SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, LAW DEBENTURE TRUST COMPANY OF NEW YORK, WELLS FARGO BANK, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees under various Pooling and Servicing Agreements and Indenture Trustees under various Indentures), AEGON USA Investment Management, LLC (intervenor), Bayerische Landesbank (intervenor), BlackRock Financial Management, Inc. (intervenor), Cascade Investment, LLC (intervenor), the Federal Home Loan Bank of Atlanta (intervenor), the Federal Home Loan Mortgage Corporation (Freddie Mac) (intervenor), the Federal National Mortgage Association (Fannie Mae) (intervenor), Goldman Sachs Asset Management L.P. (intervenor), Voya Investment Management LLC (f/k/a ING Investment LLC) (intervenor), Invesco Advisers, Inc. (intervenor), Kore Advisors, L.P. (intervenor), Landesbank Baden-Wurttemberg (intervenor), Metropolitan Life Insurance Company (intervenor), Pacific Investment Management Company LLC (intervenor), Sealink Funding Limited (intervenor), Teachers Insurance and Annuity Association of America (intervenor), The Prudential Insurance Company of America (intervenor), the TCW Group, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

-against-

FEDERAL HOME LOAN BANK OF BOSTON (intervenor), TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, LTD. (intervenors), QVT FUND V LP, QVT FUND IV LP, QUINTESSENCE FUND L.P., QVT FINANCIAL LP (intervenors), BREVAN HOWARD CREDIT CATALYSTS MASTER FUND LIMITED AND BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED (intervenor), THE NATIONAL CREDIT UNION ADMINISTRATION BOARD AS LIQUIDATING AGENT FOR U.S. CENTRAL FEDERAL CREDIT UNION, WESTERN CORPORATE FEDERAL CREDIT UNION, MEMBERS UNITED CORPORATE FEDERAL CREDIT UNION, SOUTHWEST CORPORATE FEDERAL CREDIT UNION, AND CONSTITUTION CORPORATE FEDERAL CREDIT UNION (intervenor), and AMBAC ASSURANCE CORPORATION, THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION (intervenors), AND W&L INVESTMENTS, LLC (intervenor).

Respondents,

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

Index No. 652382/2014

Assigned to: Friedman, J.

THE INSTITUTIONAL INVESTORS' MEMORANDUM OF LAW IN OPPOSITION TO OBJECTORS' OMNIBUS MOTION TO COMPEL

Motion Sequence No. 21

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The Institutional Investors oppose the Objectors' attempt to compel the production of documents reflecting their confidential mediation communications because:

1) The contents of the mediation communications are irrelevant to the sole issue in this proceeding: whether the Trustees acted reasonably and within the scope of their discretion when they evaluated and accepted JPMorgan's settlement offer;

2) The Trustees did not review or rely on the mediation communications in making their decision, so their decision was not informed (or misinformed) by them; and,

3) The Trustees seek no finding concerning the nature or content of the mediation communications (e.g., that the settlement negotiations were "arm's length," as was sought in the Countrywide Article 77 proceeding before Justice Kapnick).

Given these facts, the only argument left to the Objectors would be that the Trustees' decision to accept the $4.5 billion settlement offer, without a prior review of the mediation communications, was an abuse of discretion. However, the assertion that the Trustees abused their discretion when they decided to accept the settlement offer in reliance on expert opinions, without a review of the mediation communications, can be assessed only from the vantage point of the Trustees at the time the decision was made, and cannot be based on hindsight or second-guessed by examining information (here, mediation communications) that was not available to the Trustees at the time.

In addition to being irrelevant, these documents are mediation communications protected from disclosure by both the California mediation statute and New York common law. Though these documents are protected by the law of both states, if New York and California law are found to conflict on this issue, New York choice of law rules would dictate California law as the rule of decision, and California privileges those communications absolutely.

Finally, ordering the production of these privileged mediation communications would impose an undue burden on the Court, the parties and this proceeding. The facts establish that the

Trustees requested these communications, but could not obtain them because JPMorgan and the Institutional Investors stood on their privilege. Expanding this proceeding to include a collateral examination of settlement communications the Trustees did *not* and could *not* review will prove nothing on the ultimate question to be decided by the Court: whether the Trustees abused their discretion by evaluating and ultimately accepting the settlement based on the advice of their experts and other information, without access to the mediation communications. However, no part of that inquiry requires discovery of the *content* of those communications. So the Objectors' motion should be denied.[1]

The Institutional Investors oppose Objector Triaxx's attempt to compel them to disclose their historical holdings in the Accepting Trusts, dating back more than 5 years before the Trustees' decision' to enter into the settlement. This information is irrelevant because it played no role in the Trustees decision and presents no issue to be decided by the Court.

The Institutional Investors also oppose Objector W&L Investment's attempt to compel the production of the Institutional Investors' mediation communications, attorney/client communications, and work product regarding the distribution provision of the settlement agreement (the portion of the settlement agreement that describes how the settlement proceeds are treated in the payment "waterfall" in the Trusts' governing agreements). These documents are irrelevant to W&L's objection – that the distribution provision is inconsistent with the Trusts' governing agreements – because the distribution provision either is, or is not, inconsistent with the governing agreements (it is not), and the Institutional Investors' communications and work

[1] In an attempt to compromise on this issue, the Institutional Investors agreed to produce, and have produced, the draft settlement agreements exchanged between themselves and JPMorgan in their mediation (subject to a stipulation entered by the Court (Doc. No. 357) providing that such production did not constitute a waiver of the Institutional Investors' privilege and relevance objections).

product (which the Trustees did not review or have access to) have no relevance to this question. Moreover, these materials are privileged, as confidential mediation communications, attorney/client communications, and work product, and W&L has offered no argument that would permit them to invade the Institutional Investors' privileges.

I. THE MOTION TO COMPEL THE PRODUCTION OF MEDIATION COMMUNICATIONS SHOULD BE DENIED

A. The Mediation Communications Are Irrelevant to the Issues Presented in this Proceeding

1. Discovery in This Proceeding Is Limited to Matters That Shed Light on the Reasonableness and Good Faith of the Trustees' Decision Making Process, and Does Not Include Information that Was Neither Reviewed By nor Available to the Trustees

"[D]iscovery sought . . . must be relevant to the issue or issues in controversy."[2] In an Article 77 proceeding concerning a "trustee's settlement of claims of misconduct on the part of the originator and servicer of residential mortgage backed securities," the *sole* issue in controversy is whether, in light of "the standard of deference due to a trustee's exercise of discretionary judgment," "the trustee's discretionary power was exercised reasonably and in good faith."[3] Whether the Trustees made the "correct" decision, or one with which the Court

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[2] *Stephan-Leedom Carpet Co., Inc. v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 101 A.D.2d 574, 577 (1st Dep't 1984) (*quoting Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968)) ("[D]iscovery sought must relate to 'facts bearing on the controversy which will assist preparation for trial by sharpening issues and reducing delay and prolixity. The test is one of usefulness and reason.' In short, it must be relevant to the issue or issues in controversy.")

[3] *In re The Bank of New York Mellon*, 127 A.D.3d 120, 122-23, 125, 128 (1st Dep't 2015) ("This appeal requires us to consider the nature and extent of the scrutiny the court may properly apply to a trustee's settlement of claims of misconduct on the part of the originator and servicer of residential mortgage backed securities. . . . The ultimate issue for determination here is whether the trustee's discretionary power was exercised reasonably and in good faith.")

might agree after conducting its own analysis of the merits, is *not* at issue.[4] Nor is the Court to "micromanage" or "second guess" the Trustees' decision,[5] or evaluate that decision after the fact based on information (here, the mediation communications) that the Trustees did not review and could not obtain.[6]

2. The Trustees Exercised their Discretion to Evaluate the Settlement Offer Without Access to the Mediation Communications

The mediation communications at issue came about when the Institutional Investors and JPMorgan, with the assistance of a nationally recognized California mediator, engaged in a lengthy series of discussions regarding a potential settlement of JPMorgan's alleged repurchase and servicing liability to certain RMBS trusts in which the Institutional Investors hold certificates. *See* Patrick Affidavit at ¶¶ 3-4. The Trustees did not participate in, nor were they informed of, the contents of those discussions. *Id*. at ¶ 5. Eventually, with the assistance of the

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[4] *Id*. at 125 ("It is not the task of the court to decide whether we agree with the Trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion.")

[5] *Id*. at 128 ("Supreme Court disregarded the standard of deference due to a trustee's exercise of discretionary judgment. Indeed, in doing so the court was, in effect, improperly imposing a stricter and far less deferential standard, one that allows a court to micromanage and second guess the reasoned, and reasonable, decisions of a trustee.").

[6] *LNC Inv., Inc. v. Nat'l Westminster Bank, N.J.*, 308 F.3d 169, 176 (2d Cir. 2002), *cert. denied* 538 U.S. 1033(2003) (applying New York law) ("With regard to [the trustee's] prudence, . . . the question is not what appears to be prudent in light of our current understanding . . . , but rather what was prudent in light of what could reasonably have been known to the Trustees at the time."). *Accord Costello v Costello*, 209 N.Y. 252, 261 (1913) ("The question whether or not the trustees were culpably negligent should be determined with reference to the situation at the time . . . A wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by."); *St. Louis Union Trust Co. v. Stoffregen*, 40 N.Y.S.2d 527, 532 (Sup. Ct. New York Cnty. 1942) ("To adopt hindsight as a yard stick for the trustees' conduct would be grossly unjust to them; moreover it would create a dangerous and unfair standard of conduct for fiduciaries generally. Men are not charged with omnipotence or clairvoyance; they can act only on human indices available, at the time of action or inaction.").

mediator, the Institutional Investors and JPMorgan reached agreement on the terms of a settlement offer that JPMorgan would be obligated to make to the Trustees, with the further agreement that the Institutional Investors would urge the Trustees to accept it and, if accepted by the Trustees, would support the settlement in any subsequent action necessary to consummate it. *Id*. at ¶ 6. JPMorgan and the Institutional Investors agreed the offer of settlement would bind JPMorgan to perform only if it was accepted by the Trustees after their own independent evaluation. *Id*.

After they received the settlement offer, the Trustees evaluated its merits with the assistance of highly qualified, independent experts.[7] *See* Trustees' First Amended Petition (Doc. No. 57) at ¶¶ 3-4. In the course of evaluating the settlement offer, the Trustees requested access to the mediation communications, but JPM and the Institutional Investors elected not to waive their claims of confidentiality and privilege. *See* Patrick Affidavit at ¶ 7. The Trustees then exercised their discretion to continue their evaluation using the other, abundant information and expert analysis available to them. *See* Trustees' First Amended Petition (Doc. No. 57) *passim*. In reasonable reliance on this information, the Trustees assessed in good faith whether the settlement consideration offered to each Trust was in the best interests of the investors in that Trust, and exercised their discretion to accept the offer on behalf of the Accepting Trusts. *Id*. They also rejected the settlement offer on behalf of other trusts and loan groups. *Id*. In making their decisions, the Trustees did not receive, review, or rely on any information concerning the contents of the mediation communications between the Institutional Investors and JPMorgan. *See* Patrick Affidavit at ¶ 7; Fischel Report (Exh. 2 to Patrick Aff.) at 7 n. 17 ("We have not been

[7] *See* Trustees First Amended Petition (Doc. No. 57) at ¶¶ 3-4.

provided with submissions by the G&B [Institutional] Investors and JPM in the course of their negotiations and mediation").

3. The Contents of the Mediation Communications Are Not Relevant to An Assessment of the Reasonableness or Good Faith of the Trustees' Decisions

The Objectors cannot claim that discovery of the content of these mediation communications is relevant to an argument that the Trustees unreasonably *failed* to request access to them, because the Trustees did request such access, and the Institutional Investors and JPMorgan declined to waive their privilege and produce them.[8] The Objectors may try to argue that the Trustees' discretionary decision to continue to evaluate, and ultimately accept, the settlement offer without this information was an abuse of discretion, but the contents of the mediation communications are not relevant to this argument either. As noted above, New York law is clear that discretionary judgments of trustees can *only* be judged "in light of what could reasonably have been known to the Trustees at the time."[9]

The mediation communications are also irrelevant to "whether the trustee's discretionary power was exercised reasonably and in good faith."[10] Unlike the Countywide Article 77 proceeding, the Trustees here seek no finding regarding the conduct of any settlement negotiations. Instead, they seek only a judicial finding that they exercised their discretionary

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[8] This privilege was recognized, though not ruled on, in a discovery motion in the Countrywide Article 77 proceeding. *See* Transcript of June 14, 2012 Hearing in *In re the Bank of New York Mellon* (Countrywide Article 77), Honorable Barbara R. Kapnick presiding (Exh. 4 to Patrick Aff.) at 27-28 ("People will not want to mediate their cases if everything they're putting forward in a mediation or settlement is then out there for the world . . . I understand that concern, and I do think that while in the course of that, of the mediation would probably be privilege . . . .").

[9] *LNC Inv.*, 308 F.3d at 176. *Accord Costello*, 209 N.Y. at 261; *St. Louis Union Trust Co.*, 40 N.Y.S.2d at 532. *See also* fn. 6, *supra.*

[10] *In re The Bank of New York Mellon*, 127 A.D.3d at 125.

power reasonably and in good faith when they decided to accept JPMorgan's settlement offer on the basis of the abundant facts and expert analysis actually available to them.

The Objectors' argument boils down to the claim that the Trustees "should not have" made the discretionary judgment that they could reasonably evaluate JPMorgan's $4.5 billion settlement offer based on the abundant facts and expert analysis available to them, without access to the mediation communications. On the merits (which are not before the Court on this motion), this argument asks the Court to do precisely that which the First Department has instructed this Court not to do: "disregard[] the standard of deference due to a trustee's exercise of discretionary judgment" and instead "micromanage and second guess" a trustee's decision making process.[11] For purposes of this motion, this argument raises no issue that places the content of the mediation communications at issue, because the Trustees' discretionary judgment that they could adequately evaluate the settlement offer without access to the mediation discussions was based on – and can only be judged on – the information that was available to them at that time, information that did not include the contents of the settlement communications.[12]

4. The Objectors' "Allocation Formula" Argument Misunderstands the Settlement Agreement and the Issues in this Proceeding

[11] *In re The Bank of New York Mellon*, 127 A.D.3d at 128 ("Supreme Court disregarded the standard of deference due to a trustee's exercise of discretionary judgment. Indeed, in doing so the court was, in effect, improperly imposing a stricter and far less deferential standard, one that allows a court to micromanage and second guess the reasoned, and reasonable, decisions of a trustee."). Even if no deference were due to the Trustees' decision in this regard, it would have been patently unreasonable for them to refuse to consider a multi-billion dollar settlement offer simply because they did not know the contents of mediation communications that preceded it.

[12] *Costello*, 209 N.Y. at 261; *St. Louis Union Trust Co.*, 40 N.Y.S.2d at 532; *LNC Inv.*, 308 F.3d at 176.

The Objectors' separate argument that they need discovery of the mediation communications to evaluate the origin of the allocation formula in the settlement agreement (which specified the specific amount of the cash offer made separately to each individual Trust and Loan Group) is a *non sequitur*. No part of the Trustees' requested relief concerns the *origins* of that formula. Instead, the Trustees ask only for judicial confirmation that they acted in the scope of their discretionary authority (*i.e.*, reasonably and in good faith) when they evaluated whether the cash amount JPMorgan had offered to each individual trust, *as a result of* the allocation formula was a reasonable settlement for that Trust or Loan Group. The negotiations that led to that formula are not relevant to that issue.

Nor, as the Objectors have suggested, is discovery of mediation communications necessary to examine the motives of the Institutional Investors, or to determine if there is some "side deal" between them and JPMorgan. No part of the petition seeks relief concerning the motives or actions of the Institutional Investors. The sole issue before the Court is whether *the Trustees* exercised their discretionary power reasonably and in good faith, meaning the relevant focus of this inquiry is exclusively on the Trustees and their analysis.

Nor is discovery of the mediation communications appropriate in this proceeding to test the Objectors' rank speculation, devoid of any factual basis, that there might be some sort of "side deal" between JPMorgan and the Institutional Investors. The sole issue here is whether the Trustees acted within the scope of their discretion when they accepted the offer that was made to them, not whether the Objectors' imaginings of other agreements is true. Moreover, the existence of any such side agreement between the Institutional Investors and JPMorgan is precluded by the plain terms of the agreement between them that obligated JPMorgan to make the binding settlement offer to the Trustees. *See* November 15, 2013 RMBS Settlement

Agreement between the Institutional Investors and JPMorgan (Exh. 3 to Patrick Aff.) at § 7.12 ("This document contains the entire agreement between the Parties").

B. The Mediation Communications Are Protected from Disclosure by Both the California Mediation Statute and New York Common Law

Because the mediation communications are irrelevant, the Court need not resolve whether they are also protected from discovery by California or New York law or, if those laws conflict, which law applies. However, as we demonstrate below, these confidential mediation communications are shielded from discovery under the laws of both California and New York (the only states' law that either party contends apply here), and if the Court were to conclude that the laws of New York and California were in conflict, choice of law principles require that the Court apply California's broad mediation privilege.

1. California Law

The confidential mediation communications Objectors demand included three California institutional investors whose holdings accounted for over 40% of the Institutional Investors' holdings (well more than the holdings of investors in any other state).[13] They occurred in a mediation conducted by a California mediator[14] acting pursuant to a mediation agreement governed by California law.[15] The mediation included in person mediation sessions in California, and numerous telephone negotiation sessions with the mediator in California, and JPMorgan's lead counsel, based in California.[16]

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[13] *See* Patrick Affidavit at ¶ 2.

[14] *Id*. at ¶ 3.

[15] *Id.* at ¶ 3; Mediation Agreement (Exh. 1 to Patrick Aff.) at § 9.

[16] *See* Patrick Affidavit at ¶ 3-4.

The California mediation statute provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." Cal. Evid. Code § 1119. The statute bars discovery of any "writing … prepared for the purpose of, in the course of, or pursuant to, a mediation," and provides that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation … shall remain confidential." *Id*.

The California Supreme Court has held "these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected."[17] California does not recognize any "good cause" exception to this statutory scheme based on "prejudice" or "injustice" to the party seeking the mediation communications, so "courts are thus not free to balance the importance of mediation confidentiality against a party's need for the materials sought."[18] Thus, under California law, the mediation communications at issue here are protected from discovery.

In attempting to avoid the application of California statute, the Objectors cite Section 1120(a) of the California Evidence Code, which prohibits parties from tactically shielding otherwise discoverable information that is irrelevant to mediation simply by exchanging it in mediation.[19] However, the very categories of information the Objectors' demand – "[a]ny presentations, analyses, or other documents or communications provided to or discussed with

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[17] *Cassell v. Superior Court*, 244 P.3d 1080, 1083 (Cal. 2011).

[18] *Id.* at 1089.

[19] "Evidence otherwise admissible or subject to discovery outside of mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation." Cal. Evid. Code § 1120(a).

JPMorgan relating to *the subject matter of the Settlement or the negotiation of the Settlement*"[20] – demonstrates that the exception does not apply. These documents fall squarely within the core of materials shielded by the statute, because they are "communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... [and] "writing … prepared for the purpose of, in the course of, or pursuant to, a mediation."[21] The Objectors do not argue (nor could they) that the mediating parties exchanged documents in this mediation as a pretext to avoid otherwise permissible discovery; to the contrary, the premise of Objectors' discovery demand is that these documents were created and exchanged *for the purpose* of trying to negotiate a settlement. The documents the Objectors seek are the sum and substance of the mediation itself. Under California law, they are not discoverable.

2. New York Law

Although New York has no statutory mediation privilege, New York common law likewise shields mediation communications from discovery. New York courts have repeatedly held that "settlement negotiations are protected from discovery pursuant to the public policy of encouraging and facilitating settlement." *Crow-Crimmins-Wolff & Munier v. County of Westchester*, 126 A.D.2d 696, 697 (2nd Dep't 1987) ("Admissions of fact explicitly or implicitly made 'without prejudice' during settlement negotiations are protected from discovery pursuant to the public policy of encouraging and facilitating settlement. Actions taken and observations made for the stated purpose of arriving at a settlement agreement…should likewise generally be protected by the same public policy of encouraging attempts at settlement."). *Accord Chemical*

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[20] *See* Objectors' Brief at 4, *quoting* Request No. 1 of Respondent-Investors' First Set of Requests for Production.

[21] Cal. Evid. Code § 1119.

Bank v. Stahl, 244 A.D.2d 234 (1st Dep't 1997) (affirming denial of motion to compel because the documents at issue "are immune from discovery since they were created solely in anticipation of . . . settlement negotiations."); *Lynbrook Glass & Architectural Metals, Corp. v. Elite Associates, Inc.*, 238 A.D. 319 (2nd Dep't 1997) ("As part of their attempt to settle this matter, the parties to the mediation agreed that the report and other similar reports, prepared expressly for the mediation, were to be kept confidential. It was therefore properly held to be protected from disclosure."); *Randall Elec., Inc. v. State of New York*, 150 A.D.2d 875 (3rd Dep't 1989) ("affirming denial of motion to compel because "the subject documents were created specifically and directly as a result of the informal, off-the-record negotiations designed to settle claimant's claim and not in the normal course of the administration of the contract."); *NYP Holdings, Inc. v. McClier Corp.*, 2007 WL 519272, at *4-5 (Sup. Ct. N.Y. Cnty. 2007) ("It is the policy of this court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings. One of the reasons for this is to encourage the parties to be completely open with the mediation and each other during mediation proceedings. Such openness makes resolution of actions and compromise of disputes possible. . . . In view of this policy, the court has not now directed disclosure or even production for in camera review of the mediation documents.") *C.f.* SUPREME COURT, NEW YORK COUNTY, COMMERCIAL DIVISION RULES AND PROCEDURES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM, Rule 8 (providing for confidentiality of mediation communications conducted under Commercial Division program).

In a highly misleading and incomplete way, the Objectors cite only one case to support their claim that New York law conflicts with California on this issue: *Hauzinger v. Hauzinger*,[22] in which the Fourth Department (without distinguishing or discussing the contrary authority cited above) ruled that public policy did not prohibit disclosure of mediation communications because New York has not adopted the Uniform Mediation Act.[23] What the Objectors never discuss or even allude to is that this decision was reviewed by the Court of Appeals, which affirmed *only* the result, and took pains *not* to affirm the grounds cited and relied on here by the Objectors.[24] Instead, the Court of Appeals focused on a fact not present here, that both parties to the mediation had consented to disclosure and so had "waived mediation confidentiality."[25] The court explained that "*under these circumstances*, the courts below did not abuse their discretion" in ordering discovery.[26] The Court of Appeals stated plainly that it was neither affirming nor adopting the Appellate Division's rejection of a mediation privilege under New York law, noting that "[w]e do not address what, if any, mediation confidentiality privilege exists under CPLR 3101(b)."[27]

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[22] *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 1290 (4th Dep't 2007), *aff'd on other grounds*, 10 N.Y.3d 923 (2008).

[23] *Id*. The Fourth Department's rejection of confidentiality for mediation communications was reported to have "sent shock waves through the mediation community." Joy S. Rosenthal, *An Argument for Joint Custody As an Option for All Family Court Mediation Program Participants*, 11 N.Y. City L. Rev. 127, 129 n. 4 (2007).

[24] *Hauzinger v. Hauzinger*, 10 N.Y.3d 923, 924 (2008).

[25] *Id*.

[26] *Id*. (emphasis added).

[27] *Id*.

Since the Court of Appeals decision in *Hauzinger*, the Fourth Department's opinion has not been cited or relied on by a single New York court for the proposition that mediation communications are discoverable under New York law. The Objectors also do not point to any more recent New York authority, decided after the Court of Appeals' decision in *Hauzinger*, in which the disclosure of confidential mediation communications were ordered to be produced. Indeed, in the Countrywide Article 77 proceeding, Justice Kapnick indicated strongly that she would not permit discovery of settlement communications between an objector and Bank of America that occurred in mediation.[28]

The Objectors' assertion that the Institutional Investors expectation of confidentiality is somehow diminished because they somehow usurped the role of the Trustees, or are now attempting to settle claims of other certificateholders (as in the case of a class action settlement), is equally meritless. The Institutional Investors did not "step into the shoes" of the Trustees and settle trust claims. That would have been impossible, because the Trusts' claims belong exclusively to the Trustees. The Institutional Investors simply negotiated with JPMorgan to obtain an *offer of settlement* to be made to the Trustees for their evaluation, to be either accepted or rejected as the Trustees determined, in the exercise of their sole and reasonable discretion, for each individual Trust or Loan Group. And that is precisely what the Trustees did, after eight months of careful consideration. It is the Trustees' exercise of discretion in considering and accepting the offer that is at issue here, not the Institutional Investors' effort to obtain the offer in the first place.

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[28] *See* Transcript of June 14, 2012 Hearing in *In re the Bank of New York Mellon* (Countrywide Article 77), Honorable Barbara R. Kapnick presiding (Exh. 4 to Patrick Aff.) at 27-28 ("People will not want to mediate their cases if everything they're putting forward in mediation . . . is then out there for the world . . . I understand that concern, and I do think that while in the course of that, of the mediation would probably be privilege . . . .").

The Institutional Investors also did not settle or attempt to settle the claims of other certificateholders. It has long been established that repurchase and servicing claims are owned exclusively by the Trustees on behalf of the RMBS Trusts.[29] None of the settled claims "belongs" to any certificateholders; in fact, certificateholders are categorically precluded from pursuing them individually by virtue of a "no action" clause in the Trusts' governing agreements.[30] The mediation with JPMorgan therefore did not affect the rights of any certificateholder, because none of the claims discussed are owned by any certificateholder, and the result of the mediation was on *offer* of settlement, not a settlement of trust claims. Moreover, Certificateholders were given nine months of notice and opportunity to review the settlement offer, and raise objections to it, before the Trustees made their decisions to accept or reject it. Certificateholders were also given the opportunity, if they wished to do so in compliance with the governing agreements, to direct a Trustee to reject the settlement for any trust or loan group, pursue litigation, and indemnify the Trustee for doing so. Finally, no aspect of the settlement agreement alters in any way any of the provisions of the governing agreements for the Accepting Trusts.[31]

Nor is this case comparable to a class action, as the Objectors suggest. Unlike a class action, the Institutional Investors simply negotiated *an offer*, not a settlement that bound the

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[29] *Ace Sec. Corp. v. DB Structured Prod., Inc.*, 112 A.D.3d 522 (1st Dep't 2013), *aff'd* __ N.Y.3d __, 2015 WL 3616244 (June 11, 2015) (RMBS trustee, not certificateholder, is only party with standing to assert claims for breaches of mortgage representations and warranties).

[30] *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012).

[31] *See* Settlement Agreement (Doc. No. 3) at § 3.05 ("The Parties agree that this Settlement Agreement . . . is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement.").

Trustees or other investors. The Institutional Investors also did not take on the role of a class representative. Indeed, as is evident from this litigation, investors are clearly free to oppose the JPMorgan offer, or to direct the Trustees to reject it, if they wish. The Objectors' citation to a single, inapposite district court case on this point, *Molina v. Lexmark Int'l, Inc.*, highlights the emptiness of their class action comparison.

In that case, plaintiff in a class action sought to defeat removal to federal court by offering evidence from a prior mediation to show that the defendant knew the amount in controversy met the relevant jurisdictional threshold, but failed to remove the case within the required period.[32] On that record, the court held that the federal common law mediation privilege did not prohibit the disclosure of mediation communications to establish whether the amount in controversy jurisdictional requirement was met.[33] The court noted that there was a reduced expectation of mediation confidentiality in "class action mediation proceedings" because the "mediation settlement affects the rights of third parties."[34] Here, the mediation between the Institutional Investors and JPMorgan had *no* effect on the rights of third parties because its results bound no one, other than JPMorgan which was required to make a binding offer of settlement (and the Institutional Investors who agreed to support it).

These authorities demonstrate that New York courts protect confidential mediation communications from disclosure as a matter of public policy. Accordingly, as would be true under California law, the confidential mediation communications between the Institutional Investors and JPMorgan are immune from discovery in this proceeding under New York law.

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[32] *Molina v. Lexmark Int'l, Inc.*, 2008 WL 4447678 (C.D. Cal. Sept. 30, 2008).

[33] *Id.* at *12.

[34] *Id.* at *16.

3. Because the Laws of Both California and New York Protect Mediation Communications from Discovery, There Is No Need for the Court to Conduct a Choice of Law Analysis

As explained above, the laws of both California and New York protect the Institutional Investors' confidential mediation communications from discovery. Thus, even if the Court were to conclude these communications are relevant to this proceeding (they are not), there would be no need for the Court to conduct a choice of law analysis to conclude that they are not discoverable. It is only if the Court finds both that the communications are relevant, and that New York law would not protect them from discovery (it would), that the Court would then be required to conduct a choice of law analysis. In that event, California law would supply the rule of decision and these communications should be shielded from discovery.

C. If the Court Determines that Mediation Communications Are Not Protected Under New York Law, California Law Should Apply the Rule of Decision

"In order to determine which state's privilege law applies, New York applies its own choice of law rules," which provide that "the governing law is that of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[35] Objectors' erroneous assertion that New York courts apply New York law to evidentiary privileges, because they are "procedural" in nature, is rebutted by the very case they cite in support.[36]

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[35] *Bear, Stearns & Co., Inc. v. McKesson Corp.*, 2007 WL 7126572 (N.Y. Sup. Ct. N.Y. Cnty 2007) (citations and quotations omitted). *Accord Delta Financial Corp. v. Morrison*, 2006 WL 3068853, at *4 (N.Y. Sup. Ct. Nassau Cnty. 2006); *Lego v. Stratos Lightwave, Inc.*, 224 F.R.D. 576, 578 (S.D.N.Y. 2004) (applying New York choice of law rules); *Satcom Intl. Group PLC v. Orbcomm Intl. Partners, L.P.*, 1999 WL 76847 (S.D.N.Y. 1999) (applying New York law rules).

[36] Citing *People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195 (1st Dep't 2008), the Objectors wrongly claim that "[t]he First Department has determined that issues of privilege are procedural, and therefore New York law applies to this Article 77 proceeding." Objectors' Brief at 8. The word "procedural" appears nowhere in the opinion and the court's choice of law did

Here, the interests of California outweigh those of New York, so California law should apply the rule of decision. Three of the Institutional Investors who participated in the mediation (Pacific Investment Management Company LLC, Western Asset Management Company, and the TCW Group, Inc.) are headquartered in California.[37] Their holdings make up 43% of all certificates held by the Institutional Investors in the Accepting Trusts, as compared with only 25% being held by New York based institutions.[38] The mediation was conducted and overseen by a California mediator, under a mediation agreement governed by California law, which provided for strict confidentiality of mediation communications pursuant to California's statute.[39] In person mediation sessions took place in California and by telephone to the mediator in California, and to JPMorgan's lead counsel who is based in California.[40] Because of these contacts with California, the Institutional Investors intended, expected, and agreed with the mediator and with JPMorgan, that their mediation communications were confidential and would be protected from disclosure by California's mediation statute.[41]

On these facts, the interests of California predominate. New York does not have a more significant or compelling interest in allowing the discovery of mediation communications. As the Restatement of Conflicts has explained it, "[t]he forum will be more inclined to give effect to

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not rest on a substantive vs. procedural distinction. Instead, the *Greenberg* court applied New York's choice of law rules, looked to the state with the greatest interest, and determined that New York law applied because its contacts and interests predominated. *Id*. at 198-99.

[37] *See* Patrick Affidavit at ¶ 2.

[38] *Id*.

[39] *Id*. at ¶ 3.

[40] *Id*. at ¶ 3-4. Negotiation sessions also took place in New York and by telephone to Texas. *Id*.

[41] *Id*. at ¶ 3-5.

a privilege which, although different, is generally similar to one or more privileges found in local law."[42] Moreover, because "the forum will be more inclined to give effect to a privilege if it was probably relied on by the parties,"[43] California's interests are significant because the Institutional Investors (the plurality of whose holdings are in California) were aware of and relied on the California mediation statute to protect the confidentiality of their mediation communications.[44] As one New York court has explained it, in selecting and applying California law to shield mediation communications from discovery, where "the parties who made the communications expected that those communications would remain confidential under the law of that jurisdiction . . . th[at] state has an interest in furthering the policies behind the privilege at issue."[45]

Here, a group of investors, predominated by California-based holders, engaged in mediation before a California mediator, under an agreement choosing California law, with the expectation and intent that their communications would be protected from discovery by a California statute. On these facts, California's interests predominate over those of New York (which itself typically protects mediation communications as a matter of public policy) when New York's only contacts are that this action is pending in New York, some of the mediation sessions occurred in New York, and investors representing a minority of the holdings of the Institutional Investors reside in New York.

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[42] RESTATEMENT (SECOND) CONFLICT OF LAWS § 139, cmt on subsection (2) (1971).

[43] *Id.*

[44] *See* Patrick Affidavit at ¶ 3.

[45] *McKesson Corp*., 2007 WL 7126572. *Accord Delta Financial Corp*, 2006 WL 3068853, at *4*; Lego*, 224 F.R.D. at 578.

As a result of these California contacts, even if the Court finds that the mediation communications are relevant, and that there is a conflict between California and New York law on their discoverability, New York choice of law principles require this Court to select California law. As a result, the Objectors' motion should be denied.

D. Expanding This Proceeding to Include an Examination of the Mediation Communications Will Harm Certificateholders and Create Unnecessary Delay

Finally, it bears emphasis that the purpose of a court's review of a trustee's exercise of discretion in an Article 77 proceeding is to protect trust beneficiaries. However, if the Objectors are permitted to convert this proceeding from the focused examination of the trustee's exercise of discretion it is intended to be, into a time consuming detour into collateral matters, trust beneficiaries will be harmed.

The benefits of the settlement – over $4 billion in cash – will not be paid by JPMorgan, and will not flow to certificateholders, until a final judgment is rendered by this Court. Many of the servicing improvements called for in the settlement agreement are also not effective until final court approval. Unnecessary delay in this proceeding will deprive certificateholders of the valuable opportunity to timely reinvest, and earn a return on, the settlement proceeds, and to receive the significant benefits of servicing improvements promised by the settlement. Thus, assuming a conservative 5% annual rate of return for certificateholders on the settlement proceeds, each week of delay would cost them over $4 million in lost returns, a sum they can never recover.[46]

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[46] ($4,000,000,000 x .05) ÷ 52 = $4,038,461

The negotiations into which Objectors seek to expand the scope of these proceedings spanned more than 15 months, included multiple negotiating sessions, and involved a dozen or more participants. *See* Patrick Affidavit at ¶ 4. Discovery into these matters will expand dramatically the scope and duration of pre-hearing discovery and the presentation of evidence at the final hearing. That is certainly what happened in the Countrywide Article 77 proceeding where, unlike here, the Trustee participated in the settlement negotiations and sought findings concerning the nature of the negotiations.[47] Based on the trustee's request for that specific finding, the objectors demanded and conducted 12 depositions of participants in the settlement negotiations. *See* Patrick Affidavit at ¶ 8. At the final hearing before Justice Kapnick, more than 11 full trial days (out of 36 days total) were consumed by the examination of five different settlement negotiators, with additional submissions of lengthy written deposition excerpts from witnesses who were not examined live in court. *Id*.

II. TRIAXX'S MOTION TO COMPEL DISCLOSURE OF THE INSTITUTIONAL INVESTORS' HISTORICAL HOLDINGS SHOULD BE DENIED

Triaxx attempts to compel the Institutional Investors to disclose their historical holdings in the Accepting Trusts, dating back more than 5 years before the Trustees' decision to enter into the settlement.[48] Triaxx does not explain how the Institutional Investors' holdings in 2008 and 2009 have any bearing on the sole issue in this case: whether, in 2013 and 2014, the Trustees exercised their discretionary power reasonably and in good faith. Instead, Triaxx claims the

[47] *See* Countrywide Proposed Final Order and Judgment (Exh. 6 to Patrick Aff.) at ¶ j (requesting a finding that "[t]he arm's-length negotiations that led to the Settlement Agreement and the Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims.")

[48] The Institutional Investors have disclosed their current holdings in the Accepting Trusts.

Institutional Investors' historical holdings are relevant to the "fairness" of the so-called allocation formula in the settlement agreement. *See* Settlement Agreement (Doc. No. 3) § 3.05.[49]

This argument misreads the function of the allocation formula. JPMorgan's settlement offer, though contained in a single agreement, was in fact made separately to each individual Trust and Loan Group. *See* Settlement Agreement (Doc. No. 3) § 2.03(a) (providing for acceptance or rejection by the Trustees on a trust-by-trust, or loan group-by-loan group, basis). The allocation formula specifies the specific amount of the cash offer made separately to each individual Trust and Loan Group. *Id.* at § 3.05. Thus, the discretionary decision that was made by the Trustees in relation to the allocation formula was not whether, in general, it was "fair" or "unfair." Rather, it was whether it was in the best interest of each Trust or Loan Group to accept the cash offer that was being made to it, as a result of the formula.[50] Triaxx does not claim (nor could it) that discovery of the Institutional Investors' historical holdings is somehow relevant to this decision.

Triaxx's claim that disclosure of the Institutional Investors' historical holdings will assist Triaxx in "understanding" other issues similarly fails. Triaxx urges the Court to permit it to litigate *its own* opinion that certain Trusts (ones in which it holds certificates) should have been offered more cash, while other Trusts (in which it doesn't hold certificates) should have been offered less. That issue is not before the Court. The Trustees were presented with the offer JPMorgan actually made, not some hypothetical offer Triaxx supposes it "might" have made,

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[49] This is the same allocation formula that appears in the Countrywide settlement agreement.

[50] Fischel Report (Exh. 2 to Patrick Aff.) at ¶ 78 ("We estimated the share of the Settlement Payment each Trust would receive in accordance with Section 3.05 of the Settlement Agreement.") and *passim*.

and the sole issue before the Court is whether the Trustees acted reasonably and in good faith in exercising their discretion to accept that offer. Deciding that issue does not require the Court to litigate the merits of the settled claims by comparing investor recoveries to investor losses, and no part of the Trustees' request for relief turns on whether the Institutional Investors had any alleged conflict of interest, either.

In the end, Triaxx's demand for this discovery lays bare that its purpose is to persuade the Court to do what it cannot do: micro-manage the Trustee's process by interposing its own, independent allocation expert so that the Court will somehow (Triaxx doesn't say how) compel JPMorgan to make a different settlement offer. That is not the Court's limited role in this Article 77 Proceeding.

III. W&L INVESTMENTS' MOTION TO COMPEL DISCLOSURE OF DOCUMENTS RELATING TO THE DISTRIBUTION PROVISION SHOULD BE DENIED

W&L Investments seeks to compel the Institutional Investors to produce an astonishingly broad range of documents relating to the settlement agreement's distribution provision. W&L"s motion should be denied, because none of the requested documents is relevant, and virtually all of them are protected by the mediation privilege, the attorney/client privilege, and the work product privilege.

W&L's sole objection in this proceeding relates to § 3.06 of the Settlement Agreement, which describes how each Trust's settlement proceeds are to be treated under the payment "waterfall" contained in each trust's governing agreements, namely as a "subsequent recovery" of principal on the trust's mortgage loans.[51] This is the same treatment as was approved by

[51] Settlement Agreement (Doc. No. 3) § 3.06.

Justice Kapnick in the Countrywide settlement agreement.[52] W&L claims this provision violates the governing agreements for the Trusts in which it holds certificates.

On the basis of this objection, W&L demands that the Institutional Investors turn over all documents in their possession relating to this provision, including all documents concerning amounts the Institutional Investors will receive if it is implemented according to its terms, as well as mediation communications, attorney-client communications, and work product. Moreover, W&L demands that documents reaching back to 2010 (the beginning of the negotiations of the Countrywide settlement) also be produced.

The burden and harassment of this demand is obvious. W&L's claim that it must understand the *origins* of the distribution provision (and the Institutional Investors' understanding of how it will affect *them*) to prosecute its objection that the distribution provision violates the terms of the governing agreements is wrong on its face. First, the settlement provision either does or does not violate the governing agreements; only the precise terms of the provision are relevant for determination of this question of law, not how these terms came about, or how the Institutional Investors think it will affect them.

In addition, the Trustees also did not review or rely on any of these materials in making their settlement decisions, so they are irrelevant to the sole issue in this proceeding on that basis, as well. Finally, virtually all of these documents are immune from discovery. Mediation communications with JPMorgan are protected by both New York and California law, as discussed in Part I, *supra*. Communications between and/or among the Institutional Investors

[52] *See* Countrywide Settlement Agreement (Exh. 5 to Patrick Aff.) at § 3(d) (providing for settlement proceeds to be treated as a subsequent recovery of principal in the payment waterfall).

and their counsel relating to the distribution methodology are protected by the attorney/client privilege and any analysis prepared by their attorneys related to this subject matter are immune from discovery as attorney work product.[53]

W&L does not dispute these privileges. Instead, it first claims that "facts are not privileged," an irrelevant assertion given that what it seeks to compel are not facts, but confidential *communications* with counsel and work product. W&L next makes the unprecedented assertion, unsupported by *any* authority, that it is entitled to invade the Institutional Investors' attorney/client communications, and have access to their attorney's confidential work product, because the Institutional Investors attempted to negotiate a settlement offer that, if accepted, would have an effect on certificates held by W&L. This lawless assertion is entitled to no weight or consideration.

IV. CONCLUSION

For all the forgoing reasons, the Objectors' omnibus motion to compel should be denied.

Dated: New York, New York
July 14, 2015

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[53] *See* Patrick Affidavit at ¶ 9.

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