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.

Motion Sequence No. 4

Index No. 652382/2014

Assigned to: Friedman, J.

THE INSTITUTIONAL INVESTORS' RESPONSE TO THE OBJECTING CERTIFICATEHOLDERS' OBJECTIONS TO THE TRUSTEES' REQUEST FOR RELIEF

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The Institutional Investors[1] are holders, and/or authorized investment managers for holders, of over $20 billion of certificates in the Accepting Trusts.[2] Their holdings represent approximately 32% of all unpaid principal in the trusts. As a result, the Institutional Investors have the largest financial stake in the outcome of this proceeding of any party.

The Institutional Investors support the Trustees' exercise of discretion in entering into the Settlement, and the Trustees' request for relief in this proceeding. Accordingly, the Institutional Investors ask the Court to: (i) reject the objections asserted by the Objecting Certificateholders,[3] for the reasons stated below, and (ii) enter a final judgment approving the Trustees' exercise of discretion in entering into the Settlement.

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[1] The "Institutional Investors" are: AEGON USA Investment Management, LLC, Bayerische Landesbank, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC (f/k/a ING Investment Management LLC), Invesco Advisers, Inc., Kore Advisors, L.P., Landesbank Baden-Wurttemberg, Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Sealink Funding Limited, Teachers Insurance and Annuity Association of America, The Prudential Insurance Company of America, the TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Management Company.

[2] Unless otherwise indicated, capitalized terms have the meanings assigned to them in the Trustees' Amended Petition (Doc. No. 57).

[3] The "Objecting Certificateholders" are: the Federal Home Loan Bank of Boston ("FHLB Boston"); Triaxx Prime CDO 2006-1, Ltd, Triaxx Prime CDO 2006-2, Ltd, and Triaxx Prime CDO 2007-1, Ltd ("Triaxx"); QVT Fund V LP, QVT Fund IV LP, Quintessence Fund LP, and QVT Financial LP (collectively ("QVT"), Brevan Howard Credit Catalysts Master Fund Limited and Brevan Howard Credit Value Master Fund Limited ("Brevan Howard"); the National Credit Union Administration Board as liquidating agent for U.S. Central Credit Union, Western Corporate Federal Credit Union. Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union ("NCUA"); Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation ("Ambac"); and the Construction Laborers Pension Trust for Southern California and Laborers Pension Trust Fund for Northern California, class representatives in a pending securities class action against JPMorgan (the "Securities Class Action Plaintiffs").

I. PRELIMINARY STATEMENT

This is an Article 77 proceeding[4] in which Trustees for 319 RMBS securitization trusts seek a finding that they acted within the scope of their reasonable discretion in entering into a settlement of representation and warranty, servicing, and related claims on behalf of the Accepting Trusts.[5] Under the Settlement Agreement, the Accepting Trusts will receive cash totaling approximately $4.2 billion, and specified servicing improvements expected to generate significant additional certificateholder value.

As explained in Part II(A), *infra*, the authorities are clear that: (i) the sole issue in this proceeding is whether the Trustees acted within the scope of their reasonable discretion, *i.e.*, reasonably and in good faith, in making their decisions to enter into the Settlement; (ii) the sole legitimate basis for objection is that the Trustees acted in bad faith, or employed a decision making process that was so unreasonable that it amounts to an abuse of discretion; and (iii) objections challenging the correctness of the Trustees' decision – such as disputes over the merits of the settled claims or adequacy of the settlement consideration – are irrelevant to the sole issue before the Court: the Trustees' good faith and reasonableness. In addition, as

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[4] CPLR Section 7701 provides, in relevant part, that "a special proceeding may be brought to determine a matter relating to any express trust . . . ."

[5] One of the recognized uses of an Article 77 special proceeding is for a court to pass on the propriety of proposed trustee action. *See, e.g.*, *In the Matter of Scarborough Properties Corporation*, 25 N.Y.2d 553 (1969) (Article 77 proceeding approving trustee's proposed purchase of trust property); *In the Matter of the Application of The Bank of New York Mellon*, 42 Misc.3d 1237(A) (N.Y. Sup. Ct., N.Y. Cnty 2014) (approving trustee's exercise of discretion in settling RMBS trust claims); *In re Application of IBJ Schroeder Bank & Trust Co.*, No. 101530/1998, slip op. (N.Y. Sup Ct. N.Y. Cnty Aug. 16, 2000) (Art. 77 proceeding approving trustee's exercise of discretion in settling claims of asset securitization trust); *BlackRock Fin. Mgmt, Inc. v. The Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169, 174 (2d Cir. 2012) ("Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper.") (citations and quotations omitted).

explained in Part II(B), *infra*, the authorities are also clear that where, as here, a trustee retains and relies on qualified experts in making discretionary decisions: (i) such conduct demonstrates prudence and good faith on the part of the trustee; and (ii) objections arguing that the experts' opinions and recommendations are "wrong" in some respect are irrelevant to the question of the trustee's good faith and reasonableness.

Here, no credible argument can be made that the Trustees acted in bad faith or employed a decision making process that was inherently unreasonable. Before entering into the Settlement, the Trustees advised certificateholders of the settlement offer, and their intent to use third party experts to evaluate it. The Trustees retained distinguished and highly qualified subject matter experts, including Professor Alan Schwartz, a leading legal scholar on securitizations, Anthony J. Carpinello, a retired Appellate Division Justice, Faten Sabry, a Ph.D. economist with National Economic Research Associates, Inc. (NERA), Jeremy Reifsnyder, a mortgage loan servicing consultant with Boston Portfolio Advisors, Inc., and Daniel R. Fischel, former dean of the University of Chicago School of Law, and a leading scholar and practitioner in the application of legal and economic analysis to decision making. These experts produced nine separate reports addressing relevant legal and factual issues, the strengths and weaknesses of the settled claims, potential trust recoveries on the settled claims, and other relevant issues. In addition, Professional Fischel conducted his own detailed legal, factual, and economic analysis of the proposed Settlement, formed his own independent opinions (on a trust-by-trust, and loan group-by-loan group, basis) as to whether the Settlement was in best interest of certificateholders, and provided these recommendations to the Trustees. The Trustees then disclosed the contents of their expert reports to certificateholders, advised certificateholders of the specific Trusts for which the Trustees intended to accept the Settlement, and invited certificateholder input and/or

instruction before the Trustees took action. At the end of this process, the Trustees followed the recommendations of Professor Fischel and made their decisions to enter into the Settlement on behalf of the Accepting Trusts.[6]

No Objecting Certificateholder challenges the reasonableness of this process, or the good faith of the Trustees in putting it in place. Instead, the Objecting Certificateholders ignore the relevant standard of review and focus the vast majority of their objections on issues that are not before the Court, such as disputes over the merits of the claims being settled, the adequacy of the Settlement consideration, and the "correctness" of the expert opinions on which the Trustees relied in making their decision. These objections are irrelevant because the purpose of this proceeding is not to second guess or reevaluate the Trustees' decision that the settlement is fair, reasonable, and in the best interest of certificateholders. Rather its sole purpose is to consider whether, in reaching that conclusion, the Trustees acted in good faith and employed a reasonable decision making process.

Here, the Trustees' process was careful, deliberate, and based on the work of highly qualified and distinguished professionals If this process cannot pass the test of reasonableness and good faith, then it is fair to ask whether any RMBS trustee can ever settle RMBS trust claims in a way that does.

II. THE APPROPRIATE SCOPE OF REVIEW OF THE TRUSTEES' DISCRETIONARY DECISION TO ENTER INTO THE SETTLEMENT

Two key rules of law, applicable to trustees and their exercise of discretion, control the appropriate scope of review of the Trustees' decision making process in this proceeding, and demonstrate the lack of merit in the vast majority of the Objecting Certificateholders' objections.

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[6] The Trustees also rejected the Settlement offer on behalf of other Trusts, based on the recommendations of Professor Fischel.

They are: (1) a court's review of a trustee's exercise of discretion in settling trust claims is limited to a consideration of whether the trustee's decision was reached in good faith and as a result of a reasonable process, and thus does not include an evaluation of the merits of the underlying claims or the adequacy of the settlement consideration, or an attempt by the court to determine whether it agrees with the trustee's decision; and (2) where, as here, a trustee retains and relies on qualified experts to advise it with respect to its decision, such action demonstrates prudence and good faith on the part of the trustee, and complaints about the "correctness" of the experts' opinions are neither proper objections, nor a proper area of inquiry for the court. Each of these rules is discussed below.

A. The Court's Review is Confined to the Question of Good Faith and the Existence of a Reasonable Decision Making Process, and Does Not Inquire Into the Merits of the Underlying Claims or the Adequacy of the Settlement Consideration

In an Article 77 proceeding addressing a trustee's exercise of discretionary authority, substantial deference is given to the trustee's judgment, and the role of the court is limited to ensuring that the trustee has not acted in bad faith, or so far outside the range of reasonable conduct, given the circumstances presented, that its actions amount to abuse of its discretion.[7] Thus, the task for the court is to consider the trustee's conduct, and ask whether it was reasonable and undertaken in good faith. It is not the task of the court to conduct its own inquiry into the question of whether the trustee's exercise of discretionary judgment was "right or

[7] *See, e.g., Haynes v. Haynes*, 72 A.D.2d 535, 536 (1st Dep't 2010) ("Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith."); *RESTATEMENT (THIRD) OF TRUSTS* §87 (2007) ("When a trustee has discretion with respect to the exercise of power, its exercise is subject to supervision by a court only to prevent an abuse of discretion.").

wrong."[8] As the Court of Appeals has explained, "it is impossible to say that trustees are wanting in sound discretion simply because their judgment turned out wrong." *In re Clark's Will*, 257 N.Y. 132, 136 (1931).[9]

Thus, in evaluating the Trustees' discretionary judgment that entering into the Settlement is in the best interest of the Accepting Trusts, the scope of review is limited to the question of whether the Trustees reached their decisions in good faith and as a result of a reasonable process. The proper scope of review does not include an evaluation of the merits of the underlying claims, or the adequacy of the settlement consideration, in an attempt to determine whether the Court agrees with the Trustees' decision. As a result, objections that the settlement consideration is inadequate in light of the merits of the settled claims are not properly before the Court, and cannot form the basis of a finding that the Trustees abused their discretion in entering into the Settlement.

B. Retention and Reliance on Experts Demonstrates Prudence and Good Faith, and the Merits of the Experts' Opinions Are Not a Proper Basis for Objection

Where, as here, a trustee seeks out and relies on the opinions and advice of experts knowledgeable in the areas about which the trustee is called on to make a discretionary judgment, such conduct demonstrates good faith and prudence on the part of the trustee. The rule has been summarized as follows: "If, in the course of administering the trust, the trustee is confronted with any question which requires the advice of a skilled specialist and in good faith seeks and acts on that advice, the trustee will not, as a general rule, be held accountable for the

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[8] "A trustee's performance is not judged by success or failure – i.e., right or wrong." 106 N.Y. Jur. 2d Trusts § 383 (2014).

[9] *Accord In re Cowles' Will*, 22 A.D.2d 365, 377 (1st Dep't. 1965) ("[F]allibility in matters of business judgment is not a standard of liability. The surcharge here is not justified because the trustee's judgment turned out wrong.").

consequences of following the advice."[10] New York courts have consistently followed this rule, and held that trustees who rely on the advice of competent experts and advisers act reasonably and in good faith, and do not abuse their discretion.[11]

Moreover, courts follow the common sense rule that, where a trustee relies on the advice of experts and qualified advisers, it is irrelevant to the question of the trustee's good faith or reasonableness whether the advice on which the trustee relied is later claimed to have been "wrong."[12] For example, in *In re Clark's Will*, the Court of Appeals considered the case of a trustee who made a discretionary decision not to sell trust securities, on the basis of the advice of

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[10] 106 N.Y. Jur. 2d Trusts § 371 (2014). *Accord* RESTATEMENT (THIRD) OF TRUSTS § 93, cmt. c (2007) ("Questions of breach of trust often turn on the reasonableness of trustee judgments and whether the trustee in question has acted with proper care or caution. . . . In cases of this type, typically involving exercise of the powers and performance of the duties of the trusteeship, a trustee's reliance on the advice of financial, legal, and other advisers is a significant factor in determining whether the trustee's conduct was prudent."); *Id.* at § 77, cmt. b ("As necessary or appropriate to informed decision making, care may also call for obtaining and considering the advice of others on a reasonable basis. It is ordinarily satisfactory that information or advice be obtained from sources on which prudent property owners or managers in the community customarily rely.").

[11] *See In re Clark's Will*, 257 N.Y. at 136 (trustee not liable for breach of trust, despite loss to trust caused by failure to sell trust securities at an earlier date, where trustee relied on advice of experts in the field in making its decision to hold securities); *In re Fensterer's Estate*, 79 N.Y.S.2d 427, 431 (Sur. Ct. Bronx Cnty 1948) ("The executor was confronted with a problem which required the services of an accountant and an attorney. He was entitled to rely upon their advice, and in so doing, is protected from charges of bad faith and negligence."); *In re Wainwright's Estate*, 55 N.Y.S.2d 303, 307 (Sur. Ct. Queens Cnty 1945) ("The trustees were confronted with making a decision . . . . In making their decision they appear to have carefully reviewed the problem, consulted with counsel and secured the advice of a qualified person experienced in real estate values . . . . I find no basis for imposing any liability upon the trustees for pursuing the course taken by them."); *In re Joost's Estate*, 50 Misc. 78 (Sur. Ct. King Cnty 1906), aff'd 126 A.D. 932 (2nd Dep't 1908) ("[W]here, in the course of the administration of his trust, [the trustee] is confronted with any question which requires the advice of a skilled specialist and in good faith seeks such advice, receives the same, and acts thereon, he is not held accountable for the consequences of following it.").

[12] "Nor is the Trustees' good faith put in question merely by virtue of the fact that the opinion relied upon may have been wrong." *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2nd Cir. 1992) (applying New York law).

a group of advisers "composed of distinguished financiers, members of the New York Stock Exchange, lawyers and others of note in business circles." 257 N.Y. at 138. When the advice turned out to wrong, the trust suffered losses, and the beneficiaries brought suit against the trustee for breaching its duties. *Id.* In rejecting the claim, the Court of Appeals followed the rule that "it is impossible to say that trustees are wanting in sound discretion" simply because the advice on which they relied "turned out wrong." *Id.* at 136.

The same rule was applied in the case of *In re Joost's Estate*, where an executor was accused of wrongly failing to attempt to collect on a note owed to the estate.[13] In rejecting the claim, the Surrogate Court held that the executor had acted reasonably and in good faith in making his decision in reliance on the advice of an expert (legal counsel), regardless of whether the advice was correct.[14]

Thus, in evaluating the Trustees' discretionary judgment that entering into the Settlement is in the best interest of the Accepting Trusts, the fact that Trustees did so in reliance on the opinions of highly qualified and credentialed experts demonstrates good faith and reasonableness. And this Court's review of the Trustees' reliance on the opinions of these experts does not turn on, or include an examination of, the "correctness" of the experts' opinions. As a result, objections that the experts' reports and opinions are "wrong" are not properly before

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[13] *In re Joost's Estate*, 50 Misc. 78 (Sur. Ct. King Cnty 1906), *aff'd* 126 A.D. 932 (2nd Dep't 1908).

[14] *Id.* ("No suggestion is made that [the attorney] is not a competent and reputable attorney, or that his advice was other than his honest belief concerning the legal status of the situation. *The question, therefore, is not whether or not [the attorney's] advice was correct as a matter of law*, but was the executor, who in good faith sought such advice and followed it, discharging his duty by the estate, or was it his duty, upon the receipt of such advice, to disregard it and proceed to endeavor to collect this note? . . . [W]here, in the course of the administration of his trust, [the trustee] is confronted with any question which requires the advice of a skilled specialist and in good faith seeks such advice, receives the same, and acts thereon, he is not held accountable for the consequences of following it.") (emphasis added).

the Court, and cannot form the basis of a finding that the Trustees abused their discretion in entering into the Settlement.

III. THE OBJECTING CERTIFICATEHOLDERS' OBJECTIONS FAIL TO RAISE ISSUES ON WHICH THE COURT COULD FIND THAT THE TRUSTEES ACTED IN BAD FAITH OR ABUSED THEIR DISCRETION

The Objecting Certificateholders' objections must be rejected because they fail to raise issues on which a finding that the Trustees acted in bad faith or abused their discretion can be based. As discussed below, the great majority of these objections fail because they are premised on: (i) arguments that the Settlement consideration is inadequate, in light of the merits of the settled claims; or (ii) arguments that the Trustees' experts' reports and opinions are wrong. The remaining objections – that the Trustees are conflicted, that the allocation formula in the Settlement Agreement is unfair, and that the Settlement Agreement improperly interferes with individual certificateholders' securities claims – are equally meritless, as explained below.

A. Objections that the Settlement Consideration is Inadequate in Light of the Merits of the Settled Claims

A substantial number of the Objecting Certificateholders' objections are based on the irrelevant assertion that the Settlement consideration to be paid to each Trust is inadequate in light of the merits of the settled claims. Although the Institutional Investors fundamentally disagree with each of these meritless objections, as discussed in Part II(A), *supra*, the sole issue before the Court in this proceeding is whether the Trustees acted in good faith and based their exercise of discretionary judgment on a reasonable decision making process. Objections directed to the merits of the settled claims, or premised on assertions that the Settlement consideration is inadequate in light of the merits of the settled claims, are improper and are irrelevant to the issues presented in this proceeding.

The following fall into this category of improper and irrelevant objections:

(i) the Settlement consideration to be received by certain Trusts is less than one or more of the alternative measures of potential claim size prepared by the Trustees' expert Professor Fischel (FHLB Boston);

(ii) the Settlement consideration is inadequate because certain Trusts claims are not barred by limitations, or would not be barred if the First Department's decision in *ACE*[15] is reversed (FHLB Boston);

(iii) the Settlement consideration is inadequate when compared to other public settlements, and in light of other public information and loan re-underwriting evidence (NCUA);

(iv) the Settlement consideration to be received by certain trusts is inadequate when compared to the settlement amounts received in the 2011 RMBS repurchase and servicing settlement between Bank of America/Countrywide and The Bank of New York Mellon (Brevan Howard and QVT); and

(v) the Settlement consideration to be received by certain trusts is inadequate in light of mortgage re-underwriting and other analysis performed by Ambac, and when compared to other RMBS trust settlements (Ambac).

In addition to being irrelevant, these objections are without merit. The Settlement consideration is not inadequate, as explained in Professor Fischel's voluminous expert reports, and as evidenced by the Institutional Investors' support for the Settlement, and the small number of objectors.

More importantly however, these objections must be rejected because, on their face, they fail to state a basis on which the Trustees could be found to have acted in bad faith or abused their discretion. They consist entirely of disagreement with, and second-guessing of, the Trustees' discretionary judgment that the Settlement consideration is adequate, and that entering into the Settlement is in the best interest of the Accepting Trusts. As discussed in Part II(A), *supra*, the proper scope of review in this proceeding does not include an evaluation of the merits of the underlying claims, or the adequacy of the settlement consideration, in an attempt to determine whether the Trustees reached the "right" decision.

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[15] In *ACE Sec. Corp. v. DB Structured Prod., Inc.*, the Appellate Division, First Department, held that the statute of limitations on a RMBS repurchase claim begins to run as of the date of the closing of the RMBS transaction. 112 A.D.3d 522 (1st Dep't 2013).

In addition, two of the Trustees' experts, Professor Fischel and Faten Sabry,[16] prepared detailed expert reports addressing the merits and value of the Trusts' claims.[17] Professor Fischel recommended acceptance for each of the Accepting Trusts on the basis of his analysis. Thus, objections that the Settlement consideration is inadequate in light of the merits of the settled claims are also meritless because they are premised on the assertion that the opinions and conclusions reached by Fischel and Sabry are "wrong," and that Fischel was "wrong" when he recommended acceptance of the Settlement for the Trusts to which these objections apply. As discussed in Part II(B), *supra*, it is not a proper objection to a trustee's exercise of discretion in entering into a settlement of trust claims, in reliance on expert advice, that the advice itself was wrong.

B. Objections that the Experts' Opinions Are Wrong

The majority of the Objecting Certificateholders' objections are based on the irrelevant assertion that the expert opinions on which the Trustees relied in making their decisions to enter into the Settlement were "wrong," in that the experts arrived at erroneous conclusions concerning the merits of the settled claims and/or the advisability of entering into the Settlement in light of all relevant considerations. These objections do not call into question the qualifications or experience of the experts, or the Trustees' good faith or reasonableness in retaining and relying on these experts. Rather they simply disagree with the conclusions reached by the experts.

As discussed in Part II(A), *supra*, the sole issue before the Court in this proceeding is whether the Trustees acted in good faith and based their exercise of discretionary judgment on a

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[16] Ms. Sabry is a Ph.D. economist with National Economic Research Associates, Inc. (NERA).

[17] *See* July 17, 2014 Expert Report of Daniel R. Fischel at ¶¶ 114-18 (presenting six alternative potential claim size estimates). July 17, 2014 Expert Report of Faten Sabry (presenting three alternative claim size estimates).

reasonable decision making process. Thus, as discussed in Part II(B), *supra*, Objections that take issue with the accuracy or correctness of expert opinions on which the Trustees relied are improper and are irrelevant to the issues presented in this proceeding.

The following objections fall into this category of improper objections, in that they are premised on the argument that one or more of the expert reports on which the Trustees relied in making their decision to enter into the Settlement were "wrong" in some respect:

(i) Professor Fischel was wrong to recommend approval for certain trusts where one or more of the alternative measures of potential claim size used by him in his analysis yields a greater claim size than the amount to be received under the Settlement (FHLB Boston);

(ii) Professor Fischel was wrong to recommend approval for certain Trusts whose claims are not barred by limitations, or would not be barred if the First Department's decision in *ACE* is reversed (FHLB Boston);

(iii) Professor Fischel was wrong to consider the failure of certificateholders to take action to prosecute trust claims, or to object to the Settlement, as a factor in deciding whether the Settlement is in the best interest of the Accepting Trusts (FHLB Boston);

(iv) NERA economist Sabry made the wrong in her adjustments to GSE[18] repurchase data in connection with her estimate of the Trusts' repurchase claim size (FHLB Boston);

(v) Sabry was wrong in using actual repurchase demands and imputed GSE repurchase rate in connections with estimating the Trusts' repurchase claim size (FHLB Boston);

(vi) Sabry made the wrong assumptions and wrong adjustments to FHFA allegations of JPMorgan representation and warranty breaches in connection with estimating the Trusts' repurchase claim size (FHLB Boston);

(vii) Trustees expert Jeremy E. Reifsnyder's[19] methodology for analyzing servicing performance for the Trusts was wrong because it does not include a precise estimate of potential liability by JPMorgan, and Professor Fischel was wrong to make use of this report in making his recommendations (FHLB Boston);

(viii) Fischel and Sabry's estimates of potential repurchase liability are wrong because they fail to account for differences in representations and warranties in the PSAs, in particular the presence or absence of a fraud representation (Triaxx);

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[18] The "GSEs" are government sponsored entities Fannie Mae and Freddie Mac. Both Fannie Mae and Freddie Mac are part of the Institutional Investors group that supports the Settlement and the Trustees' request for relief.

[19] Reifsnyder is a mortgage loan servicing consultant with Boston Portfolio Advisors, Inc.

(ix) Reifsnyder's analysis of mortgage servicing performance is wrong, and Fischel's acceptance recommendations are wrong, because they failed to consider a servicing liability theory (raised by Triaxx for the first time in its objection) based on alleged conflicts of interest of JPMorgan in modifying mortgages with second liens (Triaxx)[20];

(x) Retired Appellate Division Justice Anthony J. Carpinello's[21] analysis of statute of limitations issue is wrong because he failed to consider an argument that, for some Trusts, accrual language in the PSAs may prevented the running of limitations (Ambac);

(xi) Fischel reached the wrong conclusions concerning the likelihood that clams for certain trusts would be litigated by overestimating the need for certificateholder action and underestimating the Trustees' alleged obligations to bring such claims, and alleged right to use Trust assets to prosecute such claims (Ambac);

(xii) Fischel and Sabry's estimates of repurchase liability were wrong because they failed to consider an alternative theory of repurchase liability that it is alleged could be asserted against JPMorgan as servicer based on its alleged failure to prosecute repurchase claims (Ambac)[22];

(xiii) Fischel and Sabry's estimates of repurchase liability were wrong because they failed to conduct a forensic re-underwriting of mortgages in the Trusts (QVT and Brevan Howard); and

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[20] Triaxx claims that JPMorgan as servicer may have increased losses in Trusts by modifying first lien mortgages without extinguishing second lien mortgages owned by JPMorgan. Reifsnyder's expert report considers increased losses from servicing failures, for all reasons, by comparing JPMorgan's performance to industry benchmarks. Thus, Triaxx's theory does not represent a new claim, but rather one of many alternative theories that could be advanced in furtherance of a claim – poor servicing – that the Trustees considered. It should also be noted that, although Triaxx had notice of the terms of the proposed Settlement, the contents of the Trustees' expert reports, and the deadline by which the Trustees would make their decisions, well before the Trustees actually accepted the Settlement, it appears that Triaxx made no effort to raise this theory with the Trustees, before they made their decisions.

[21] Justice Carpinello served for 14 years as a Justice of the Supreme Court and Supreme Court Appellate Division, Third Department.

[22] Fischel and Sabry's estimates of repurchase liability considered JPMorgan's liability for all defective loans. Thus, Ambac's theory that JPM has indirect repurchase liability as a servicer (in addition to its direct contractual liability) does not represent a new claim, but rather one of many alternative theories that could be advanced in furtherance of a theory – that JPMorgan has repurchase liability for defective mortgages in the Trusts – that the Trustees considered. It should also be noted that, although Ambac had notice of the terms of the proposed Settlement, the contents of the Trustees' expert reports, and the deadline by which the Trustees would make their decisions, well before the Trustees actually accepted the Settlement, it appears that Ambac made no effort to raise this theory with the Trustees before they made their decisions.

(xiv) Fischel was wrong to consider the failure of certificateholders to object or take action to prosecute trust claims because, it is alleged, certificateholders' opinions were not solicited (NCUA and Brevan Howard).

These objections must be rejected because each fails to state a basis on which the Trustees could be found to have acted in bad faith or abused their discretion. Each of these objections is based on the assertion that one or more of the Trustees' experts' opinions is wrong in some respect. As discussed in Part II(B), *supra*, it is not a proper objection to a trustee's exercise of discretion in entering into a settlement of trust claims, in reliance on expert advice, that the advice itself was wrong.

C. Objections that the Trustees Are Conflicted

Two of the Objecting Certificateholders claim that one or more of the Trustees was operating under a conflict of interest when deciding whether to accept the Settlement because: (i) accepting the Settlement would prevent the Trustees from being sued for failing to obtain value for the Trusts' claims (FHLB Boston and Brevan Howard); and (ii) certain Trustees may have an interest in settling the Trusts' claims, because litigating them might increase the liability of the Trustees or their affiliates (in some unexplained way) in their roles as sponsors, sellers and/or servicers on unrelated RMBS transactions (Brevan Howard). Neither of these objections states a basis on which the Trustees' request for relief could be denied.

Courts applying New York law to claims of trustee conflict of interest are guided by the principle that:

> Pushed with relentless logic, a possible conflict of interest can be conjured up out of all sorts of situations in which persons of normal scruple would feel no hesitation to go ahead. The law ought not make trusteeship so hazardous that responsible individuals and corporations will shy away from it. Of course the courts should not impose impractical obligations on a trustee. *Merely vague or*

> *remote possible selfish advantages to a trustee are not sufficient to prove such an adverse interest as to bring his conduct into question.*[23]

Here, the conflicts claimed to exist by the Objecting Certificateholders are nothing but claims of "vague or remote possible selfish advantages to a trustee" that are not sufficient to call the Trustees' decision making into question.

The first claim of conflict – that the Trustees had a self interest in accepting the Settlement in order to avoid being sued for failing to obtain value for the Trusts' claims – is meritless on its face. Every trustee for a trust with potential litigation claims has an interest in avoiding being sued for failing to obtain value for such claims. That does not create a conflict of interest on the part of a trustee who is deciding whether to compromise and settle a trust claim. If it did, it would mean that no trustee could ever settle a trust claim without breaching its obligation to avoid conflicts.

The second claim of conflict – that certain Trustees may have an interest in accepting the Settlement because litigating the Trusts' claims could increase their liability as sponsors, sellers and/or servicers in connection with other, unrelated RMBS transactions – also fails in this situation because it is vague, remote, and speculative, on the facts alleged in the objections. No objector asserts that any of the Trustees has *any* liability (direct or indirect) on *any* of the claims that are the subject of the Settlement. Instead, the argument appears to be that accepting the Settlement for the Accepting Trusts could, in some unspecified, indirect way, have some affect on some unspecified potential liability the Trustees could have, based on unspecified obligations, arising out of wholly separate contracts, transactions, and mortgages. Such claims of "vague or

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[23] *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 675 (2d Cir. 1952) (applying New York law) (citations and quotations omitted, emphasis added).

remote possible selfish advantages to a trustee are not sufficient" to support a claim of conflict on the part of the Trustees.[24]

D. Objections to the Allocation of Settlement Proceeds Among the Accepting Trusts

Three of the Objecting Certificateholders object that the formula in the Settlement Agreement, which determines the precise amount of the settlement payment that will be received by each of the Accepting Trusts, is "unfair" because they claim it: (i) does not adequately account for differences in loan types from trust to trust (Triaxx); (ii) does not account for the fact that certain Trusts have claims that are not barred by limitations (NCUA); (iii) does not adequately justify the amounts the amounts received by Trusts where JPMorgan was not the loan originator (NCUA); and (iv) does not adequately consider that claims against third party originators may be time barred, or that JPMorgan may have liability for failing to pursue claims against such originators (QVT). These objections are meritless because they ignore the fact that Trustees did not accept a bulk settlement, premised on the fairness of an allocation formula, but rather accepted (and in some cases rejected) the Settlement on a trust-by-trust basis, based on an analysis of the settlement consideration to be received by each individual Trust, in light of the strengths and weaknesses of the claims belonging to each Trust.

Thus, the Trustees properly based their decisions on whether the Settlement was in the best interest of each individual Trust, in light of the individual consideration offered to it, and not on the basis of the abstract fairness of the method by which the precise amount of the settlement

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[24] *Id.*

offer to each Trust was derived. As a result, objections to the fairness of the allocation formula in the Settlement Agreement are not properly before the Court.[25]

E. Objections That the Settlement Agreement Releases or Improperly Interferes With Individual Certificateholders' Securities Claims

The Securities Class Action Plaintiffs confine their objections to meritless assertions that the Settlement Agreement somehow: (i) releases individual certificateholders' securities claims, not owned by the Trustee; and (ii) improperly allows JPMorgan to claim a credit for amounts paid under the agreement against other claims for damages asserted by certificateholders who receive any such amounts. These objections are meritless, as they are plainly rebutted on the face of the Settlement Agreement.

The argument that the Settlement Agreement releases securities claims belonging to individual certificateholders (which the Securities Class Action Plaintiffs are currently attempting to prosecute on a class basis in federal court) is meritless. First, the securities claims of individual certificateholders are not owned by the Trustees, meaning the Trustees could not release them even if they had attempted to do so. Moreover, the Settlement Agreement makes clear on its face that the Trustees have not attempted to release such claims. Section 4.04 of the Settlement Agreement explicitly provides that the release contained within it does not apply to "*direct individual claims* for securities fraud or other alleged disclosure violations."

Nonetheless, the Securities Class Action Plaintiffs wrongly claim that this express carve-out (which is itself unnecessary in light of the fact that the Trustees have no power to release individual securities claims) is insufficient because it does not preserve such claims "when

[25] In addition, because Professor Fischel took account of the individual consideration to be received by each of the Trusts under the allocation formula in his expert report and recommendation to the Trustees, and concluded for the Accepting Trusts that it was in their best interest to accept the Settlement, objections to the "fairness" of the allocation formula are improper because they are premised on the assertion that Professor Fischel's opinions and recommendations are "wrong." *See* Part II(B), *supra*.

brought as part of a class action." This objection is meritless. A class action is a purely procedural device allowing the consolidation of individual claims of class members into a single proceeding; [26] it does not change the nature of the claims, or take them outside the category of "direct individual claims for securities fraud or other alleged disclosure violations" that are expressly unaffected by the Settlement Agreement.

The Securities Class Action Plaintiffs' other objection – that the Settlement Agreement "permits JPMorgan to attempt to offset, credit, or seek a reduction in damages," in separate securities fraud litigation, for the amount of any payments or benefits JPMorgan makes under this settlement – is also meritless. Section 4.04 of the Settlement Agreement expressly provides that: (i) "all Persons" (including the Securities Class Action Plaintiffs, and all individual certificateholders) reserve their rights "with respect to the position they may take" on this issue; and (ii) the question of a settlement credit or offset will be determined "in the action in which such claim [for settlement credit] is raised." Thus, the Settlement Agreement unambiguously takes no position on this issue, and preserves the rights of all parties with respect to it.

IV. CONCLUSION

For all the foregoing reasons, the Institutional Investors ask the Court to: (i) reject the objections asserted by the Objecting Certificateholders and (ii) enter a final judgment approving the Trustees' exercise of discretion in entering into the Settlement.

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[26] *See, e.g.*, *Deposit Guar. National Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (explaining that Rule 23, like other rules of federal procedure, "shall not abridge, enlarge or modify any substantive right").

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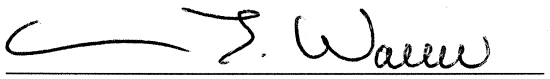
December 3, 2014

WARNER PARTNERS, P.C.

By: 

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