be improper. *Lehman*, 2012 U.S. Dist. LEXIS 90796, at *56 (“a court must not simply interpret the language of the release, but also should consider whether there was authority to enter into the release on behalf of the class for the particular claims at issue inasmuch as a settlement agreement ‘cannot release claims that the parties were not authorized to release’”) (quoting *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 135 (2d Cir. 2011)). The Class Representative Objectors and the class members in the Securities Class Action are not parties to the RMBS Trust Settlement Agreement, nor were they involved in (or asked to be involved in) the settlement negotiations. Thus, the Class Representative Objectors had no opportunity to ensure that their interests or those of class members they represent were adequately protected, and therefore should not be bound by the RMBS Trust Settlement Agreement which attempts to release their independent and unrelated Securities Class Action claims.

B. The RMBS Trust Settlement Agreement Allows JPMorgan to Improperly Reserve the Right to Offset, Credit, or Otherwise Reduce Its Damages in the Securities Class Action Based on the Amount Paid to the Trusts

The RMBS Trust Settlement Agreement also permits JPMorgan to attempt to offset, credit, or seek a reduction in damages in any action relating to “disclosure claims,” including the Securities Class Action, by the amount of any payments it makes or benefits it confers in connection with the

Proposed Settlement. NYSCEF Doc. No. 3 at 15, §4.04. The Class Representative Objectors find this clause unacceptable. First, as described above, the Securities Class Action claims have no legal connection to the claims resolved by the Proposed Settlement. JPMorgan should be held liable for creating and distributing false and misleading Offering Documents in the Securities Class Action to the full extent provided by §11 of the Securities Act of 1933, without regard for its prior settlements for unrelated conduct. The fact that JPMorgan has contracted to pay *different* parties for *different* misconduct in a separate action is irrelevant to the damages proscribed by statute to be paid to the Securities Class Action plaintiffs for the harm it has caused them. Indeed, the Class Representative Objectors are suing JPMorgan in the Securities Class Action pursuant to §11 of the Securities Act of 1933, which provides a specific *statutory damages formula that does not allow for an offset* like that which JPMorgan attempts to fashion through the Proposed Settlement. *See* 15 U.S.C. §77k(e).

Moreover, the Class Representative Objectors had no direct or representative involvement in negotiating the provision purporting to limit their recovery in the Securities Class Action, nor are they parties to the RMBS Trust Settlement Agreement. The terms at issue were negotiated between JPMorgan and the Trustees, who are not involved in litigating the claims in the Securities Class Action, but nevertheless gives power to JPMorgan to minimize the payment of damages in that case. As such, defendants are interfering with the Class Representative Objectors' and certified class members' rights to litigate their independent claims. The RMBS Trust Settlement Agreement in its current form provides JPMorgan with an improper (but lucrative) loophole, which it will inevitably exploit to the detriment of the Class Representative Objectors and members of the class.⁶ The Class

⁶ The Class Representative Objectors' concern was reinforced when, upon asking JPMorgan's counsel to confirm that it would not try to offset damages in the Securities Class Action by any amounts paid in settlement of the Trustee Action, they refused to do so. *See* Rudman Aff., Ex. 2.

Representative Objectors assert the offending language must be removed from the RMBS Trust Settlement Agreement in order for approval of the Proposed Settlement to move forward.

III. CONCLUSION

The Class Representative Objectors and the members of the class they represent will be irreparably injured if not permitted to assert their claims in the Securities Class Action and continue litigating those claims, including seeking all statutorily proscribed damages to their full extent. The Class Representative Objectors therefore respectfully assert that the Proposed Settlement cannot be approved in its current form, and request that the Court: (1) order the signatories to the RMBS Trust Settlement Agreement to modify the release to specifically exempt class and representative “disclosure” claims as well as individual claims; and (2) order the signatories to the RMBS Trust Settlement Agreement to eliminate any provision which allows JPMorgan to offset, credit, or reduce the amount of damages awarded in the Securities Class Action by the amount paid or benefits conferred by JPMorgan in connection with the Proposed Settlement.

DATED: November 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the NYSCEF system which will send notification of such filing to the registered participants.

I certify under penalty of perjury under the laws of the State of New York that the foregoing is true and correct. Executed November 3, 2014.

s/ SAMUEL H. RUDMAN
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