Matter of U.S. Bank N.A. v Federal Home Loan Bank of Boston
2015 NY Slip Op 32585(U)
August 12, 2015
Supreme Court, New York County
Docket Number: 652382/2014
Judge: Marcy Friedman
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60
PRESENT: Hon. Marcy Friedman, J.S.C.

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, BREVAN HOWARD CREDIT VALUE MASTER FUND LIMITED (intervenors), 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), 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

DECISION

In this CPLR Article 77 proceeding, eight Trustees of residential mortgage-backed securitization (RMBS) Trusts seek judicial approval of their decision to accept a settlement, on behalf of the Trusts, of claims against JPMorgan Chase & Co. and its direct and indirect subsidiaries (JPMorgan).[1] (See First Am. Pet. ¶ 20 [Pets.' Exh. 001].) The proposed settlement, the RMBS Trust Settlement Agreement (Proposed Settlement or Agreement), was negotiated by JPMorgan and a group of institutional investors that together hold approximately 32.45% of the securities issued by the Trusts (the Institutional Investors). (Id. ¶ 1.) This Agreement was initially entered into as of November 15, 2013 by and among the Institutional Investors and JPMorgan as the Seller, Sponsor, Depositor, and/or Servicer for the Trusts. It was presented to the Trustees for their acceptance by letter of the same date. (See Letter, dated Nov. 15, 2013, from Gibbs & Bruns [Institutional Investors' counsel] to Trustees [Pets.' Exh. 005].)[2] The Agreement was modified as of July 29, 2014, and first executed by the Trustees on or around August 1, 2014 on behalf of numerous Trusts and/or loan groups. (RMBS Trust Settlement

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[1] The RMBS securitization process was recently summarized by the Court of Appeals in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581, 589 [2015]). This process and the types of claims commonly brought by RMBS trustees against securitizers in the wake of the financial crisis are also discussed at length in this court's prior RMBS decisions. (See e.g. Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 2016 WL 1587345 [Sup Ct, NY County, Apr. 12, 2016, No. 650291/2013] [FHFA (NC1)]; ACE Secs. Corp., Series 2006-SL2 v DB Structured Prods., Inc., 52 Misc3d 343 [Sup Ct, NY County, Mar. 29, 2016, No. 651854/2014] [ACE (SL2)]; U.S. Bank Natl. Assn. v Greenpoint Mtge. Funding, Inc., 2015 WL 915444 [Sup Ct, NY County, Mar. 3, 2015, No. 651954/2013]; ACE Secs. Corp., Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503 [Sup Ct, NY County, Aug. 28, 2014, No. 651936/2013].)

[2] The eight Trustees are U.S. Bank National Association (U.S. Bank), the Bank of New York Mellon, the Bank of New York Mellon Trust Company, N.A. (collectively BNYM), Wilmington Trust, National Association (Wilmington), Law Debenture Trust Company of New York (Law Debenture), Wells Fargo Bank, National Association (Wells Fargo), HSBC Bank USA, N.A. (HSBC), and Deutsche Bank National Trust Company (Deutsche Bank). The Institutional Investors with which JPMorgan negotiated the Proposed Settlement have intervened as co-petitioners in this proceeding. They are Aegon USA Investment Management, LLC, Bayerische Landesbank, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC (formerly known as ING Investment LLC), Invesco Advisers, Inc., Kore Advisors, L.P., Landesbank Baden-Wurttemberg, Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Sealink Funding Limited, Teachers Insurance and Annuity Association of America, The Prudential Insurance Company of America, the TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Management Company.

Agreement, as executed on August 1, 2014 [Pets.' Exh. 003]).[3] On October 1, 2014, the Trustees accepted the Agreement on behalf of a small additional group of Trusts. (First Am. Pet. ¶ 31.) Ultimately, the Trustee accepted the Proposed Settlement on behalf of loan groups in 319 of the 330 Trusts.[4] (First Am. Pet., Exh. A [listing all accepting Trusts and loan groups].)

Under the provisions of the Agreement, JPMorgan agreed to make a cash payment of up to $4.5 billion to 330 RMBS Trusts administered by the Trustees, in return for the release of all claims against JPMorgan "that arise under or are based upon the Governing Agreements [for the securitizations] and that relate to the origination, sale, delivery and/or servicing of Mortgage Loans to or in the Settlement Trusts, including without limitation":

> "(i) representations or warranties made by any JPMorgan entity, (ii) any alleged obligation to give notice of alleged breaches of representations or warranties, (iii) any alleged obligation of any JPMorgan entity to enforce claims for breaches of representations or warranties against the originator of a Mortgage Loan (including but not limited to any demands already made by the Accepting Trustees or any Investors of the Settlement Trusts), (iv) the documentation of the Mortgage Loans held by the Settlement Trusts including with respect to allegedly defective, incomplete, or non-existent documentation, as well as issues arising out of or relating to recordation, title, assignment, or any other matter relating to legal enforceability of a mortgage or mortgage note, or any alleged failure to provide notice of such defective, incomplete or non-existent documentation, and (v) the servicing of the Mortgage Loans held by the Settlement Trusts (including but not limited to any claim relating to the timing of collection efforts or foreclosure efforts, any foreclosure delays on Mortgage Loans that as of the Effective Date are already in the process of foreclosure, loss mitigation, transfers to subservicers, advances, servicing advances, or claims that servicing includes an obligation to take any action or provide any notice towards, or with respect to, the possible repurchase of Mortgage Loans by the applicable Servicer, Seller, or any other Person) (collectively, all such claims being defined as the '<u>Released</u>

[3] The RMBS Trust Settlement Agreement, as presented to the Trustees on November 15, 2013, was admitted into evidence as Petitioner's Exhibit 005. All citations are to the revised Agreement executed by the Trustees, which is in evidence as Petitioners' Exhibit 003.

[4] Each of the 330 Trusts covered by the Proposed Settlement is comprised of at least one "loan group" (i.e. group of mortgage loans), and the Proposed Settlement allowed the Trustees to accept or reject the offer on a loan group by loan group basis. (RMBS Trust Settlement Agreement ¶ 2.03 [a].)

Claims').”

(RMBS Trust Settlement Agreement §§ 3.01-3.02 [emphasis in original].) In addition, in exchange for the releases, JPMorgan agreed to implement certain servicing improvements set forth in a Subservicing Protocol, annexed as Exhibit B to the Agreement. (Id. § 3.01 [ii] & Exh. B.)

As discussed more fully below, at the time this proceeding was commenced, the court directed an international notice program to provide notice of the Proposed Settlement to investors in the affected Trusts. The court granted leave to intervene as respondents to seven groups of investors that opposed the First Amended Petition (the Objectors).[5] By Order dated October 28, 2014 (NYSCEF No. 101), the court also granted leave to the Institutional Investors to intervene as petitioners in support of the First Amended Petition. Following discovery, an evidentiary hearing was held on the First Amended Petition over four non-consecutive days, commencing on January 20, 2016 and concluding on January 26, 2016. All of the Objectors, except Ambac and W&L, withdrew their objections prior to the commencement of the evidentiary hearing. (NYSCEF Nos. 352, 539, 547, 557, 567.) During the course of the hearing, Ambac reached a resolution with JP Morgan of its objection to the Proposed Settlement and other pending litigation against JP Morgan. (See Jan. 26, 2016 Hearing Tr. at 347-349; Ambac Notice & Stip. of Withdrawal [NYSCEF No. 580].) There is no claim, or evidence in the record

[5] The seven groups of objecting investors who intervened as respondents in this proceeding are (i) the Federal Home Loan Bank of Boston, (ii) Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., Triaxx Prime CDO 2007-1, Ltd. (collectively Triaxx), (iii) QVT Fund V LP, QVT Fund IV LP, Quintessence Fund L.P., QVT Financial LP (collectively QVT), (iv) Brevan Howard Credit Catalysts Master Fund Limited, Brevan Howard Credit Value Master Fund Limited (collectively the DW Funds), (v) 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, Constitution Corporate Federal Credit Union (collectively National Credit Union), (vi) Ambac Assurance Corporation, the Segregated Account of Ambac Assurance Corporation (collectively Ambac); and (vii) W&L Investments, LLC (W&L). The intervention motions by all of the Objectors other than W&L were granted by order dated December 2, 2014. (NYSCEF No. 207.) The W&L intervention motion was granted by order dated March 12, 2015. (NYSCEF No. 315.)

to suggest, that the resolution of the withdrawing respondents' objections affects the settlement amount or will otherwise interfere with the implementation of the Proposed Settlement according to the terms that were disclosed to investors at the outset of this proceeding.

As a result of these withdrawals, no objections remain with respect to 317 of the 319 Trusts at issue in this proceeding – i.e., all but the two Trusts with respect to which W&L continues to maintain an objection.

The Trustees request that the court make the following findings of fact and law, as set forth in a Proposed Final Order and Judgment filed with the court on January 4, 2016 (NYSCEF No. 553):

> "1. For purposes of this Final Order and Judgment, the Court adopts all defined terms set forth in the Settlement Agreement [i.e. the Proposed Settlement]. Capitalized terms used herein, unless otherwise defined, shall have the meanings set forth in the Settlement Agreement.
>
> 2. The Court has jurisdiction over the subject matter of this Article 77 proceeding, all parties to this proceeding, the Accepting Trusts, and all Certificateholders, Noteholders, and other parties claiming rights in the Accepting Trusts. The Court shall retain jurisdiction to enforce the terms of this Final Order and Judgment.
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> 3. As previously found in the August 18, 2014 Order to Show Cause, NYSCEF Doc. 40 and the October 10, 2014 Order to Show Cause, NYSCEF Doc. 68, Certificateholders, Noteholders, and any other parties claiming rights in any Accepting Trust have been provided with notice that was reasonable and adequate and was the best notice practicable, was reasonably calculated to put interested parties on notice of this action, and constitutes due and sufficient notice of this special proceeding in satisfaction of federal and state due process requirements and other applicable law. All such persons have been given the opportunity to be heard in opposition to the First Amended Petition and to raise any claims relating to the Trustees' evaluation and acceptance of the Settlement Agreement.
>
> 4. All objections to the Trustees' conduct in connection with the Settlement Agreement are overruled, and any objections or claims related to the Settlement Agreement that have not been raised are waived.

> 5. Each of the Trustees acted within the bounds of its discretion, reasonably, and in good faith with respect to its evaluation and acceptance of the Settlement Agreement, concerning the Accepting Trusts.
>
> 6. Certificateholders, Noteholders, and any other parties claiming rights in any Accepting Trusts are barred from asserting claims against any Trustee with respect to such Trustee's evaluation and acceptance of the Settlement Agreement and implementation of the Settlement Agreement, so long as such implementation is in accordance with the terms of the Settlement Agreement."[6]

STANDARD OF REVIEW

This proceeding for approval of the Trustees' acceptance of the Proposed Settlement is brought pursuant to CPLR 7701, which provides generally that "[a] special proceeding may be brought [with exceptions not relevant here] to determine a matter relating to any express trust." No appearing party has disputed that Article 77 provides a procedure for the Trustees to seek judicial approval of their decision to accept a settlement of RMBS breach of contract claims, and this is not the first proceeding in which RMBS trustees have been afforded such relief. (See Matter of The Bank of New York Mellon v Retirement Bd. of the Policemen's Annuity & Benefit Fund of the City of Chicago, 127 AD3d 120 [1st Dept 2015], affg as modified 2014 WL 1057187 [Sup Ct, NY County, Jan. 31, 2014, No. 651786/11, Kapnick, J.] [Countrywide]; Matter of U.S. Bank Natl. Assn. [Citigroup Article 77], 51 Misc3d 273 [Sup Ct, NY County 2015] [Citigroup] [this court's prior decision].)

In Countrywide, the Appellate Division of this Department considered a petition, pursuant to CPLR Article 77, for "judicial instructions and approval of a proposed settlement" by an RMBS trustee of its claims against the securitizer and servicer of the trusts. (Countrywide

[6] As the Trustees have represented throughout this proceeding, this proceeding "concern[s] only the Trustees' settlement conduct." (Trustees' Memo. In Opp. to Objs.' Motion to Compel, at 4 [NYSCEF No. 459].) They "are not seeking an order from the Court relating to their pre-settlement duties." (July 23, 2015 Oral Arg. Tr., at 35.)

Verified Pet., Caption; see also 127 AD3d at 124.)[7] In elucidating the standard of review, the Court held that "[t]he ultimate issue for determination . . . is whether the trustee's discretionary power was exercised reasonably and in good faith. 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." (Id. at 125 [citation omitted].)

In approving the settlement, the Court cited the facts that the "[t]he Trustee acted within its authority throughout the process, and there is no indication that it was acting in self-interest or in the interests of BofA rather than those of the certificateholders." (Id. at 126.) The Court also considered the trustee's reliance on the advice of counsel, reasoning:

> "Importantly, if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence. . . . Court approval of the settlement does not require that the court agree with counsel's judgment or assessment; all that is required is a determination that it was reasonable for the Trustee to rely on counsel's expert judgment."

(Id. [quotation marks and citations omitted].) In addition, the Court found that, "[i]n evaluating the elements of the settlement, the Trustee properly obtained and considered the opinions of several highly respected outside experts" on valuation and other issues. (Id. at 127.)

In Citigroup, this court considered a similar petition, brought by four RMBS trustees pursuant to CPLR Article 77, for judicial approval of their decision to accept a settlement, on behalf of the trusts, of claims against the securitizer of the trusts.[8] (51 Misc3d at 274.) No

[7] In Countrywide, BNYM, as RMBS trustee, commenced the Article 77 proceeding for approval of its settlement with the originator and servicer of the trusts, Countrywide Home Loans, and its successor, Bank of America (BofA). (127 AD3d at 123.)

[8] In Citigroup, RMBS trustees U.S. Bank, Deutsche Bank, HSBC, and Law Debenture commenced the Article 77 proceeding for approval of their decision to settle claims against Citigroup Inc. and its direct and indirect

investor or other interested person filed an objection or other papers in opposition to the petition. (Id. at 276.) The court nonetheless undertook a detailed review of the evidence submitted by the trustees concerning their evaluation and acceptance of the settlement. Among other things, the court noted that senior trust personnel had made the decision to accept the settlement following an eight-month evaluation period and regular meetings with counsel. (Id. at 279.) The trustees had also obtained and considered the plausible reports and advice of outside experts on significant legal and valuation issues, including the applicable statute of limitations for repurchase actions, and a comparison of the settlement payment to estimated losses incurred by the Trusts due to breaches of representations and warranties. (Id. at 279-280, 285-286.) A "top-level" expert had been retained to form an independent opinion of the reasonableness of the settlement, and to recommend whether it should be accepted or rejected for each covered loan group. (Id. at 280.) The trustees had taken reasonable steps to ensure their experts' access to necessary information, negotiated several extensions of the deadline to accept the proposed settlement, made substantial efforts to keep investors informed of their progress, and taken investors' views into account in making their final decisions. (Id. at 281.) The Trustees had also provided extensive notice to investors of their opportunity to object to the proposed settlement. (Id. at 282-283.) Applying the standards set forth in Countrywide, the court held that the trustees had exercised their discretionary power reasonably and in good faith in accepting the settlement. (Id. at 284.)

THE TRUSTEES' EVALUATION OF THE PROPOSED SETTLEMENT IN THIS PROCEEDING

As discussed more fully below, the sole remaining Objector in this proceeding, W&L,

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subsidiaries, in their capacities as sellers, sponsors, and/or depositors for the trusts. (51 Misc3d at 274-275.) Each of the Citigroup trustees is also a Trustee in this proceeding.

maintains a limited objection to the Trustee's evaluation and acceptance of the Proposed Settlement. W&L objects solely to the manner in which the settlement payment will be distributed among certificateholders in two of the Trusts. Other Objectors' challenges to the Trustees' evaluation of the Proposed Settlement and its terms have been withdrawn.

As also discussed more fully below, at the hearing, without objection and with the court's approval, the Trustees made a prima facie showing, by affidavits from senior Trust personnel, of the process they followed in evaluating and accepting the Proposed Settlement. (See NYSCEF Nos. 558-565.) The Trustees also called their economic expert, Professor Daniel R. Fischel, who, among other things, had made recommendations to the Trustees as to whether to accept the Proposed Settlement on a Trust and loan group basis. Respondent Ambac did not call any experts or other witnesses before withdrawing as an Objector, and did not complete cross-examination of Professor Fischel. W&L cross-examined Professor Fischel, and also cross-examined Loretta Lundberg of BNYM, whose direct testimony, like that of the other Trustee representatives, was given by affidavit. W&L also called its own expert, Matthew Lewis, who gave general testimony as to the time when losses are sustained as a result of material breaches of representations and warranties affecting the loans underlying the securitizations.

Although W&L objects only to the manner in which the settlement payment will be distributed to certificateholders, the Trustees request a finding that they exercised their discretion reasonably and in good faith in reviewing and approving the entirety of the Proposed Settlement. The court must therefore consider, as it did in Citigroup, whether the Trustees have demonstrated entitlement to such relief. The evidence presented in this action largely parallels the evidence submitted by the trustees in Citigroup.

As in Citigroup, the Trustees' acceptance of the Proposed Settlement followed an

evaluation over an eight-month period. In each case, the final decision of the Trustee was rendered by senior trust personnel, following regular meetings with counsel, and, in the case of U.S. Bank, review of the Proposed Settlement by a working group created specifically to coordinate and otherwise assist with the evaluation.[9] (Valaperta Aff. ¶¶ 13-16, 53; Lundberg Aff. ¶¶ 12-14, 44-46; Nardi Aff. ¶¶ 12-15, 17, 52-54; Musarra Aff. ¶¶ 11-12, 46-47; Sohlberg Aff. ¶¶ 14-19, 54-56; MacKay Aff. ¶¶ 6, 15-16, 44-53; Co Aff. ¶¶ 9-11, 42-45.) Following a multi-stage vetting process, the Trustees and their counsel also retained and considered the opinions of five outside experts on a number of issues relevant to their decision to accept or reject the Proposed Settlement. (See e.g. Valaperta Aff. ¶¶ 19-25.)

On or about December 30, 2013, the Trustees engaged Boston Portfolio Advisors, Inc. (BPA) to provide expert analysis of the mortgage loan servicing-related terms of the Proposed Settlement. Jeremy Reifsnyder of BPA was responsible for the engagement. (Engagement Letter, dated Dec. 30, 2013, from BPA to Trustees' counsel, at 1 [Pets.' Exh. 073]; see Valaperta Aff. ¶ 21.) As Managing Director of BPA, Mr. Reifsnyder provides litigation support and expert witness services related to matters regarding the servicing, origination, administration, and financing of mortgage, consumer, and corporate loan portfolios. (Reifsnyder Expert Report ¶ 1 [Pets.' Exh. 019].) On July 12, 2014, he issued a report which estimates the losses associated with JPMorgan servicing of Trust loans, and the potential benefits of the Subservicing Protocol that was agreed to as part of the Proposed Settlement. (Id. ¶¶ 8-31; Valaperta Aff. ¶ 39.)

On or about January 24, 2014, counsel for the Trustees retained NERA Economic Consulting (NERA) to serve as the Trustees' expert on valuation issues. (Engagement Letter,

[9] U.S. Bank serves as Trustee for 180 of the 330 Trusts covered by the Proposed Settlement. (Valaperta Aff. ¶ 7; see also Pets.' Exh. 051 [listing covered Trusts for which U.S. Bank acts as Trustee].)

dated Jan. 24, 2014, from Dr. Faten Sabry to Trustees' counsel [Pets.' Exh. 076]; see Valaperta Aff. ¶ 21.) Dr. Sabry is Senior Vice President in the Securities and Finance Practice at NERA, where she provides economic consulting and expert testimony in securities, bankruptcy, and complex damages litigation matters, including RMBS matters. (Sabry CV, at 3 [Pets.' Exh. 056].) Her July 17, 2014 Expert Report provides, among other things, estimates of the lifetime net losses of each Trust, the losses potentially attributable to breaches of representations and warranties, and the amount of each Trust's "Allocable Share" – that is, the amount each Trust stood to receive under the Proposed Settlement. (Sabry Expert Report, at 8-11 [Pets.' Exh. 021]; Valaperta Aff. ¶ 38.)

The Trustees also retained two legal experts. (Engagement Letter, dated Mar. 26, 2014, from Trustees' counsel to Alan Schwartz, at 1 [Pets.' Exh. 088]; Engagement Letter, dated Mar. 31, 2014, from Trustees' counsel to Hon. Anthony J. Carpinello [Pets.' Exh. 087].) Professor Schwartz is the Sterling Professor of Law at Yale Law School. (Schwartz CV, at 1 [Pets.' Exh. 081].) He was asked to analyze contractual interpretation issues raised by the transactional documents governing the RMBS Trusts (the Governing Agreements).[10] For example, the Trustees asked him to identify the circumstances under which the Trustees could bring repurchase claims against JPMorgan, rather than against the loan originators, or under which a servicer could be held liable for acts taken, or for refraining from the taking of any act, in connection with servicing of the loans. (Schwartz Expert Report §§ 3.1, 3.3 [Pets.' Exh. 017.) The Trustees further inquired as to the meaning of language in the Governing Agreements that a breach of a representation and warranty must "materially and adversely affect[] the interests of

[10] The Governing Agreements applicable to the Trusts in this case include Pooling and Servicing Agreements, Indentures, and Sale and Servicing Agreements. (See First Am. Pet. ¶¶ 6-10; Pets.' Exh. 014 [CD containing Governing Agreements for each Trust covered by the Proposed Settlement].)

the Certificate holders or a Certificate Insurer in any Mortgage Loan," and whether, to prevail on a repurchase claim, the Trustees would be required to prove a causal link between each breach and the relevant loan's non-performance. (Id. § 3.4.) Professor Schwartz's report on these questions is dated May 27, 2014. (Id. at 14.)

Hon. Anthony J. Carpinello, the second legal expert, is a retired Associate Justice of the New York State Supreme Court, Appellate Division, Third Department. (Carpinello CV, at 3 [Pets.' Exh. 085].) The Trustees asked Justice Carpinello to provide a legal opinion as to the applicable statute of limitations for the claims that would be released by the Proposed Settlement. (Carpinello Expert Report, at 1 [Pets.' Exh. 015].) He released an initial report, dated May 5, 2014, and two supplemental reports, dated May 27 and June 20, 2014. The latter reports analyzed additional statute of limitations issues, as well as the Trustees' obligation, if any, to give notice to JPMorgan as a condition precedent to repurchase litigation. (Pets.' Exhs. 016, 018.)

Professor Fischel, of Compass Lexecon, served as the Trustees' "Economic Expert." (Valaperta Aff. ¶ 21; Engagement Letter, dated Jan. 8, 2014, from Prof. Fischel to Trustees' counsel [Pets.' Exh. 074].) Professor Fischel is the President and Chairman of Compass Lexecon, and a professor emeritus of law and business at the University of Chicago Law School. (Fischel CV, at 1 [Pets.' Exh. 055].) He was retained by counsel for the Trustees to provide an independent opinion on the "reasonableness of the settlement as to each Trust and Loan Group, in light of the reports of the valuation expert, servicing expert, legal experts, and other factors that [he] deemed relevant." (Lundberg Aff. ¶ 26; Fischel Expert Report ¶ 12 [Pets.' Exh. 20]; Jan. 20, 2016 Hearing Tr., at 125-126.) His initial Expert Report, dated July 17, 2014,[11] included

[11] Ambac objected to the admission of Professor Fischel's reports at the evidentiary hearing (Jan. 20, 2016 Hearing Tr., at 133-134), and moved in limine to preclude him from offering expert opinion to the court. (See id. at 85-95;

the following: (i) a comparison of the Proposed Settlement to other recent settlements involving similar issues, including the settlements in the Countrywide and Citigroup Article 77 proceedings (Fischel Expert Report ¶¶ 32-42); (ii) an analysis of the market reaction to the Proposed Settlement (id. ¶¶ 58-76); (iii) an estimation of each Trust's settlement payment and of the value of the Subservicing Protocol to each Trust (id. ¶¶ 77-95); and (iv) an analysis of the impact of the statute of limitations, in reliance upon the reports of Justice Carpinello (id. ¶¶ 123-126). He estimated the potential recovery of each Trust in litigation if the Proposed Settlement were rejected, using six different measures of material breach rate, including loan file reviews from other cases. (Id. ¶¶ 106-110.) He also considered the support and opposition of investors to the Proposed Settlement (id. ¶¶ 52-57), and the uncertainty as to whether claims would be pursued if the settlement were rejected. (Id. ¶ 19.)

Based on the above analysis, Professor Fischel recommended that the Proposed Settlement be rejected for a particular Trust where each of the following criteria was met: (1) "[t]he holders of a substantial portion of the Trust's Certificates [had] expressed opposition to accepting the Proposed Settlement for that Trust and their holdings exceed[ed] those of Certificateholders who supported the Proposed Settlement"; (2) there was an "indication," using one of the six measures of material breach rate referenced above, that the Trust's expected recovery in litigation "would be greater than the value of the Settlement Consideration"; and (3) the Trust's claims, other than those related to servicing, were not likely to be time-barred, or

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Resps.' Letter, dated Jan. 4, 2016 [Ct.'s Exh. 1].) The court admitted the reports for the limited purpose of showing the advice that the Trustees received in making their decisions to accept or reject the Proposed Settlement for each Trust and/or loan group. (Id. at 134.) Ambac subsequently withdrew its objection to the First Amended Petition, with prejudice, and specifically withdrew its motion in limine. (Notice & Stip. of Withdrawal, dated Jan. 25, 2016 [NYSCEF No. 580]; Jan. 26, 2016 Hearing Tr., at 348.) The remaining Objector, respondent W&L, took no position on the motion in limine (Jan. 20, 2016 Hearing Tr., at 96), and stated as follows with respect to the admission of the reports: "[W]e certainly have the position that they should be admitted for what was provided to the trustee in terms of their notice. We don't have a position at this time with respect to the truth of the matters asserted." (Id. at 134.)

there was an indication that the Trust's recovery on servicing claims would exceed the value of the settlement consideration. (Id. ¶¶ 29-30.) Fischel included an "important caveat" that "before a Trustee rejects the Proposed Settlement for any Trust, the Trustee needs to be confident that there is a Group [of certificateholders] that is willing and able to direct and indemnify the Trustee to complete the investigation and potential litigation that would likely be necessary to pursue claims against JPM[organ}." (Id. ¶ 31.)

Professor Fischel applied these criteria to each of the 330 Trusts covered by the Proposed Settlement and made individual recommendations to the Trustees to either accept or reject the settlement. (Id., Exh. T [chart documenting application of criteria to each Trust.) He subsequently issued a Supplemental Expert Report, dated July 26, 2014, in which he adapted the methodology and criteria detailed above so as to enable him to make recommendations on a loan group level. (Fischel Suppl. Expert Report [Pets.' Exh. 022].)

Based on the credible undisputed evidence, the court finds, as in Citigroup, that the Trustees took reasonable steps to ensure that their experts had the information necessary to form reasoned opinions. (See Jan. 20, 2016 Hearing Tr., at 126-130.) They participated in regular calls with the experts to monitor their progress, ensure coordination among the experts, and facilitate information and document requests.[12] (Valaperta ¶ 30; Lundberg Aff. ¶ 31; MacKay Aff. ¶ 28.) They secured from JPMorgan several extensions of time to respond to the Proposed

[12] U.S. Bank produced evidence that it provided, among other documents, the agreements governing its Trusts, summaries of certain provisions in those agreements requested by the experts, copies of correspondence from investors concerning the Proposed Settlement, data concerning lawsuits then being prosecuted by U.S. Bank involving breach of mortgage loan representation and warranty claims, mortgage loan repurchase correspondence concerning certain Trusts, and tolling agreements applicable to the Trusts. (Valaperta Aff. ¶ 27.) At the experts' request, counsel for the Trustees conferred with JPMorgan to obtain additional documents and information, including "transaction closing sets," historic mortgage loan repurchase and performance information, mortgage loan modification data, mortgage loan breach notices received by JPMorgan and subsequent correspondence, and loan servicing records from various third-party and JPMorgan databases. (Id. ¶¶ 28-29.) JPMorgan provided voluminous documents and data in response to these requests. (Id. ¶ 29; see also Lundberg Aff. ¶¶ 28-30; Jan. 20, 2016 Hearing Tr., at 128-130.)

Settlement, which finally terminated on August 1, 2014 for most of the Trusts and loan groups.[13] (Valaperta Aff. ¶ 31; Lundberg Aff. ¶ 32; Nardi ¶ 31.)

Also as in Citigroup, the Trustees made substantial efforts to keep investors informed of their progress, and took their views into account in making their final decisions. (See Restatement [Third] of Trusts § 80, cmt. b [noting that it is "normally proper for a trustee to obtain and consider information concerning not only the beneficiaries' circumstances but also their concerns, preferences, and general views with respect to matters of trust administration"].) The Trustees retained Garden City Group, LLC (GCG) to establish a publicly accessible website containing relevant documents, information, and notices concerning the Proposed Settlement. (Valaperta Aff. ¶ 32; Lundberg Aff. ¶ 34; Nardi Aff. ¶ 32.) Between December 11, 2013 and October 14, 2014, the Trustees sent twelve separate notices to investors, informing them, among other things, of the Proposed Settlement, its modifications, GCG's website, the issuance of expert reports, extensions of the acceptance deadline, and procedures for investors to contact the Trustee with questions or directions concerning the Proposed Settlement. (Valaperta Aff. ¶¶ 33-34; Lundberg Aff. ¶¶ 35-40; Nardi Aff. ¶¶ 33-37; Pets.' Exhs. 010-013, 023-030 [twelve notices].) The Trustees also established processes to manage the inflow of investor communications, such as those expressing support or opposition to the settlement, and frequently communicated with investors by letter, email, and phone. (Valaperta Aff. ¶ 36; Nardi Aff. ¶ 38.)

Following the Trustees' receipt of the expert reports, they met with counsel, reviewed the reports, Professor Fischel's recommendations, and communications with investors, and

[13] At the request of certain of the Trustees, JPMorgan agreed to extend the acceptance date to October 1, 2014 for a small number of Trusts and loan groups, including eight Trusts and five loan groups for which U.S. Bank serves as Trustee. (Valaperta Aff. ¶ 51; Notice, dated Aug. 1, 2014, from Wells Fargo to investors, Exh. D [Pets.' Exh. 012] [listing the Trusts and loan groups for which the acceptance date was extended].)

determined whether to accept or reject the Proposed Settlement for each Trust and/or loan group. (Valaperta Aff. ¶¶ 48, 53; Lundberg Aff. ¶¶ 43-46; Nardi Aff. ¶¶ 53-54, 59-62; Musarra Aff. ¶¶ 46-47; Sohlberg Aff. ¶¶ 54-63; MacKay Aff. ¶¶ 44-54; Co Aff. ¶¶ 45.) The Trustees' decisions were made on or around August 1 and October 1, 2014. (See Pets.' Exhs. 012, 030 [Notices from Trustees to investors of the Trustees' acceptance of the Proposed Settlement on behalf of the Aug. 1, 2014 and Oct. 1, 2014 accepting Trusts, respectively].) As previously noted, the Trustees ultimately accepted the Proposed Settlement on behalf of loan groups in 319 of the 330 Trusts. (First Am. Pet., Exh. A [listing all accepting Trusts and loan groups].)

THE POST-ACCEPTANCE NOTICE PROGRAM

Upon the commencement of this proceeding, by Order to Show Cause signed on August 15, 2014, the court directed the Trustees to undertake a comprehensive Notice Program to provide notice to investors of the Proposed Settlement. Under this Notice Program, information concerning this proceeding, and the Trustees' acceptance of the Proposed Settlement on behalf of the August 1, 2014 accepting Trusts, was required to be published in newspapers worldwide, in multiple languages, and on investor reporting websites. (Aug. 15, 2014 Order to Show Cause ¶ 3 [4]-[5], [8] [Pets.' Exh. 006].) Copies of the notice and related papers were also required to be mailed to each of the investors listed in the Certificate Registry for each August 1, 2014 accepting Trust. (Id. ¶ 3 [1].) The Order to Show Cause expressly notified investors that

> "any potentially interested person who fails to object in the manner required herein shall be deemed to have waived the right to object (including any right of appeal) and shall forever be barred from raising such objection in this or any other action or proceeding, unless the Court orders otherwise."

(Id. ¶ 7.)

By Order to Show Cause signed on October 9, 2014, the court directed the Trustees to

undertake a Supplemental Notice Program with respect to the October 1, 2014 accepting Trusts. The substantive provisions of the two Notice Programs are identical. (See Oct. 9, 2014 Order to Show Cause ¶ 4 [Pets.' Exh. 007].) The October Order to Show Cause also warned potentially interested persons of the consequences of failing to object as required by the Order. (Id. ¶ 8.)

The court has previously held that the Notice and Supplemental Notice Programs were the best notice practicable, were reasonably calculated to put interested parties on notice of this action, and constitute due and sufficient notice of this special proceeding in satisfaction of federal and state due process requirements and other applicable law. (Aug. 15, 2014 Order to Show Cause ¶ 4; Oct. 9, 2014 Order to Show Cause ¶ 5.) The court adheres to that holding, and further finds that the Trustees diligently complied with the Notice and Supplemental Notice Programs. The affidavit of Jose C. Fraga, sworn to on October 13, 2014 (Pets.' Exh. 008), and his two supplemental affidavits, sworn to on November 4, 2014 (Pets.' Exh. 009) and July 18, 2016 (NYSCEF No. 591), satisfactorily demonstrate that both programs were executed in accordance with the court's directives.[14]

ANALYSIS

Upon consideration of the extensive evidence in the record, including the Trustees' affidavits and the testimony of the parties' witnesses, the court finds that the Trustees are entitled to the declaratory relief requested. Applying the factors outlined by the Appellate Division in Countrywide, and consistent with this court's reasoning in Citigroup, the court holds that the Trustees exercised their discretion reasonably and in good faith in accepting the Proposed Settlement with JPMorgan.

Authority to Settle

[14] As requested by the court, Mr. Fraga's latest affidavit, sworn to on July 18, 2016, clarifies the roles of each person or entity to which the required mailing was made.

No question of fact exists as to the Trustees' authority to settle these claims. Here, as in Countrywide and Citigroup, the Trustees clearly acted within their authority throughout the process of evaluating the Proposed Settlement. (See Countrywide, 127 AD3d at 126.) Under the terms of the Governing Agreements, the Trustees were assigned all "right, title and interest" in and to the mortgage loans. (See Ancone Aff. ¶ 3 [NYSCEF No. 569]; Slade Aff. ¶¶ 4-6 [NYSCEF No. 570]; Russell Aff. ¶¶ 4-5 [NYSCEF No. 571]; Rademacher Aff. ¶ 3 [NYSCEF No. 572]; Krauss Aff. ¶ 5 [NYSCEF No. 573]; Andreoli Aff. ¶ 4 [NYSCEF No. 574]; Hooper Aff. ¶ 4 [NYSCEF No. 575]; see also Pets.' Exh. 014 [CD containing Governing Agreements for each Trust covered by the Proposed Settlement].) In reviewing substantially similar agreements, the Courts have held that such provisions "effectively grant[] the Trustee the power and authority to commence litigation" and, with it, the discretionary "power to settle litigation." (Countywide, 2014 WL 1057187, at * 9, mod on other grounds 127 AD3d 120; Citigroup, 51 Misc3d at 284; LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp., 180 F Supp 2d 465, 471 [SD NY 2001] [holding that a conveyance of all "'right, title, and interest' in [] mortgages . . . . ordinarily includes the power to bring suit to protect and maximize the value of the interest thereby granted"].)

Conflicts of Interest

Here, as in Countrywide and Citigroup, there is no indication in the record that, in approving the Proposed Settlement, the Trustees acted in their self-interest or in the interests of JPMorgan or of the Institutional Investors, rather than in the interests of the investors generally. (See Countrywide, 127 AD3d at 126; Citigroup, 51 Misc3d at 284-285; see generally Royal Park Investments SA/NV v HSBC Bank USA, Natl. Assn., 109 F Supp 3d 587, 597-598, 610 [SD NY 2015] [citing AG Capital Funding Partners, L.P. v State Street Bank & Trust Co. (11 NY3d 146,

156-157 [2008]) in support of holding that, under New York law, although RMBS trustees' pre-default duties are defined by the governing agreements, trustees are required to avoid conflicts of interest].)

More particularly, there is no evidence that the Trustees will financially benefit from the Proposed Settlement. The court does not find a conflict based on JPMorgan's indemnification of the Trustees for their reasonable expenses in evaluating the settlement and maintaining this proceeding, under these circumstances in which the Trustees plausibly argue, as in Citigroup, that they are entitled to indemnification for such expenses under the PSAs. (See RMBS Trust Settlement Agreement § 2.06; Citigroup, 51 Misc 3d at 285.) It is noted that, despite the assertion of other conflicts by Ambac before its withdrawal as an Objector, neither Ambac nor any other Objector asserted that the indemnification by JPMorgan of the Trustees' evaluation expenses gave rise to a conflict of interest.

Ambac claimed that the Trustees had a self-interested motive to accept the Proposed Settlement – namely, to avoid being named as defendants in lawsuits brought by the Institutional Investors. In support of this contention, Ambac cited suits brought by the Institutional Investors against the same Trustees, alleging their breach of contractual and fiduciary duties in serving as trustees of other RMBS trusts. (See Resps.' Pre-Hearing Memo., at 5-6.) Ambac further asserted that the Trustees here willfully failed to inform their economic expert of Events of Default, because the acknowledgment of Events of Default would be inconsistent with the Trustees' defenses in the Institutional Investors' lawsuits.

As Ambac has withdrawn its objection to the Proposed Settlement, it has failed to develop its conflict of interest claims. The court does not, however, credit the contention that mere exposure to litigation in the event of a failure to accept the Proposed Settlement, in and of

itself, suffices to establish a Trustee conflict of interest. Moreover, there is no evidence in this record that any notice of an Event of Default was ever sent to any Servicer, Master Servicer, or Trustee. Neither Ambac nor any other party has submitted evidence to counter the Trustees' claims that they did not identify any declared Events of Default, as defined in the Governing Agreements, and/or have knowledge of such Events at the time they evaluated and accepted the Proposed Settlement. (See e.g. Valaperta Aff. ¶ 27; Nardi Aff. ¶ 8; Musarra Aff. ¶ 10; Sohlberg ¶ 20; MacKay Aff. ¶ 58.)

Finally, the court cannot conclude that section 7.06 of the Agreement created a conflict or renders the Trustees' decision an abuse of discretion. That section provides for JPMorgan's payment of "reasonable and necessary" legal fees to the Institutional Investors' counsel, Gibbs & Bruns, subject to reduction proportionally on account of any Net Losses in any Non-Settling Trusts – i.e. covered Trusts for which the relevant Trustee declined to accept the Settlement. The Agreement expressly provides that JPMorgan will pay such fees "in addition to – and not out of – the Settlement Payment." Although undoubtedly sizeable, these fees, in relative terms, amount to approximately 1.5 percent of the settlement payment. The settlement agreement in Citigroup included a substantially similar attorney's fee provision. (See Citigroup Settlement Agreement § 6.06, Index No. 653902/2014 [NYSCEF No. 3].) Significantly, no potentially interested party in either proceeding has ever asserted that this payment calls into question the Institutional Investors' support for the settlement or the Trustees' decision to accept the settlement.

Reliance on Outside Experts

The court further adheres to its Citigroup decision in holding that the Trustees' reliance on the plausible reports and advice of outside experts is "significantly probative of [the Trustees'] prudence." (51 Misc3d at 285, quoting Countrywide, 127 AD3d at 126.) The law on

trusts, cited by the Appellate Division in the Countrywide decision, recognizes that a trustee's duty of prudence "may [] call for obtaining and considering the advice of others on a reasonable basis." (Restatement [Third] of Trusts § 77, cmt. b. See also id. § 93, cmt. c ["a trustee's reliance on the advice of financial, legal, and other advisors is a significant factor in determining whether the trustee's conduct was prudent"].) "[O]btaining competent guidance and assistance" is particularly important where the particular aspect of the trust's administration requires greater than ordinary knowledge or experience. (See id. § 77, cmt. b.)

The focus of the Appellate Division in the Countrywide Article 77 proceeding was on the trustee's reliance on the plausible advice of counsel, whereas the focus in this court's Article 77 proceedings has been on the Trustees' reliance on the advice of outside experts.[15] As this court noted in Citigroup, however, the reasoning underlying the Countrywide Court's finding that reliance on counsel was "significantly probative of prudence" applies with equal force where a trustee has relied reasonably and in good faith on other "highly-regarded specialists." (See 127 AD3d at 126.) Indeed, the comments to the most recent Restatement of Trusts articulate a rule that parallels the rule enunciated in Countrywide concerning a trustee's reliance on counsel, but which applies to professional advice generally:

> "Reliance on relevant professional advice does not afford a complete defense to allegations of breach of trust, for that protection should not apply, for example, if the trustee acted unreasonably in following the advice or in procuring it, as might be the case in shopping for advice to support a desired course of conduct. If, however, a trustee has selected an adviser prudently and in good faith, has provided the adviser with relevant information, and has relied on plausible advice on a matter within the adviser's competence, this conduct provides significant evidence of the prudence of the trustee's action or inaction in the matter at issue."

[15] As did the trustees in Citigroup, the Trustees here emphasize their reliance on outside experts retained to provide both legal and non-legal advice on matters relevant to the Trustees' decision to accept or reject the settlement, rather than their reliance on counsel.

(Restatement [Third] of Trusts § 93, cmt. c. See also id. § 80, cmt. b [a trustee "may consult with and receive advice from others, such as accountants, legal counsel, and financial advisors," and in some circumstances may have a duty to do so, but "must exercise independent, prudent, and impartial fiduciary judgment on the matters involved"].)

The Trustees in this case properly obtained and considered the opinions of several highly qualified outside experts on legal issues relevant to the assessment of the Trusts' potential recovery in litigation, including the bar of the statute of limitations.[16] Consistent with his advice to the trustees in Citigroup, Justice Carpinello opined that the majority of federal and state courts have held that the six-year statute of limitations on claims for breaches of representations and warranties begins to run as of the date that the Trusts were funded or closed. (Carpinello Expert Report, at 3.) In his June 20, 2014 Supplemental Report, Justice Carpinello further advised that, absent a provision in the Governing Agreements requiring a securitizer to repurchase defective loans upon discovery of breaches of representations and warranties, courts have dismissed suits for failure to comply with a condition precedent, where the suits have been commenced before the requisite notice to repurchase has been given. (June 20, 2014 Carpinello Suppl. Expert Report, at 4-5.) This court adheres to its holding in Citigroup (51 Misc3d at 287) that these conclusions were based on "[v]iable legal reasoning," and anticipated the Court of Appeals decision in ACE. (See Countrywide, 127 AD3d at 126; ACE Secs. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 589 [2015] [holding that RMBS trust's cause of action against the sponsor of the transaction for breach of representations and warranties "accrued at the point of contract execution"].)

[16] The Trustees in this case relied on the input and recommendations of many of the same experts and consultancy firms that were retained in the Citigroup matter. (See 51 Misc3d at 279-280 [discussing similar reports from Professor Schwartz and Justice Carpinello, as well as a report by Bradford Cornell, Professor Fischel's colleague at Compass Lexecon].)

The Trustees' economic and valuation experts, Dr. Sabry, Mr. Reifsnyder, and Professor Fischel, also provided estimates of the Trusts' lifetime losses, the value of the Subservicing Protocol, and the likelihood of greater recoveries in litigation, respectively. These estimates required the development and application of complex methodologies. As discussed above (supra at 13-14), Professor Fischel made the ultimate recommendations as to whether each Trustee should accept the Proposed Settlement on a Trust and loan group basis. The criteria that he used in making these recommendations were substantially similar to those used by Bradford Cornell, Professor Fischel's colleague at Compass Lexecon, and found plausible in Citigroup. (51 Misc3d at 280-281, 287.) While certain Objectors in this proceeding initially challenged Professor Fischel's criteria and recommendations, none of those Objectors pursued its challenge through the evidentiary hearing. The methodologies of Professor Fischel and the Trustees' other economic experts do not appear to be implausible on their face.[17] The court accordingly cannot find that the Trustees' reliance on these experts' reports was an unreasonable exercise of discretion. (See Countrywide, 127 AD3d at 126-127.)

W&L's Objection

[17] Professor Fischel noted in his Expert Report that, during the Trustees' evaluation of the Proposed Settlement, Objectors represented by Quinn Emmanuel (QE Objectors) recommended that the Trustees conduct their own loan file review before approving the settlement. (See Fischel Expert Report ¶ 108.) That recommendation was considered and rejected by Professor Fischel. (Id. ¶ 108-110.) Objections similar to that made by the QE Objectors were made and withdrawn in this proceeding. (See e.g. DW Statement of Objections to Proposed Settlement and to the Trustees' Petition, at 4-5 [NYSCEF No. 99].) Withdrawn objections also included challenges to the size of the Proposed Settlement in relation to other settlements by RMBS Trustees with securitizers (see e.g. QVT Memo. In Supp. of Motion to Intervene, at 4 [NYSCEF No. 88]), and objections to the share that particular Trusts would receive of the settlement payment under the allocation formula set forth in the Proposed Settlement. (See e.g. id. at 5 [objecting to "haircut" – i.e., allocation formula under which losses "will be allocated pro rata among the various trusts based on the amount of losses suffered by each trust, except that losses 'associated' with certain 'Selected Third-Party Originators' [solvent originators] are discounted by 90% in the allocation calculation" (emphasis in original)]; Triaxx Memo. In Supp. of Obj. to Pets.' Appl. Seeking Judicial Approval of Proposed Settlement, at 1 [objecting that allocation formula is based on estimated lifetime losses without adequate consideration of whether losses were caused by breaches of representations and warranties].) In light of the facial plausibility of the experts' methodologies, the withdrawal of these Objectors, and the consequent absence of expert or other testimony or argument developing the claims of deficiencies in the Trustees' experts' opinions, the court does not find on this record that the experts' did not provide plausible advice.

W&L, the sole remaining Objector in this proceeding, holds certificates in Classes B-1 through B-5 of two of the accepting Trusts: Chase 2007-A3 and Chase 2007-S6 (the W&L Trusts). (See W&L Holdings Chart, attached to W&L's First Suppl. Interr. Responses [Pets.' Exh. 357].) The B certificates are the most junior, or subordinated, classes of certificates in each W&L Trust. The Bank of New York Mellon (BNYM) is Trustee for both Trusts.

As previously noted, W&L maintains a limited objection to the Trustees' evaluation and acceptance of the Proposed Settlement. W&L does not contend that the Trustees suffered from a conflict of interest, or that their reliance on the advice of outside experts was improper. Nor does W&L object to the experts' advice, their conclusions, or their estimates of the amounts to be allocated to each Trust under the Proposed Settlement. W&L objects solely to the manner in which the W&L Trusts' settlement allocation will be distributed among certificateholders in the two Trusts (the Distribution Methodology). It is undisputed that W&L's certificates have been written off, and that it will not receive any payment under the Proposed Settlement, as the settlement proceeds will have been exhausted by payments to senior certificateholders.

The Distribution Methodology under the Proposed Settlement provides for each Trust's share of the settlement payment to be treated as a "subsequent recovery" under the terms of that Trust's Governing Agreement. Section 3.06 (a) of the Proposed Settlement thus states, in relevant part:

> "Each Trust's Allocable Share shall be deposited into the related Trust's collection or distribution account pursuant to the terms of the Governing Agreements, for further distribution to Investors in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a 'subsequent recovery' relating to principal proceeds available for distribution on the immediately following distribution date . . . ."

The W&L Trusts are each governed by a Pooling and Servicing Agreement (PSA), dated as of November 1, 2007. (See Chase 2007-A3 PSA [Resps.' Exh. 14.8]; Chase 2007-S6 PSA [Resps.' Exh. 14.9].) Both PSAs define the term "Subsequent Recovery" as "[t]he amount, if any, recovered by the Servicer with respect to a Liquidated Mortgage Loan with respect to which a Realized Loss has been incurred after liquidation and disposition of such Mortgage Loan." (Chase 2007-A3 PSA, at 65; Chase 2007-S6 PSA, at 31.) Section 5.08 of the PSAs requires the Servicer to "deposit or cause to be deposited in the [Trust] Collection Account on a daily basis (and not later than the second Business Day following receipt), and retain therein . . . [a]ny Subsequent Recovery . . . ." (Chase 2007-A3 PSA, at 104; Chase 2007-S6 PSA, at 61.) Section 6.01, the waterfall provision, then provides that, on the Distribution Date (defined as the 25th day of any month), the Available Distribution Amount (defined as "an amount equal to the amount on deposit in the Collection Account" with respect to the applicable Trust loan groups) is to be distributed among classes of certificateholders according to their level of seniority. (See Chase 2007-A3 PSA, at 118-127; Chase 2007-S6 PSA, at 75-80.)

W&L objects to this Distribution Methodology on the grounds that it is "inconsistent with the Governing Agreements for the W&L Trusts," and that it "fails to effectuate the purpose of the Settlement Agreement." (W&L Suppl. Memo., at 1.) W&L also argues that BNYM abused its discretion in accepting the Proposed Settlement, because neither BNYM nor its experts "considered whether the Distribution Methodology effectuated the purpose of the Settlement Agreement or complied with the Governing Agreements." (Id.) W&L proposes that the settlement payment for the W&L Trusts be distributed first to W&L, as the certificateholder that allegedly sustained the losses from breaches of representations and warranties affecting the

value of the loans. (Id at 7.)[18] The Trustees counter that W&L's objection is "refute[d]" by the terms of the PSAs (Pets.' Suppl. Memo., at 5), and that no provision of the PSAs authorizes W&L's proposed alternative distribution methodology. They thus contend that W&L "cites no provision of the PSA[s] that would authorize the Trustee to pay the Settlement Payment to certificates that have been written off – because no such provision exists." (Id. at 4.)

W&L's contention that the Distribution Methodology is inconsistent with the Governing Agreements is based on the "sole remedy" clauses in the W&L PSAs. (See W&L Suppl. Memo., at 2-3.) As is common in RMBS agreements, section 3.01 of the PSAs provides that, upon discovery or notice of a breach of a representation and warranty that materially and adversely affects the value of a loan or the interests of certificateholders, the Seller (here, a JPMorgan affiliate) shall, within a specified period, cure such breach, substitute the defective loan, or repurchase the loan at a contractually defined Purchase Price. The PSAs further provide that "the obligation of the Seller to cure, substitute or purchase any Mortgage Loan as to which such a breach has occurred shall constitute the sole remedy respecting such breach available to Certificateholders or the Trustee on behalf of Certificateholders." (Chase 2007-A3 PSA, at 90; Chase 2007-S6 PSA, at 48.) Section 2.02 of the PSAs similarly limits BNYM's remedies with respect to loans affected by a defect in documentation. (See Chase 2007-A3 PSA, at 70-71; Chase 2007-S6 PSA, at 36-37.) Payments under these sections are defined in the PSAs as Repurchase Proceeds, as opposed to Subsequent Recoveries. (Chase 2007-A3 PSA, at 62; Chase 2007-S6 PSA, at 28.)

[18] Although W&L contends that its certificates suffered losses early in the securitizations from breaches of representations and warranties, W&L has not in fact submitted any evidence that it owned the certificates at the time of the alleged losses.

W&L argues that, because the Proposed Settlement resolves claims for breaches of representations and warranties, treatment of the settlement proceeds "other than as set forth in Section 3.01 is inconsistent with the Governing Agreements." (See W&L Suppl. Memo., at 3.) W&L thus in effect claims that classification of the settlement proceeds as Repurchase Proceeds is more consistent with the purpose of the Proposed Settlement (namely, to compensate for breaches of representations and warranties) than is their classification as Subsequent Recoveries.

The Trustees acknowledge that the PSAs define Repurchase Proceeds and Subsequent Recoveries separately. However, they plausibly argue that the PSAs provide for distribution of the two types of funds in the same manner. (Pets.' Suppl. Memo., at 1.) Sections 2.02 and 3.01 of the agreements require the Servicer to deposit Repurchase Proceeds in the Trust Collection Account promptly upon receipt. (Chase 2007-A3 PSA, at 71, 90; Chase 2007-S6, at 36-37, 48.) Section 5.08 also provides for the Servicer to deposit funds received, including "Any Subsequent Recovery" and "All Repurchase Proceeds," in the Collection Account. (Chase 2007-A3 PSA, at 104; Chase 2007-S6 PSA, at 61.) Under section 6.01, Subsequent Recoveries and Repurchase Proceeds are treated the same way – that is, they are distributed on the next Distribution Date to certificateholders according to their level of seniority. (Chase 2007-A3 PSA, at 118-127; Chase 2007-S6 PSA, at 75-80.) The PSAs thus support the Trustees' contention that classification of the settlement payment as Repurchase Proceeds would not result in a different distribution among classes of certificateholders in the W&L Trusts than is provided for under the Proposed Settlement.

Unable to dispute that the PSAs provide for distribution of Repurchase Proceeds and Subsequent Recoveries in the same manner, W&L argues that the Distribution Methodology conflicts with a "temporal element" of the PSA sole remedy clauses, under which Repurchase

Proceeds must "have the same effect as prepayments of the affected mortgage loans," and be applied "at the time the breaching loan defaults or is otherwise removed from the Trust." (W&L Suppl. Memo., at 3.) In support of this contention, W&L cites not the PSAs but the Prospectus Supplements for the W&L Trusts. These Prospectus Supplements represented to potential Trust investors that Repurchase Proceeds from loans affected by material breaches of representations and warranties or defects in documentation "will be passed through to the related Certificateholders as a prepayment of principal in the month following the month of such repurchase." (Pro. Supp. 2007-A3, at S-81 [Resps.' Exh. 303]; Pro. Supp. 2007-S6, at S-57 [Resps.' Exh. 304] [same].) W&L in effect contends that losses caused by breaches of representations and warranties must be identified so that the time at which Repurchase Proceeds should have been paid can be determined, and the settlement payment can then be distributed to certificateholders who absorbed those losses. According to W&L, it should have priority in the distribution of the settlement payment because its certificates allegedly sustained most of the losses from breaches of representations and warranties during the early years of the securitizations, before the senior certificates suffered losses.[19]

[19] In support of this contention, W&L relies on the report and expert testimony of Matthew Lewis, Managing Director of the Financial Markets Advisory division at NewOak Capital. (See Jan. 26, 2016 Hearing Tr., at 388-389; Lewis CV, at 1 [Pets.' Exh. 238].) Mr. Lewis testified at the evidentiary hearing that he had been retained by W&L solely "to evaluate the time of the losses on mortgage loans generally and specifically those which have material breaches of representations and warranties." (Jan. 26, 2016 Hearing Tr., at 415-416, 442-443.) His opinion, as stated at the hearing, was that defaults on mortgage loans, as a result of material breaches of representations and warranties, occur substantially earlier on average than defaults on loans that do not occur as a result of such breaches. (See id. at 416.) In particular, he estimated that the majority of defaults due to breaches of representations and warranties were likely to occur "within the first one to two years" of a securitization, and that substantially all of the ultimate losses on such defaults would occur by the end of year five, "with the vast majority of those losses occurring in the first two to four years . . . ." (Id. at 433, 445.)

Mr. Lewis further testified that he had looked at the realized loss history for the W&L Trusts, and found that the certificates owned by W&L had been fully written down due to losses in the 39th and 44th months following the Trusts' November 2007 closing dates – or by about February 2011 for Chase 2007-A3, and July 2011 for Chase 2007-S6. (See Jan. 26, 2016 Hearing Tr., at 434, 461.) He therefore concluded that he "would expect that the majority of those write-downs they incurred were related to breaches of reps and warranties." (Id. at 434.) Mr. Lewis acknowledged that his opinion was intended to "address[] the timing of losses generally with respect to loans breaching," and that he did not perform an analysis to identify which, if any, certificateholder in the Trusts had suffered a loss on any individual defective loan. (Id. at 459.) He also acknowledged that at least one W&L Trust,

Although W&L has not itself performed an analysis to identify breaches of representations and warranties causing losses to loans underlying the W&L Trusts, it argues that BNYM must do so in order to satisfy the asserted temporal requirement of the repurchase protocol and thus to "apply the Settlement Payment to breaching loans as of the time of their default." (W&L Suppl. Memo., at 7.) W&L claims that BNYM could accomplish this objective by analyzing "discrepancies in the data provided to the rating agencies," or by "conduct[ing] a loan level review of the defaulted loans in each of the W&L Trusts . . . ." (Id. at 8.) Using this information, "the Trustees could [then] determine the date on which the loan level loss was realized by the Trust," and "refill the loss caused by the alleged breach by paying the contractual Purchase Price for each individual loan to the Class of Certificates that absorbed the loss for each such loan." (Id.)

The mere articulation of this alternative methodology makes its burden apparent. A primary benefit to the Trusts of accepting the Proposed Settlement was avoidance of the expense and uncertainty associated with having to prove the existence of material breaches of representations and warranties, and the extent of losses caused by those breaches. (Fischel Expert Report ¶¶ 14, 24.) As claimed by the Trustees, and not disputed by W&L, loan-level analysis requires significant time. (Id. ¶¶ 109-110 [opining that review would be required of approximately 33,000 loans at a minimum]; see Jan. 26, 2016 Hearing Tr., at 369 [testimony of Loretta Lundberg, Managing Director, BNYM Global Corporate Trust Division].) Moreover, in prior RMBS litigations, the reliability of methodologies used to perform the loan-level analyses

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Chase 2007-S6, had experienced losses in its early years commensurate with losses in a 2000-2002 cohort or "vintage" of trusts, which he hypothesized were not largely caused by breaches of representations and warranties. (See Jan. 26, 2016 Hearing Tr., at 447-449; Pets.' Exh. 239 [Chart comparing yearly average losses of 2000-2002 and 2007 "vintage" Trusts with the performance of Chase 2007-S6, completed by Mr. Lewis at his deposition].)

has been the subject of sharp dispute. (Fischel Expert Report ¶ 109.) Given the burdens of conducting a de novo loan-level analysis, the court cannot find that the Trustees' decision to accept the Proposed Settlement without first undertaking such an analysis was an unreasonable exercise of discretion.[20]

More significant than the burden of W&L's proposal is W&L's failure to point to any provision in the Governing Agreements authorizing, let alone requiring, BNYM to distribute settlement proceeds as if they had been acquired years earlier in the form of repurchase payments, or to discriminate among certificates on any basis other than their contracted-for level of seniority. W&L does not explain how the representation in the Prospectus Supplements, that repurchase payments would be distributed to investors "in the month following the month of [the] repurchase," is inconsistent with the Distribution Methodology, given that there has been no formal repurchase of loans, and the settlement proceeds will not come into the Trust collection accounts until some time in the future. As the Trustees further convincingly argue, W&L's argument reduces to the untenable contention that the Trustees must "roll back the clock" and distribute the settlement payment as if it had been paid before W&L's certificates were written down, at the time losses from breaches of representations and warranties were realized. (Pets.' Suppl. Memo., at 4.) Any such distribution would be a significant departure from the way in which funds are distributed to certificateholders under the PSAs in the regular course of the Trustees' business.

In contrast, the Trustees advance a reading of the PSAs that is plausible and supports their contention that treatment of the settlement payment as a Subsequent Recovery comports with the PSAs and with certificateholders' expectations. As discussed above (<u>supra</u> at 24-26), it

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[20] It is noted that Professor Fischel reviewed loan-level analyses conducted in litigation by directing certificateholders and monoline insurers for a limited number of the Trusts. (Fischel Expert Report ¶ 107.)

is undisputed that, under the PSA § 6.01 waterfall provision, Repurchase Proceeds and Subsequent Recoveries are distributed to certificateholders from the same account in the same manner, and senior certificateholders have priority in the distribution of funds from the account. Citing the write-off of all of W&L's certificates, the Trustees contend, also without dispute, that the W&L Trusts have reached their Credit Support Depletion Dates, and that the PSA waterfall therefore provides for distribution of funds, including principal and interest, solely to senior certificateholders, i.e., Class A certificates. (See PSA § 6.01 [II] ["On or after the Credit Support Depletion Date, the Available Distribution Amount shall be applied, first, in respect of interest in accordance with Section 6.01 (I) (b) (i) and, second, in respect of principal to each Class of the Class A Certificates, pro rata, based upon their respective outstanding balances"]; see Pets.' Suppl. Memo., at 6 & n 9.) Under settled precepts of contractual interpretation, "[a] reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (Beal Sav. Bank v Sommer, 8 NY3d 318, 324-25 [2007] [internal quotation marks and citations omitted]; National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969] [holding that "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency"].) W&L's argument that the section 3.01 sole remedy provision overrides the section 6.01 waterfall provision ignores that, where Repurchase Proceeds are recovered in the regular course of the Trusts' business, they are distributed in accordance with the waterfall provision.

The court is unpersuaded by W&L's further contention that the Distribution Methodology fails to meet the purpose of the Proposed Settlement. (See Resps.' Pre-Hearing Memo. at 14.) The Proposed Settlement compensates the accepting Trusts collectively for the

release of repurchase and servicing claims. (See RMBS Trust Settlement Agreement § 3.01-3.02.) The Agreement releases claims "that arise under or are based upon the Governing Agreements and that relate to the origination, sale, delivery and/or servicing of Mortgage Loans to or in the Settlement Trusts . . . ." (Id. § 3.02 [quoted in full, supra at 3].) As this court has previously held in cases brought by RMBS trustees against securitizers for repurchase of defective loans, certificateholders are the beneficiaries of the trust and, in a general sense, are represented by the trustee to the extent that they are or will be the ultimate beneficiaries of successful litigation commenced by the trustee on behalf of the trust. Generally, however, certificateholders have limited rights to enforce the governing agreements or to control litigation by the trustee. (FHFA [NC1], 2016 WL 1587345, at * 9; ACE [SL2], 52 Misc3d at 348-349.) Here, similarly, although the certificateholders are beneficiaries of the Trusts, their rights are limited by the PSAs. The court does not find that it was an abuse of discretion for the Trustees to accept a Distribution Methodology that provides for the settlement payment to be treated as a Subsequent Recovery and distributed to certificateholders in accordance with the priorities set in the PSA section 6.01 waterfall provision.

Nor does the court find that the Trustees' acceptance of this Distribution Methodology was inconsistent with the expectations of investors. W&L argues that the "requirement to pay Repurchase Proceeds shortly after default or notice of breach is [] central to the expectations of market participants." (W&L Suppl. Memo., at 4.) In focusing solely on this purported expectation, W&L fails to account for the current, legitimate expectations of senior investors in the Trusts. According to W&L's own expert, these senior investors suffered the majority of the total lifetime losses of each W&L Trust. (See Jan. 26, 2016 Hearing Tr., at 464-465 [Mr. Lewis's testimony].) By purchasing the most subordinated certificates in the Trusts, W&L

assumed the risk that it would suffer the first losses were the Trusts to fail. (See W&L Suppl. Memo., at 4 [acknowledging that part of the role of junior certificates was to "shor[e] up" cash flows to senior certificateholders].) The very Prospectus Supplements on which W&L relies warned investors in Class B certificates, like W&L, that their right to receive distributions with respect to the mortgage loans would be subordinated to the rights of the holders of more senior certificates.[21] The waterfall provision in section 6.01 of the PSAs memorializes the senior certificates' priority. Having nonetheless decided to invest, W&L cannot now be heard to argue that the settlement deprives it of the benefit of its bargain. Notably, although hundreds of investors hold certificates in the Trusts covered by the Proposed Settlement (see Suppl. Fraga Aff., dated July 18, 2016, Exh. A), W&L alone has asserted that the treatment of settlement proceeds as Subsequent Recoveries frustrates certificateholders' expectations.

Finally, the court rejects W&L's contention that it was an abuse of discretion for BNYM to accept the Proposed Settlement without expressly considering, or retaining an outside expert to consider, the propriety of the Distribution Methodology. (Resps.' Pre-Hearing Memo., at 17.) As the Trustees persuasively argue, they have significant subject matter expertise in applying waterfall provisions in the Governing Agreements to distribute Trust funds to certificateholders. (Jan. 26, 2016 Hearing Tr., at 490, 493-495.) Moreover, BNYM had previously entered into significant settlements, including the Countrywide settlement, which treated settlement payments

[21] As set forth in the Prospectus Supplements:

> "The rights of the holders of the Class M Certificates to receive distributions with respect to the mortgage loans will be subordinated to such rights of the holders of the Class A Certificates. The rights of holders of a class of Class B Certificates to receive distributions with respect to the mortgage loans will be subordinated to such rights of the holders of the Class A Certificates, the Class M Certificates and the classes of Class B Certificates with lower numerical designations, all to the extent described in this prospectus supplement . . . ."

(Pro. Supp. Chase 2007-A3, at S-27; Pro. Supp. Chase 2007-S6, at S-15, S-16 [same].)

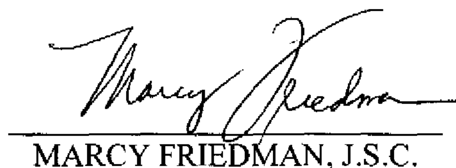
by securitizers as Subsequent Recoveries. (Id. at 379 [testimony of Ms. Lundberg].) W&L has not identified any case in which RMBS settlement proceeds have not been distributed according to the Governing Agreements' waterfall provisions. Under these circumstances, the court holds that the Trustees did not abuse their discretion in accepting the Proposed Settlement without an outside experts' evaluation of the Distribution Methodology.

CONCLUSION

For the above reasons, the court holds that W&L's objection to the First Amended Petition is without merit. The court further holds that the Trustees exercised their discretionary power reasonably and in good faith in approving the Proposed Settlement. The First Amended Petition will therefore be granted to the extent set forth in a separate Order and Judgment.

This constitutes the decision of the court.

Dated: New York, New York
August 12, 2015



MARCY FRIEDMAN, J.S.C.