

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

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**STEERING COMMITTEE'S MEMORANDUM OF LAW
IN SUPPORT OF THE ORDER TO SHOW CAUSE
WHY THE COURT SHOULD NOT COMPEL DISCOVERY FROM
RRMS ADVISORS, LLC**

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The Steering Committee of Intervenor-Respondents and Objectors (“Steering Committee”) respectfully moves under CPLR § 3124 to compel RRMS Advisors, LLC (“RRMS”), through its representative Brian Lin, to produce documents responsive to the September 14, 2012 subpoena to RRMS (“RRMS Subpoena”).¹ Rollin Aff. at Ex. 1.² Despite their unquestionable relevance, RRMS has refused to produce: (1) documents RRMS relied on in forming the opinions in the two RRMS reports; (2) drafts of the reports prepared by RRMS, including notes and calculations; (3) time records, invoices, and bills for work performed by RRMS; and (4) prior reports prepared by RRMS concerning mortgage-backed securities. As RRMS has not asserted any privilege over these documents, the only issue before the Court is their relevance. Exs. 7-11. The Steering Committee respectfully requests an order requiring the production of documents responsive to the subpoena, as well as permitting the re-opening of Mr. Lin’s deposition to the extent that the formerly withheld documents necessitate additional questioning.

INTRODUCTION

In deciding to enter into the proposed settlement, the Trustee relied on several outside advisors, including RRMS, which provided BNYM with two reports. *See* Ex. 3 at 33:15-25, 169:23–170:3; Ex. 4 at 453:4–454:6; Ex. 5 at 73:19–74:8, 122:3-13; *see also* Ex. 6 at § 8.02(ii) (noting in the PSA that the Trustee may consult with “counsel, financial advisers or

¹The Steering Committee submits this memorandum on behalf of all Intervenor-Respondents and Objectors except: the Delaware Department of Justice; the New York State Office of the Attorney General; the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; and Cranberry Park II LLC.

² Citations to “Ex. ___” reference the exhibits to the Affirmation of Michael A. Rollin In Support of the Order to Show Cause Why the Court Should Not Compel Discovery from RRMS Advisors, dated January 13, 2013, and filed simultaneously with this brief.

accountants”).³ One of the reports opined on the reasonableness of a settlement range and the other on the servicing provisions of the proposed Settlement Agreement (“RRMS Reports”). Ex. 5 at 73:19–74:8; Exs. 12 and 13. Prior to the October 16 and October 17 deposition of Mr. Lin, the Steering Committee served RRMS with the RRMS Subpoena. Ex. 1.


In response to the subpoena, BNYM’s counsel—which represents BNYM and RRMS for purposes of discovery in this case—refused on relevance grounds to produce critical documents from the files of RRMS. Under CPLR § 3101, “all matter material and necessary in the prosecution or defense of an action” is discoverable. Despite conceding the application of CPLR § 3101, BNYM artificially and unilaterally narrowed the definition of relevance for purposes of the RRMS document production. Under BNYM’s narrow interpretation of relevance, only documents that the Trustee’s personnel and lawyers “considered” in making the decision to enter in the Settlement Agreement are relevant. Ex. 10. According to BNYM, documents that the paid advisors considered, but which were not provided to the Trustee, are not discoverable. *Id.* Based on this definition of relevance, BNYM’s counsel refused to produce documents from the files of RRMS if the Trustee did not “consider” those documents in its assessment of the proposed Settlement.

Although Mr. Lin provided the entirety of the RRMS file to BNYM’s counsel, the following documents have been withheld from the Steering Committee:

1. A copy of *all* facts, data and other documents Mr. Lin relied upon in forming the opinions in the RRMS Reports, [REDACTED]
[REDACTED]
(responsive to Document Request No. 2 of the RRMS

³ At times, the Trustee has referred to RRMS as an “expert,” (*see* Verified Petition, ¶¶ 61, 64-67), [REDACTED] [REDACTED] However, for current purposes, BNYM offers Mr. Lin as a fact witness on the issue of whether the Trustee’s decision to enter into the Settlement Agreement was reasonable.

Subpoena; *see* Ex. 5 at 173:14–177:24; 241:19–243:17; 284:2–285:2);

2. All drafts to the RRMS Reports prepared by Mr. Lin and RRMS (responsive to Document Request No. 3 of the RRMS Subpoena);
3. All notes and calculations made by RRMS in connection with the RRMS Reports (responsive to Document Request No. 3 of the RRMS Subpoena);
4. All time records, invoices and bills evidencing payment for all work performed by Mr. Lin and RRMS in connection with BNYM’s retention of Mr. Lin and RRMS (responsive to Document Request No. 5 of the RRMS Subpoena); and
5. 

(*see* Ex. 5 at 85:21–86:16) (all five categories collectively referred to as the “RRMS Documents”).

BNYM’s line-drawing obstructs discovery concerning the trustworthiness of its advisors’ opinions and unreasonably limits the Steering Committee’s access to discoverable information. By electing to rely on the opinions of its advisors, BNYM affirmatively injected the credibility of its advisors and the trustworthiness of its advisors’ opinions into the question of the Trustee’s reasonableness and good faith. *See* Ex. 6 (noting in Section 8.02(ii) that the Trustee’s reliance on counsel, financial advisors or accountants must be done in good faith).

As this Court is aware, BNYM wants the Court to sign an eleven-page order broadly blessing its conduct in entering the Settlement Agreement. As proposed, the Settlement Agreement would permanently extinguish the rights of all Certificateholders related to the Covered Trusts. Doc. No. 7. BNYM’s proposed findings include:

- (1) “[t]he Settlement Agreement is the result of factual and legal investigation by the Trustee” (*id.* ¶ h);
- (2) “[t]he Trustee appropriately evaluated the terms, benefits, and

consequences of the Settlement and the strengths and weaknesses of the claims being settled” (*id.* ¶ i);

- (3) [t]he Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts” (*id.* ¶ k);
- (4) the actions of the Trustee in entering into the Settlement Agreement are approved “in all respects” (*id.* ¶ l); and
- (5) the Settlement Agreement is “approved in all respects, and is fully enforceable in all respects” (*id.* ¶ n).

By seeking these broad findings and by asserting good faith reliance on the advisors’ reports, BNYM has affirmatively defined the scope of relevance to include the reasonableness of what its paid advisors did and did not do, considered and did not consider, relied on and rejected. BNYM’s position in response to the RRMS Subpoena is contrary to the broad scope of discovery that is permitted under Article 31 of the CPLR and causes unnecessary delay in the parties’ already abbreviated discovery schedule.

The RRMS Documents are necessary, and cannot be obtained from another source, to fully evaluate what the evidence currently shows—numerous flaws in the assumptions, information, and methodology that RRMS used to arrive at its opinion that \$8.8 to \$11 billion would be a reasonable settlement range. [REDACTED]

[REDACTED] See, e.g., Ex. 5 at 189:14–208:24; 262:11–268:21; 359:9–361:10. For example, Mr. Lin’s analysis begins with four categories of loans that were pre-defined by the Inside Institutional Investors according to their delinquency status (i.e. liquidated loans, 60+ delinquent loans, modified current loans, non-modified current loans/D30). Ex. 12 at 8; Ex. 5 at 262:11–268:21. For each category, Mr. Lin applies the anticipated default rate (e.g. 35% to 45% for modified current loans) as well as several other variables to arrive at a “reasonable”

settlement range for each bucket of loans. Ex. 12 at 8. [REDACTED]

[REDACTED] See Ex. 5

at 320:12–327:22. Without the benefit of the entire RRMS file, it is unclear whether Mr. Lin considered or evaluated the potential that under the vast majority of the PSAs, modified loans must be repurchased at full price. See Ex. 6 at § 3.11(b) (“the Master Servicer may agree to a modification of any Mortgage Loan...if...the Master Servicer purchases the Modified Mortgage Loan from the Trust Fund”).⁴ This is merely one example of an instance in which information withheld from the Steering Committee could bear significantly on the reasonableness of the Trustee and its advisors’ settlement-related activities.

[REDACTED]

[REDACTED] Ex. 5 at 154:18-22; 178:4-10; 209:2-16; 244:24–255:23; 276:14-21; 359:9–360:7; 366:12-22; 461:20–462:3; 522:12-17; 559:20-25. Without access to the withheld RRMS Documents, the Steering Committee is unable to fully explore the effect of undisclosed documents [REDACTED] that purportedly justified his choice to accept the lower numbers provided by Bank of America over the higher numbers provided by the Inside Institutional Investors. See Ex. 12 at 8 (“I feel it would be reasonable to utilize BofA’s percentages for both [the “Breach” and “Success”] rates.”). All of these issues bear heavily on the question of whether the Trustee reasonably and in good faith approved the Settlement Agreement. A complete production of the RRMS

⁴ The impact of any failure to consider a methodology in which the “reasonable” settlement value encompassed full price repurchase of modified loans cannot be understated. In his proposed settlement value, Mr. Lin allocated \$300 to \$400 million to settle a \$12.8 billion balance of modified current loans – representing a mere 3 to 4 percent of the total settlement range of \$8.8 to \$11 billion. Ex. 12 at 8. Notably, Bank of America, N.A. and Fannie Mae recently settled certain repurchase requests arising from breaches of selling representations and warranties. Ex. 14. In an agreement under which Bank of America will repurchase approximately 30,000 loans from Fannie Mae for an aggregate purchase price of approximately \$6.51 billion, approximately 40% of the total repurchase was allocated to modified current loans (or as high as 70% with the inclusion of modified loans that were 30 days or more delinquent). *Id.* at 2.

Documents will provide a more accurate record of what the Trustee's chosen advisor relied on, considered, rejected, and ignored, and shed light on whether the Trustee acted reasonably and in good faith.

LEGAL STANDARD

New York's discovery rules require "full disclosure of all matter material and necessary in the prosecution or defense of an action." CPLR § 3101(a). These rules are to be liberally construed and "require disclosure, upon request, of any facts bearing on the controversy." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968); *Cent. Buffalo Project Corp. v. Rainbow Salads, Inc.*, 530 N.Y.S.2d 346, 347 (4th Dep't 1988) (CPLR § 3101(a) "is accorded a liberal interpretation in favor of disclosure."); Siegel, N.Y. Practice, § 344 (3d ed. 1999) (New York's broad discovery rules mandate "the disclosure of all evidence relevant to the case and all information reasonably calculated to lead to relevant evidence.").

There is no comprehensive list of circumstances or reasons that would be deemed sufficient to warrant discovery from a nonparty and circumstances will necessarily vary from case to case. *Kooper v. Kooper*, 901 N.Y.S.2d 312, 322 (2d Dep't 2010). As one example, the circumstances warrant discovery from a nonparty when the information cannot be obtained from the parties. *Id.*

The burden of proof on whether a nonparty may resist discovery is on the party urging immunity from disclosure. *Flacke v. NL Industries, Inc.*, 463 N.Y.S.2d 351, 352 (Sup. Ct. Albany County 1983).

ARGUMENT

The RRMS Documents bear directly on the good faith, reasonableness, and adequacy of the Trustee's evaluation of the Settlement Agreement and the strengths and weaknesses of the

claims being settled. These documents are discoverable and have been improperly withheld.

I. The RRMS Documents are Relevant to the Question of Whether the Trustee Acted in Good Faith to Obtain Accurate Information from RRMS Regarding Potential Liability and the Proposed Settlement

When a party purportedly relying on the advice of experts or advisors is a trustee or fiduciary, numerous courts agree that the credibility of the advisor is relevant to whether the party's reliance on such advisor is reasonable. *See, e.g., Bussian v. RJR Nabisco*, 223 F.3d 286, 299 (5th Cir. 2000) (instructing courts to “objectively assess whether the fiduciary, at the time of the transaction, utilized proper methods to investigate, evaluate and structure the investment; acted in a manner as would others familiar with such matters; and exercised independent judgment when making investment decisions”); *Howard v. Shay*, 100 F.3d 1484, 1489-90 (9th Cir. 1996) (“[I]ndependent expert advice is not a ‘whitewash.’”); *Donavan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir. 1983) (“An independent appraisal is not a magic wand that fiduciaries may simply waive over a transaction to ensure that their responsibilities are fulfilled. It is a tool and, like other tools, is useful only if used properly.”).

The link between the trustworthiness of Mr. Lin's opinions and the Trustee's decision to rely on those opinions arises from the principle that a decision made in reliance on inaccurate or incomplete information, without sufficient effort to obtain accurate information, is not a decision made in good faith. In *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1034 (2d Cir. 1983) the Second Circuit considered whether the district court properly ordered the U.S. Army Corps of Engineers (“the Corps”) to conduct a new Environmental Impact Statement (“EIS”) before issuing a permit under the Clean Water Act to allow construction of a proposed highway that would require landfill in the Hudson River. The EIS had been compiled by outside consulting firms, who concluded that the area of the Hudson River requiring landfill was

“biologically impoverished.” *Id.* at 1017-18, 1030-31. Despite evidence indicating that these conclusions were not reasonable or accurate (including a separately commissioned report that found significant numbers of fish in the area that would be impacted by the project), the Corps relied on the EIS to support the issuance of the permit. *Id.* at 1018-24. In upholding the district court’s conclusion that the Corps should conduct a new EIS, the court did not “express any view as to whether the decisionmakers’ overall evaluation of the benefits and detriments of [the project] was ‘wrong.’” *Id.* Rather the court “h[eld] simply that a decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a ‘reasoned’ decision.” *Id.* In sum, the credibility of the EIS was relevant to whether the agency’s reliance on the EIS was reasonable.

The principles and reasoning of these cases support the production of the RRMS Documents because the documents are likely to include evidence, or may lead to the discovery of relevant evidence demonstrating, that the Trustee’s reliance on an untrustworthy opinion, with knowledge that the opinion lacked credibility, was not good faith reliance. The Steering Committee must have access to discoverable information on what RRMS did and did not consider and what RRMS relied upon and rejected, regardless of whether that information was provided to the Trustee or its counsel. In other words, the Steering Committee must be able to develop discovery on why the RRMS Reports lacked trustworthiness and why the Trustee could not have relied upon them in good faith. Without question, this bears upon whether the Trustee’s reliance was justified under the circumstances. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In sum, all documents from the RRMS files—including but not limited to draft reports, copies of documents and website screenshots that were considered, notes and calculations, time records describing the tasks undertaken by RRMS, and prior reports on mortgage backed securities—are relevant and discoverable on the issue of whether the Trustee acted in good faith to obtain accurate information to guide its decisions on ultimate liability and the proposed Settlement.

II. Documents from the RRMS File, Such as Drafts, Notes and Calculations, and Documents Relied Upon, are Relevant to the Reasonableness of the Trustee Regardless of Whether Those Documents Were Provided to the Trustee

Documents from Mr. Lin’s working file are relevant to the question of whether the Trustee reasonably relied on his opinion regardless of whether the documents were provided to BNYM or its counsel. *See Chiron Corp. v. Genentech, Inc.*, 179 F.Supp.2d 1182, 1189 (E.D. Cal. 2001). In *Chiron*, a case in which the defendant asserted reliance on counsel as a defense, the court concluded that the protection for counsel’s work product was waived even when the work product of counsel was not provided to the client.⁵ *Id.* The court reasoned that work product was waived because it would be “irrational to assume that there could be no relationship between what counsel really thought (as reflected in her private papers) and what she in fact communicated to her client.” *Id.* (quoting *Electro Scientific Indus. v. General Scanning, Inc.*, 175 F.R.D. 539, 545-46 (N.D. Cal. 1997)). “[E]vidence about what really was in the lawyer’s mind could be quite relevant to the issue of what really was in the client’s mind.” *Id.* In fact, the

⁵ *Chiron* is presented here, not for its holding on the waiver of work product privilege, but rather for its analysis of the relevance of the internal working file of a relied-upon advisor. To be clear, the Steering Committee is not asserting that it should receive access to the RRMS Documents because BNYM has waived a privilege by virtue of their reliance on Mr. Lin’s reports. Because the RRMS Documents are not privileged, reliance on counsel cases that discuss work product waiver are analogous only to the extent that they analyze the relevance of internal documents that the advisor did not provide to the client.

court could not even foresee “all the kinds of ways that the contents of such documents might be used to shed reliable light on the issue of whether the defendant received additional opinions (perhaps orally) that were inconsistent with the opinions reflected in the disclosed opinion letter.” *Id.* Thus, even documents not provided to the client could be “highly probative on the issue of what really reached the mind of the client” and it would be “unfair, absent a compelling countervailing interest, to cut-off access to evidence and leads of this kind.” *Id.*

Here, evidence of what was in the mind of Mr. Lin and the staff of RRMS is relevant or likely to lead to the discovery of relevant evidence regarding what was in the mind of the Trustee. [REDACTED] Ex. 5 at 237:3–238:12. [REDACTED] [REDACTED] *Id.* at 238:13–239:15. It is reasonable to assume that other changes in Mr. Lin’s reports were the result of conversations with Mayer Brown. Consequently, Mr. Lin’s drafts, notes, and calculations are likely to reflect the flow of information between the Trustee, via Mayer Brown, and its advisor. Likewise, the time records, invoices and bills for RRMS are likely to contain relevant information such as when conversations occurred between Mayer Brown and RRMS and how the Trustee, through its counsel, may have directed the path and scope of RRMS’s work. Finally, the documents that Mr. Lin relied upon are relevant to what was in the mind of Mr. Lin and are, therefore, highly probative of what may have reached the Trustee or its counsel. All of these documents bear on the relevant question of whether the Trustee acted reasonably and in good faith when it relied on the reports of RRMS. As these documents are not protected by any work product privilege, there is no countervailing interest that should limit their disclosure.

III. The RRMS Documents Contain Relevant and Discoverable Impeachment Evidence

The RRMS documents are discoverable on one additional ground: they are directly relevant to Mr. Lin's credibility. Even under BNYM's view that Mr. Lin is a fact witness on the issue of the reasonableness of the proposed Settlement Agreement, Mr. Lin can be subject to impeachment. Thus, a subpoenaed party must comply with a document request likely to lead to the discovery of admissible impeachment evidence. *See Nationwide Mut. Fire Ins. Co. v. Smith*, 174 F.R.D. 250, 253 (D. Conn. 1997) (in a bad faith insurance action where the plaintiff must show that the insurer acted unreasonably, granting plaintiff's motion to compel information on previous claims that the insurer's expert had investigated in order to uncover evidence of impeachment). This is particularly true where, as here, evidence relating to or undermining the trustworthiness of Mr. Lin's opinions bears on the question of the Trustee's good faith reliance on the opinions of RRMS.

The deposition of Mr. Lin evidenced numerous areas in which the trustworthiness and credibility of Mr. Lin's opinions could be called into question and where the RRMS Documents could have provided additional evidence for impeachment. *See Introduction supra*. As one small example of many, [REDACTED] Ex. 5 at 154:18-22; 178:4-10; 209:2-16; 244:24-255:23; 276:14-21; 359:9-360:7; 366:12-22; 461:20-462:3; 522:12-17; 559:20-25. Without the benefit of the RRMS Documents—[REDACTED]—the Steering Committee is being deprived of a full opportunity to test the trustworthiness of the RRMS opinions. By extension, the Steering Committee is limited in its ability to gather evidence that the Trustee could not have relied upon the RRMS opinions in good faith.

CONCLUSION

For the above reasons and pursuant to the broad relevance rules of CPLR § 3101(a), the Steering Committee respectfully requests that this Court issue an order compelling the production of the RRMS Documents and permitting the deposition of Mr. Lin to be re-opened to the extent that the withheld documents necessitate additional questioning of the witness.⁶

⁶ Two of the five advisors that BNYM hired have not yet been deposed – Robert Daines and Capstone Valuation Services. To the extent that these depositions reveal that additional relevant documents have been unreasonably withheld, the Steering Committee reserves its right to compel the production of such documents, consistent with any Order of the Court in response to the instant motion.

DATED: January 14, 2013

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