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

Respondents,

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

Index No. 652382/2014

Marcy S. Friedman, J.S.C.

JPMORGAN CHASE & CO.'S MEMORANDUM OF LAW IN OPPOSITION TO THE OBJECTORS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM JPMORGAN

Motion Seq. No. 22

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JPMorgan Chase & Co. ("JPMorgan") respectfully submits this brief in opposition to the Respondent-Investors' Motion to Compel Production of Documents From JPMorgan, filed on July 7, 2015 (Dkt. No. 398) (the "Motion" or "Mot.").

PRELIMINARY STATEMENT

At the conclusion of the June 19 conference, the Court provided the parties with helpful guidance to facilitate resolution of their outstanding discovery disputes and to streamline the issues for the January 20, 2016 final hearing. Cognizant of the Court's directives that there should be some additional "appropriately limited discovery" and that the parties should try again to reach sensible compromises to resolve their disputes, JPMorgan agreed, subject to and without waiver of its relevance objections and in order to avoid burdening the Court with further motion practice, to produce multiple expert reunderwriting reports from other RMBS cases and voluminous loan-level data and information from an ongoing fraud action brought by Ambac Assurance Corporation ("Ambac"). Unfortunately, this gesture of cooperation did not satisfy the Objectors, who insist on burdening the Court by demanding, *for a third time*, that JPMorgan also produce a confidential draft complaint prepared by the U.S. Department of Justice as part of a civil investigation for purported violations of the federal securities laws.

Apparently tone deaf to the Court's previous directives that this draft complaint, which was never filed in any court and is replete with unproven allegations, is "highly unlikely . . . [to] be discoverable" and "highly problematic" in this Article 77 proceeding (Dkt No. 354, Mar. 20, 2015 Tr., at 93:20-24; Dkt. No. 436, June 19, 2015 Tr., at 64:4-11), the Objectors ask the Court yet again, despite its "expressed skepticism," to compel JPMorgan to produce this draft complaint. (Mot. at 2.) The Court should deny this request for the third and final time.

The Objectors try to justify compelled production of this draft complaint by arguing that (i) it "demonstrates that the value of the claims to be released in the Proposed Settlement . . . dwarfs the consideration paid by JPMorgan" and (ii) it contradicts the Trustees' claim that they actually conducted the 'thorough' and 'exhaustive' evaluation process." (Mot. at 2, 9.) Neither argument is correct.

First, at the outset of this proceeding, the Court admonished the Objectors that this proceeding "is not going to be a minitrial on the merits of the repurchase claims." (Dkt. No. 255, Dec. 16, 2014 Tr., at 80:13-17.) Yet, the Objectors openly acknowledge that they are trying to litigate "the *merits and value* of the [settled] claims" by seeking production of the draft DOJ complaint. (Mot. at 8 (emphasis supplied).) Of course, settlement is intended to *avoid* litigation over the merits of the settled claims and, as the First Department recently confirmed, the standard of review in an Article 77 proceeding is deferential: Reviewing courts should not "micromanage and second guess the reasoned, and reasonable, decisions of a trustee." *In re The Bank of New York Mellon*, 127 A.D.3d 120, 128 (1st Dep't 2015).

But even if it were appropriate for the Court to evaluate the "merits and value" of the settled claims (it is not), an unverified draft complaint prepared by a non-party as part of confidential settlement negotiations and filled with unproven allegations carries absolutely no evidentiary value in subsequent, unrelated litigation. Moreover, beyond being worthless for evidentiary purposes, the draft complaint relates to potential *federal securities* claims. The question before the Court, however, is a narrow and entirely different one: Whether the Trustees abused their discretion by agreeing to settle *contractual repurchase* claims. Indeed, the settlement in this action explicitly carves out securities claims owned by individual investors from the scope of release. The Objectors thus engage in some measure of misdirection when

arguing that this draft complaint "relates to the exact conduct for which JPMorgan would be released in the Proposed Settlement." (Mot. at 2.) That is simply not true.

Second, it is undisputed "that the Trustees . . . did *not* request [the draft complaint] in considering the Proposed Settlement." (Mot. at 1 (emphasis in original).) But to the extent it matters, the Trustees did have before them the fact and terms of JPMorgan's "highly publicized" settlement with the Department of Justice and the statement of facts to which JPMorgan and the Department of Justice stipulated as part of that settlement. (Mot. at 2, 5.) Although also not relevant to this proceeding for the same reasons that the draft complaint is not relevant, the statement of facts and the settlement agreement (with all its exhibits and annexes) are available to the Objectors to make whatever arguments they deem appropriate about JPMorgan's supposedly "widespread misconduct surrounding its securitization practices." (Mot. at 9.) The Objectors are free to argue that the Trustees' decision to proceed with evaluating and ultimately accepting the Settlement offer without reviewing unproven allegations in the draft complaint was an abuse of discretion and they can point to the documents publicly available to support that argument. But the actual contents of the draft complaint are simply irrelevant.[1]

RELEVANT BACKGROUND

In the nine-month evaluation period that followed the Institutional Investors' and JPMorgan's presentation of the Settlement Agreement to the Trustees, the Trustees requested, and JPMorgan provided, millions of pages of documents and voluminous data to assist the

[1] The draft complaint not only is replete with unproven allegations relating to different claims and not relevant to the narrow issue before this Court in this proceeding, but also was a document used in connection with settlement discussions. As a policy matter, it would be inappropriate to compel production of such a settlement communication, particularly given that it reflects, at best, potential allegations by a litigant who is not a party to the current proceeding.

Trustees and their experts in evaluating the terms of the proposed Settlement offer.[2] Subject only to the protection of borrower information that cannot reasonably be redacted, the Trustees have reproduced all of this voluminous information to the Objectors.[3] Despite these massive productions—which were offered to the Objectors from the outset of this proceeding—the Objectors propounded eighteen multi-part requests for production upon JPMorgan, seven of which are solely on behalf of Ambac, which is separately suing JPMorgan for alleged fraud (*not* repurchase) in collateral litigation. (*See* Dkt. No. 360.)

At the March 20, 2015 conference, the Court encouraged all sides to bridge their discovery disputes and provided unambiguous direction to the Objectors concerning the draft DOJ complaint: It seems "highly unlikely that [it] would ultimately be discoverable in this action." (Dkt. No. 354, at 93:20-22.) Nevertheless, after months-long periods of silence and without prior notice to JPMorgan, the Objectors filed a motion to compel on May 29, 2015 (in

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[2] The "Settlement" or "Settlement Agreement" refers to the RMBS Trust Settlement Agreement entered into between JPMorgan, the Institutional Investors and the Accepting Trustees (each as defined therein), as modified on July 29, 2014. (Dkt. No. 3.)

[3] Specifically, JPMorgan produced over one million pages of documents in response to requests from the Trustees, including the "reunderwriting analyses" supporting repurchase notices and all subsequent correspondence concerning the Trusts covered by the Settlement and dozens of spreadsheets and other documents detailing historic loan default and repurchase rates. This information was provided to the Trustees' respective subject matter experts who analyzed it and prepared their reports. (*See*, *e.g*., Expert Reports of Daniel R. Fischel, *available at* the Trustees' notice website: http://www.rmbstrusteesettlement.com/doc.php (Doc. Nos. 22-23).) In addition to this extensive discovery from JPMorgan, the Objectors have now received voluminous productions—covering nearly 100 custodians—from the Trustees concerning all correspondence with certificateholders, the Trustees' evaluation of the Settlement Agreement and the Trustees' correspondence with its five experts who prepared eight different reports, several of which span hundreds of pages, covering considerations that ranged from the legal analyses concerning statutes of limitations to the valuation of servicing improvements. (*See* Expert Reports Submitted to the Trustees, *available at* the Trustees' notice website: http://www.rmbstrusteesettlement.com/doc.php (Doc. Nos. 16-23).) Finally, the Objectors received, subject to the parties' stipulation concerning non-waiver of privilege, the draft settlement papers exchanged between JPMorgan and the Institutional Investors. (Dkt. No. 356.) In total, the Objectors have already received more than 1.3 million pages of discovery. (Dkt. No. 436, at 7:23.)

violation of Commercial Division rules) seeking the draft complaint and three other categories of documents, including reunderwriting analyses, all documents concerning a former JPMorgan employee and cloned discovery from Ambac's separate fraud litigation against JPMorgan. (Dkt. No. 367, at 8-9.) The Objectors also moved to compel production of additional voluminous discovery from the Trustees. (Dkt. No. 386.)

At the June 19, 2015 conference, the Court again stated "that the request by the objectors for the DOJ documents . . . seems to me to be highly problematic" and "again, urge[d] the objectors to consider withdrawing their request for those documents." (Dkt. No. 436, at 64:4-11.) As to other matters, the Court directed that "counsel [should] continue to meet and confer in an effort to resolve their discovery disputes." (Dkt. No. 436, at 61:17-18.) Following the conference, at JPMorgan's request, JPMorgan and the Objectors met and conferred multiple times, and ultimately resolved three of the four categories of document demands. Heeding the Court's guidance that all sides should strive to resolve as many discovery disputes as possible, JPMorgan agreed to produce (subject to any restrictions on the disclosure of borrower information) significant additional discovery sought by the Objectors—all of which happens to be irrelevant to this proceeding about whether the Trustees abused their discretion—including thousands of pages of expert reunderwriting reports from other RMBS litigations and numerous databases requested by Ambac containing massive amounts of loan-level data. Yet for their part, despite receiving nearly everything they sought, the Objectors refused to drop their demand for the confidential draft DOJ complaint and now move once again to compel its production, based on their stated, but rather incredible, belief that the Court has yet to really focus on the issue because it has not had "the benefit of full briefing." (Mot. at 2.)

ARGUMENT

I. THE DRAFT DOJ COMPLAINT IS PLAINLY IRRELEVANT TO THIS ARTICLE 77 PROCEEDING.

The draft DOJ complaint is irrelevant for at least three reasons:

First, the Objectors argue that the draft complaint bears on an (impermissible) inquiry into "the *merits and value* of the claims" (Mot. at 8 (emphasis supplied)). But the merits of the settled claims is precisely what this proceeding is *not* about. *See*, *e.g*., *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 does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that." (internal quotation marks and citation omitted)). As the Court made clear in its first conference with the parties, and as the First Department unequivocally confirmed in *In re Bank of New York Mellon*, this proceeding "is not going to be a minitrial on the merits of the repurchase claims." (Dkt. No. 255, at 80:13-17); *see also BlackRock Fin. Mgmt. Inc.* v. *Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 179 (2d Cir. 2014) (remanding Article 77 proceeding and noting that the objectors to that settlement "would . . . recast the removed proceeding (which concerns a trustee's rights, duties, and obligations) into the underlying claim resolved in the Settlement Agreement: A claim by The Bank of New York Mellon against Countrywide and Bank of America to enforce the buy-back provisions of the PSA. That is not the claim that was removed here[.]"). Rather, as Objectors acknowledged in their motion against the Trustees, "the Court is being asked to review the Trustees' *process*, rather than its result[.]" (Dkt No. 386, at 3 (emphasis supplied).) As the Objectors concede there, discovery that is "directed . . . to second-guessing the value of the proposed Settlement" would be inappropriate and should instead address only "the process by which the Trustees evaluated and accepted the proposed Settlement." (Dkt No. 386, at 2.) Yet,

the draft complaint fails under this same process-based standard of review—the contents of the "highly-publicized" draft complaint are irrelevant to the question of whether the Trustees abused their discretion when accepting the Settlement because it is undisputed that the Trustees "did *not* request [it] from JPMorgan." (Mot. at 1 (emphasis in original).) Put simply, because the only conceivable use for the draft complaint would be to litigate the merits of the settled claims, it is not relevant in this case.

Second, the draft complaint has no relation to the settled claims. The Objectors contend that it "relates to the exact conduct for which JPMorgan would be released in the Proposed Settlement[.]" (Mot. at 2.) Nothing could be farther from the truth. The draft complaint relates to *potential federal securities law* claims and JPMorgan's supposed failure to disclose certain information to investors in public offering materials. By contrast, the Settlement relates to *contractual repurchase and servicing* claims under separate agreements. The Settlement Agreement explicitly excludes any release for "any direct individual claims for *securities fraud or other alleged disclosure violations*[.]" (Dkt No. 3, at § 4.04 (emphasis supplied).) For this reason, the Objectors' contention that a Pennsylvania state court ordered the production of the draft complaint is beside the point: Unlike this case, that action involved securities claims and thus says nothing about whether the draft complaint is discoverable in this entirely different proceeding involving contract-based claims, the merits of which, again, are not being litigated.

Third, even if it were appropriate for the Court to assess the merits of the settled claims, the unproven, unverified and unadmitted allegations in the draft complaint are not probative of anything. The Court cannot possibly make findings in this proceeding based on unproven draft allegations by a non-party from an unrelated matter. In fact, not only is the draft

complaint irrelevant to the Trustees' petition in this Article 77 proceeding, it would also be irrelevant in a full-scale litigation of the settled claims. *See CFIG Assur. N. Am., Inc.* v. *Bank of America, N.A.*, No. 654028/2012, 2013 N.Y. Slip. Op. 51565(U), at *4 (Sup. Ct. N.Y. Cnty. Sept. 23, 2013) (RMBS complaint relying "upon allegations taken from another complaint . . . confidential witness statements, reports of government investigations and media reports" is insufficient to state a claim); *Union Cent. Life Ins. Co.* v. *Ally Fin., Inc.*, No. 11-cv-2890, 2013 WL 2154381, at *1 (S.D.N.Y. Mar. 29, 2013) (finding, in an RMBS case, that plaintiffs' allegations about other lawsuits and government investigations were insufficient for pleading purposes).[4] It consists only of unproven draft allegations, not admitted facts, which would have no real evidentiary value in any case, much less in this Article 77 proceeding where the merits of the settled claims are not before the Court.

To make matters worse, the *draft* allegations here were never finalized into an actual complaint, rendering them even less relevant than allegations routinely disregarded in full-scale litigation. Thus, production of the draft complaint adds nothing while creating a significant risk that this limited proceeding will be mired in litigation over wholly irrelevant issues concerning the merits of potential *securities* claims that were never actually alleged in any court document because the draft complaint was never filed. For example, the Objectors also request, in a parenthetical, "any documents attached or referenced" in the draft complaint, which would significantly expand the scope of discovery beyond the four corners of the draft complaint

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[4] *See also In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 594, 598 (S.D.N.Y. 2011) (striking a complaint's references to a CFTC order because it was "not an adjudication of the underlying issues"); *Dobina* v. *Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 258 (S.D.N.Y. 2012) ("there is no basis to conclude that a DOJ investigation initiated over a year after the events in question is probative of anything"); *In re Manulife Fin. Corp. Secs. Litig.*, 276 F.R.D. 87, 102 (S.D.N.Y, 2011) ("Securities regulators are obligated to examine the behavior of public corporations, and the fact that a regulator is fulfilling this role cannot be sufficient to allege scienter.").

to matters bearing on the merits of completely different, un-filed securities claims. (Mot. at 2.) Unless the Court intends to allow the Objectors to gather and present *actual evidence* concerning the *allegations* in the draft complaint, the draft complaint serves no conceivable purpose here. It can only distract from the actual process-based question before the Court: Whether the Trustees abused their discretion in accepting the Settlement. *See Andon ex rel. Andon* v. *302-304 Mott St. Assocs*., 94 N.Y.2d 740, 745-46 (N.Y. 2000) (in resolving discovery disputes, courts consider the "need for the information against its possible relevance, the burden . . . and the potential for unfettered litigation on [ancillary issues]").

II. EVEN ACCEPTING THE OBJECTORS' EXPLANATION OF RELEVANCE, THE DRAFT COMPLAINT IS STILL IRRELEVANT.

The Objectors do not—and cannot—articulate *any* legitimate need for the draft complaint. They claim that the draft complaint supports their argument that the Trustees acted in bad faith and abused their discretion because the Trustees' "purportedly 'thorough' and 'exhaustive' evaluation" of the Settlement Agreement was illusory without having received and reviewed the draft complaint. (Mot. at 11.) The problem, of course, is that the Objectors need no discovery from JPMorgan to make this argument. That the Trustees could have, but did not, ask to review the draft complaint is undisputed. Indeed, the Objectors cite to the extensive publicly available information and claim that the "landmark $13 billion settlement with the DOJ . . . in which JPMorgan admitted to various forms of misconduct" was a "result[]" of the "DOJ's investigation and draft complaint." (Mot. at 9.) In fact, the Objectors rely extensively on "JPMorgan's admissions" in the publicly available "Statement of Facts" accompanying the DOJ settlement—which the Trustees undisputedly had access to when considering this Settlement—to argue the importance of the draft complaint that the Trustees supposedly failed to consider. (Mot. at 9-10.) As demonstrated by the arguments and citations in their Motion, the Objectors

are free to argue that the Trustees' decision to evaluate and ultimately accept the Settlement, without access to the contents of the draft complaint, was so unreasonable that it amounted to an abuse of discretion. Discovery into the particular contents of the draft complaint is entirely unnecessary, and indeed irrelevant, to this argument because the Trustees' judgment that they could adequately evaluate the Settlement offer without access to the draft complaint was based on the information that was available to them at that time, which did not include the contents of the draft complaint. *See 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) (trustees' judgment can only be judged "in light of what could reasonably have been known to the Trustees at the time").

In all events, this argument amounts to nothing more than precisely the type of micromanaging and second-guessing of a trustee's decision-making process that the First Department has recently warned against.[5] *In re The Bank of New York Mellon*, 127 A.D.3d at 128. Because the contents of the draft complaint are wholly irrelevant to an evaluation of the Trustees' good faith when accepting the Settlement, it has no possible relevance to this proceeding.

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[5] 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 for the benefit of the Accepting Trusts simply because they did not know the exact contents of a "highly publicized" draft complaint prepared by the DOJ applying its formidable regulatory pressure.

CONCLUSION

For the foregoing reasons, the Objectors' Motion should be denied.

Dated: July 14, 2015

Respectfully submitted,

/s/ Robert A. Sacks

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