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March 18, 2015

VIA ECF AND HAND DELIVERY

Justice Marcy S. Friedman, Part 60
New York State Supreme Court
Commercial Division
60 Centre Street, Courtroom 248
New York, New York 10007

Re: ***In the Matter of U.S. Bank Nat'l Ass'n, et al.,***
N.Y. Sup. Ct. No. 652382/2014 (Friedman, J.)

Dear Justice Friedman:

We represent Intervenor-Respondents Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation (collectively "Ambac") in this proceeding. We write to apprise the Court of the respective positions of the Intervenor-Respondents and JPMorgan Chase & Co. ("JPMorgan") concerning discovery from JPMorgan (including discovery of re-underwriting results, about which the Court asked during the last teleconference) in advance of the March 20, 2015 conference.

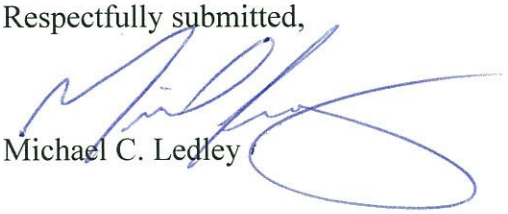
In light of the Court's desire not to receive further briefing on discovery issues, we enclose herewith the recent exchange of correspondence between Ambac and JPMorgan setting forth their respective positions. The correspondence consists of three letters. On March 4, 2015, counsel for JPMorgan set forth, for the first time, its responses to certain specific document requests served by the Intervenor-Respondents on December 8, 2014. Ambac promptly responded on March 6, in which we proposed several compromises in the interest of reaching a consensual resolution. At that time, however, Ambac did not deem it appropriate to submit the exchange to the Court because JPMorgan had not had an opportunity to respond to our proposals. Counsel for JPMorgan responded to our letter yesterday (March 17). Unfortunately, the parties remain at an impasse. All three letters discussed above are enclosed.

Upon receiving JPMorgan's March 17 letter, we reached out to counsel for JPMorgan that same day to discuss a joint submission to the Court. This afternoon counsel for JPMorgan informed us that they would not participate in a joint submission on the ground that it would be untimely. In light of the fact that our exchange with JPMorgan did not conclude until March 17, we believe it is appropriate to apprise the Court of the parties' current positions and that such

information would be useful to the Court. We therefore respectfully request that the Court consider this submission.

We will be prepared to address these issues at the conference on March 20.

Respectfully submitted,



Michael C. Ledley

cc: Counsel of Record (via ECF)

Enclosures

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March 4, 2015

Via E-mail

Michael Ledley, Esq.,
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500 Fifth Avenue,
New York, New York 10110.

Re: *In the Matter of U.S. Bank National Association, et al.*, Index No. 652382/2014 (Sup. Ct. N.Y. Cty.)

Dear Michael:

I write on behalf of JPMorgan Chase & Co. ("JPMorgan") to correct certain comments you made during the February 23, 2015 teleconference with Justice Friedman in the above-referenced Article 77 proceeding (the "Proceeding") and to make clear our position concerning the reasonable scope of any discovery from JPMorgan.

As we have discussed, the objectors' 18 multi-part requests (11 propounded on behalf of all objectors and 7 propounded on behalf of Ambac Assurance Corp. alone) suffer from three fundamental problems: (i) they largely seek documents going to the underlying merits of the settled claims; (ii) they are exceedingly overbroad and unduly burdensome; and (iii) certain requests seek the very same documents that the trustees have already agreed to produce, and you have offered no reasonable justification for the significant expense and burden involved in such duplicative discovery.

We last spoke about your clients' demands for discovery from JPMorgan on January 12, 2015. During that call, I explained all of these issues. Nevertheless, I made clear that JPMorgan would be willing to entertain narrowed requests for targeted information that is relevant to the Proceeding and is not otherwise being produced to you by the trustees. During that call you also asked for the first time whether JPMorgan would produce documents about trustee conflicts. Although the objectors had never requested documents from JPMorgan concerning trustee conflicts (which I pointed out to you), I made clear that JPMorgan would be willing to consider specific requests on that subject if the objectors chose to make any. Yet following the January 12 call, we heard nothing further from you (or any other counsel for the objectors) for six weeks, until your

surprising statement to the Court during the teleconference that you wanted to discuss discovery issues about JPMorgan. I address each of these issues in more detail below.

Overbroad and Burdensome Requests Directed to the Merits of the Settled Claims

The objectors have made no effort to tailor their requests to the limited scope and nature of this Article 77 Proceeding. *See* CPLR § 7701 (providing a "right to examine *the trustees*" (emphasis supplied)); *Andrews* v. *Trustco Bank, N.A.*, 289 A.D.2d 910, 913 (3d Dep't 2001) (denying discovery demands for "'all memorand[a], correspondence, and work papers related to the administration of the trust'" because they "plainly are overbroad, seek irrelevant information and impose an undue burden[.]"); *In re Beeman*, 108 A.D.2d 1010, 1012 (3d Dep't 1985) (limiting discovery to trustee).

Rather, the requests seek wholesale discovery into the underlying merits of *all* of JPMorgan's many RMBS litigations and investigations (including those that do not even involve the Accepting Trusts), and appear designed to impose the maximum burden on JPMorgan in the process. For example, the objectors' requests seek without limitation *all* documents produced in every government investigation relating to JPMorgan's RMBS activities, of which there have been several, and *every* transcript from depositions of JPMorgan's current or former employees in *all* of JPMorgan's RMBS cases, of which there are many dozen. The tens (and likely hundreds) of millions of pages of documents sought by these unbounded requests are also replete with confidential non-party borrower information which the objectors have no right to receive. Moreover, many of the requested documents have no possible connection to the trusts included in the Settlement Agreement or they pertain to Trusts in which the objectors have no interest at all.

Virtually none of this massive discovery is relevant to the sole question before the Court: Whether the trustees abused their discretion when they accepted the Settlement Agreement on the recommendation of their independent experts. *In re Bank of New York Mellon*, 2014 WL 1057187, at *9 (Sup. Ct. N.Y. Cnty Jan. 31, 2014); *In re IBJ Schroder*, 2000 N.Y. Misc. LEXIS 692, at *8 (Sup. Ct. N.Y. Cnty. Aug. 16, 2000) ("[T]he trustee's decision to compromise . . . [an] action is within the scope of the trustee's powers . . . and is entitled to judicial deference."). Rather, the vast majority of the objectors' requests seek discovery going to the merits or strength of the settled repurchase or servicing claims and therefore have no tenable connection to the Court's limited inquiry. *See, e.g.*, *Andrews*, 289 A.D.2d at 913.[1] This is the exact result the

[1] Even in the context of class action settlements—a circumstance and standard markedly different from an Article 77 proceeding—the sort of merits discovery sought here by the objectors is disallowed. *See Newman* v. *Stein*, 464 F.2d 689, 691-92 (2d Cir. 1972) ("since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial[.]" (internal quotation marks omitted)); *Zerkle* v. *Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("In determining whether to approve the compromise or not, the Court

Settlement Agreement is designed to avoid and is an approach the Court has unequivocally rejected. *See* Dec. 16, 2014 Tr. at 80:13-17 ("[T]he ultimate hearing of *this matter is not going to be a minitrial on the merits of the repurchase claims.* I think everyone would agree, if not on the record at least in private, that that is not the proper result for this Article 77 proceeding . . .") (emphasis supplied).

For clarity, I address below the particular demands that are overbroad and exceed the scope of any relevant issue in this Article 77 Proceeding:

- Request Nos. 1-4, 6, 10, 11 and the Ambac Requests seek expansive discovery concerning (i) all of JPMorgan's 100-plus RMBS litigations (*e.g.*, transcripts of *every* deposition of current and former employees concerning RMBS (Req. No. 3) and *all* "[d]ocuments produced [] to the DOJ and to the SEC in connection with the investigations that resulted in the JPMorgan-DOJ Settlement and JPMorgan-SEC Settlement." (Req. No. 4)), (ii) loan reunderwriting performed by JPMorgan (Req. No. 6), and (iii) loan files, databases and loan-specific quality control and diligence processes (Ambac Requests). The burden involved with such a massive production is substantial (even if the protective order and individual confidentiality issues could be overcome) and there is no reason to believe that this discovery would have any plausible bearing on a review of the trustees' decision-making process. For example, the separate settlements that JPMorgan reached with the DOJ and the SEC are well known and have been widely publicized. To the extent the objectors intend to argue that the trustees abused their discretion because they failed to account for some purported misfeasance or past settlements involving JPMorgan, they are free to pursue those arguments, however misguided and unsupported by the facts as they may be, based on publicly available information. The same holds true for the alleged (and grossly exaggerated) breach rates in Ambac's and other RMBS plaintiffs' publicly filed complaints. The objectors are free to make the argument that the trustees should have requested and considered that information.

- Request Nos. 7 and 8 seek all correspondence with certificateholders "concerning any analysis of losses to the JPMorgan Trusts." This information, which was not provided to the trustees, is also not relevant to the trustees' independent evaluation of the Settlement. Moreover, these requests seek information about JPMorgan's confidential mediation with the Institutional Investors. As the Institutional Investors' counsel has previously informed you, the content of those negotiations, conducted before a California mediator, is protected from disclosure

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does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that."); *Matter of Nachison* v. *Phoenix of Hartford Ins. Co.*, 30 A.D.2d 499, 503 (3d Dep't 1968) (denying discovery to conduct "full scale trial of the issues").

under a mediation privilege. JPMorgan is not at liberty to unilaterally produce any such mediation documents.

Requests Seeking Duplicative Discovery

Request Nos. 5 and 9 seek information that is potentially relevant to this Proceeding—"[c]ommunications with the Trustees concerning actual or potential breaches of representations made by JPMorgan" and "[a]ll documents JPMorgan provided to any Trustee Expert or to the Trustees for use by or with respect to any Trustee Expert." However, these requests are entirely duplicative of requests directed to the trustees, for which the trustees have agreed to produce responsive documents. Other than to impose unnecessary burdens and costs on JPMorgan, there is no reason to seek the exact same discovery of JPMorgan. As we informed you when we last spoke on January 12, this is a large volume of information, all of which the trustees have agreed to provide to the objector group because it relates to their evaluation of the Settlement Agreement. If the trustees are unable to produce these materials, we will work with you and the trustees' counsel to complete that production and to ensure that you have access to this information. Unless and until such an issue arises, however, there is no basis to demand this same discovery from JPMorgan.

Trustee Conflicts

The objectors did not serve JPMorgan with any discovery requests relating to what you refer to as "trustee conflicts." However, during our January 12 call, you asked whether JPMorgan was going to produce such documents. We pointed out to you that the objectors neglected to include any such document requests, but that we would nevertheless consider responding to tailored requests on that topic should the objectors choose to make them. We have heard nothing else on the subject.

* * *

In light of the foregoing, I was extremely surprised when you sought to blindside JPMorgan by raising issues with the Court on the teleconference without notice. In the future, I ask that you at least provide us the professional courtesy of informing us that you intend to raise issues with the Court before doing so. We would certainly extend you the same courtesy.

Sincerely,

Robert A. Sacks

cc: Counsel to Objecting Parties
Counsel to Trustees
Counsel to Institutional Investors

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March 6, 2015

BY EMAIL AND FEDERAL EXPRESS

Robert A. Sacks
Sullivan & Cromwell LLP
1888 Century Park East
Los Angeles, CA 90067-1725

Re: *In the Matter of U.S. Bank National Association, et al.*,
Index No. 652382/2014 (Sup. Ct. N.Y. Cty)

Dear Robert:

We write on behalf of the intervenors in this action opposing the Proposed Settlement (the "Respondent Investors") in response to your letter dated March 4, 2015.

As an initial matter, my statements to the Court during the February 23 teleconference were entirely accurate. During our meet and confer call on January 12, 2015 you indicated that JPMorgan intended to produce no documents in response to the document requests propounded by the Respondent Investors. We agreed that we were at an impasse with respect to those requests and no further discussions would be productive. Indeed, the upshot of your March 4 letter is that JPMorgan *still* intends to produce no documents in response to the Respondent Investors' requests.[1] How you could deny this was JPMorgan's position during the February 23 teleconference is beyond me. In light of the acknowledged impasse, your expression of surprise that the Respondent Investors continue to seek discovery from JPMorgan and brought the dispute to the Court's attention is unwarranted.

The parties have already submitted briefs on the scope of discovery and there is no reason to repeat our arguments concerning the relevance of the Respondent Investors' document requests via letter. Suffice it to say that JPMorgan's objection to producing documents "going to the underlying merits of the settled claims" is unfounded. For example, such objection ignores that JPMorgan agreed in its settlement offer to provide the Trustees with whatever documents

[1] Your offer to "entertain" some hypothetical set of narrowed requests is neither here nor there. The Repondent Investors have served requests. If JPMorgan seeks to compromise by producing a narrower subset of the documents we requested, then it behooves JPMorgan to make a proposal. You have made no proposal. The Respondent Investors should not have to guess at what categories of documents JPMorgan might agree to produce.

they reasonably requested to evaluate the Proposed Settlement. *See* Proposed Settlement Agreement, §2.05(a). The Respondent Investors' requests seek, for the most part, documents that a reasonable trustee would have requested from JPMorgan to evaluate the settlement. Accordingly, these documents go directly to the reasonableness of the Trustees' evaluation process.

It is unnecessary to debate JPMorgan's relevance objection for the further reason that the Court indicated during the teleconference that it was not inclined to preclude relatively non-burdensome discovery on the basis of relevance. *See* Feb. 23, 2015 Tr. at 33-34. The Court specifically identified re-underwriting results as an example of materials that should be produced without prejudice to any parties' rights as to relevance. *Id.* As discussed below, the majority of the Respondent Investors' requests seek similarly discrete and easily identifiable quantitative and summary information that the Trustees could and should have obtained from JPMorgan but apparently made no attempt to do so. These documents pose no significant burden and should be produced.

With these points in mind, we discuss the Respondent Investors' specific requests and JPMorgan's responses (to the extent you provided a response) below.

Requests on Behalf of All Respondent Investors

- Request 1 – Draft DOJ Complaint: You did not address this document in your letter. The existence of the Draft DOJ Complaint was widely discussed for almost the entire period the Trustees considered the settlement. It would have provided the Trustees with a focused and detailed roadmap for the claims they were asked to release and any reasonably diligent trustee would have requested it. It appears the Trustees did not. Obviously, producing a draft complaint and any documents attached to or referenced in it imposes virtually no burden on JPMorgan. In light the Court's comments concerning production of non-burdensome documents without prejudice to relevance objections, these documents should be produced.

- Requests 2-4 – Prior Depositions, Exhibits, and DOJ Investigation Materials: JPMorgan cherry picks these requests to portray the Respondent Investors' requests as a whole as unduly burdensome. Whatever the volume of the documents, we would be shocked if Sullivan & Cromwell did not have them electronically stored and indexed such that they could easily be produced. We therefore believe JPMorgan's concerns about burden are overstated. Nevertheless, in the interest of compromise, the Respondent Investors would agree to take these requests off the table for the present time if JPMorgan agrees to comply with the Respondent Investors' other requests.

- Request 5 – Communications With Trustees Concerning Breaches: To the extent the Trustees produce these documents in full, the Respondent Investors will not seek the identical documents from JPMorgan. However, JPMorgan should produce any responsive documents not produced by the Trustees or confirm that none exist.

- Request 6 – Re-Underwriting Results: As discussed above, the Court specifically identified re-underwriting results as an example of materials that should be produced on a without prejudice basis. We would be happy to confer with you regarding JPMorgan's confidentiality concerns. To the extent those concerns are not ultimately resolved by a protective order, they can be addressed via redactions as the Court suggested during the teleconference.

- Requests 7-8 – Analysis of Losses and JPMorgan Liabilities Provided By Certificateholders: The Respondent Investors acknowledge that JPMorgan is asserting a "mediation privilege" under California law with respect to materials and analyses exchanged with the Institutional Investors. We do not believe the assertion of privilege has merit, and this issue may have to be resolved by the Court. However, JPMorgan should produce any responsive material exchanged with other certificateholders, with respect to which there is no claim of privilege.

- Request 9 – Documents Provided to Trustee Experts: As with Request 5, if the Trustees produce these documents in full, the Respondent Investors will not seek the identical documents from JPMorgan. To the extent JPMorgan has an index of such materials or cover letters detailing what documents were provided, we request they be produced so the Respondent Investors can confirm all responsive documents were produced by the Trustees.

- Request 10 – Notices of Events of Default or Servicer Breaches: Your letter does not address these documents. The existence of Events of Default bears on the scope of the Trustees' duties under the applicable trust documents, and therefore these documents are highly relevant. You have articulated no issue as to burden or any other basis not to produce the documents.

- Request 11 – Fleischmann Whistleblower Documents: Your letter also does not address these documents. The existence of Ms. Fleischmann's whistleblower reports was the subject of numerous media reports during the period the Trustees evaluated the Proposed Settlement, and a reasonably diligent trustee would have requested them. Based on these reports, we understand this to be a relatively small volume of communications. You have articulated no issue as to burden or any other basis not to produce the documents.

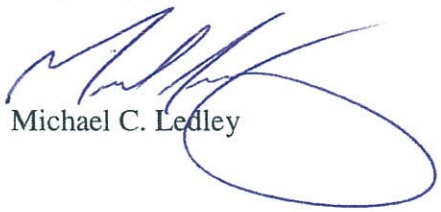
Requests on Behalf of Ambac

The Ambac requests are similarly targeted, reasonable, and seek documents that the Trustees could and should have requested from JPMorgan to evaluate the proposed Settlement. You have not articulated any issue of burden or specific objection with respect to these particular requests – and we believe there can be none, as JPMorgan can simply agree that all documents responsive to these requests that otherwise have been, or will be, produced in *Ambac Assurance Corporation et al. v. EMC Mortgage LLC et al.*, Index No. 651013/2012 (N.Y. Supreme Court), may be used in this proceeding (subject to the protective order ultimately entered by the Court). This eliminates entirely the issue of burden on JPMorgan in this proceeding.

As set forth above, the Respondent Investors seek a discrete and narrowly tailored universe of materials from JPMorgan. The Respondent Investors' requests were not unduly burdensome as drafted, and we have proposed several compromises in an effort to further minimize burden. Therefore, the only colorable objection that remains is relevance. Based on the Court's comments during the teleconference, it is obvious that the Court would strongly prefer to avoid lengthy and time consuming motion practice concerning relevance objections where documents can be produced with minimal burden. We hope JPMorgan will take up the Court's suggestion and produce the documents we have requested without prejudice to its arguments regarding relevance. Moreover, if JPMorgan has any specific burden concerns, please let us know and we will consider whether we can modify one or more requests to alleviate those concerns.

Feel free to contact me if you would like to discuss these issues.

Very truly yours,



Michael C. Ledley

cc: All Counsel (via email)

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March 17, 2015

Via E-mail

Michael Ledley, Esq.,
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500 Fifth Avenue,
New York, New York 10110.

Re: *In the Matter of U.S. Bank National Association, et al.*, Index No. 652382/2014 (Sup. Ct. N.Y. Cnty.)

Dear Michael:

I write in response to your letter of March 6, 2015, which responded to my letter of March 4, 2015.

In your letter, you argue that "JPMorgan's objection to producing documents 'going to the underlying merits of the settled claims' is unfounded" and that "it is unnecessary to debate JPMorgan's relevance objection[.]" Notably absent from your letter is any mention of the First Department's March 5, 2015 decision in *In re Bank of New York Mellon*, --- N.Y.S.3d ---, 2015 WL 921625 (App. Div. 1st Dept.). The First Department unanimously held that the limited scope of judicial review attendant to Article 77 proceedings focuses on "ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion." *Id.* at *2. This is, of course, the very same standard that we articulated in our prior correspondence. In light of the First Department's decision, there can be no reasonable question that the incredibly broad and unduly burdensome requests that the objectors have propounded are outside the bounds of potentially relevant matters in this Article 77 proceeding. To date you have proposed no limits on the objectors' requests. If you believe that any of the objectors' requests fall within the narrowly-circumscribed scope of review, please contact me to discuss.

Sincerely,

Robert A. Sacks/sa

Robert A. Sacks

cc: Counsel to Objecting Parties
Counsel to Trustees
Counsel to Institutional Investors