

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), *et al.*

Petitioners,

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 ORDER TO  
SHOW CAUSE WHY THE COURT SHOULD NOT COMPEL DISCOVERY OF  
EVIDENCE THAT THE TRUSTEE HAS PLACED AT ISSUE AND THAT IS SUBJECT  
TO THE FIDUCIARY EXCEPTION**

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The Steering Committee of Intervenor-Respondents and Objectors respectfully moves under CPLR § 3124 to compel the Bank of New York Mellon (BNYM) to produce the following targeted set of communications and materials: (1) communications with counsel at the [REDACTED] meeting; (2) communications with and documents generated by counsel concerning BNYM’s evaluation of the settlement amount, including its decision to retain RRMS Advisors and to forego a review of loan files; and (3) communications with and documents generated by counsel concerning its own self-dealing. This includes materials concerning issues that created risk for BNYM, including event of default, the forbearance agreement and BNYM’s [REDACTED] as well as materials concerning BNYM’s assessment of its own risk, its [REDACTED], and BNYM’s [REDACTED]. The Steering Committee further requests that BNYM be compelled to produce one or more witnesses to testify regarding the above topics.<sup>1</sup>

### INTRODUCTION

BNYM made a decision to bring this Article 77 proceeding and seek expansive findings from the Court through the proposed final order and judgment (“PFOJ”). Nevertheless, BNYM continues to shield important information behind claims of privilege, making it impossible to determine whether BNYM is in fact entitled to the relief it requests. By seeking expansive relief from the Court through its PFOJ, BNYM has placed much, if not all, of its communications with

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<sup>1</sup> The Steering Committee submits this memorandum on behalf of all Intervenor-Respondents 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; Cranberry Park II LLC; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policemen's Annuity and Benefit Fund of the City Of Chicago; and The Westmoreland County Employee Retirement System.

counsel at issue in this case. However, the Steering Committee is not seeking broad discovery into all of BNYM's communications with counsel. Instead, consistent with the Court's prior direction to keep discovery targeted, the Steering Committee has identified three targeted topics that simply cannot remain shielded from discovery.

*First*, the Steering Committee seeks communications with counsel at the [REDACTED] meeting. BNYM has placed at issue the advice its counsel gave to the Trust Committee when the Committee [REDACTED]. In the PFOJ, BNYM seeks numerous findings concerning its "decision to enter into the settlement agreement." BNYM has even taken the position that whether its decision to enter into the settlement agreement was within its reasonable discretion is the *only* issue before the Court. Through the course of discovery, which BNYM has resisted at every turn, the Steering Committee has learned [REDACTED]

[REDACTED] BNYM has steadfastly refused full discovery of what was communicated between the trust committee members and counsel, making an analysis of the Trustee's decision-making process impossible. BNYM's decision-making process at the [REDACTED] meeting has been placed at issue because BNYM came to Court to obtain approval of its decision. Accordingly, BNYM has waived any applicable privileges that might otherwise attach to these communications.

*Second*, the Steering Committee seeks communications with and documents generated by counsel concerning BNYM's evaluation of the settlement amount. BNYM's communications with counsel concerning the settlement amount are at issue in this case. BNYM seeks an order approving of the settlement agreement "in all respects," as well as an order approving of

BNYM's decision to enter into the settlement agreement. Obviously, one of the key elements of the proposed settlement agreement is the amount certificateholders will receive. Testimony from BNYM corporate personnel has made clear that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, the Trustee [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Because BNYM now seeks an order from this Court approving the settlement and BNYM's decision-making concerning the settlement, BNYM's communications with counsel concerning the settlement amount have been placed at issue.

*Finally*, the Steering Committee seeks communications with and documents generated by counsel concerning BNYM's self-dealing. As this Court has previously held, BNYM owed the certificateholders fiduciary duties as trustee, including the duty of loyalty. However, the record contains numerous examples of the Trustee acting in furtherance of its own interests rather than those of certificateholders. For example, the Trustee [REDACTED]

[REDACTED] even though the certificateholders would have greater rights during an event of default. Further, the Trustee throughout this period [REDACTED]

[REDACTED] At one point, the Trustee even agreed (at the suggestion of Bank of America) to [REDACTED]

[REDACTED] In

seeking Court approval for its legal investigation and its deliberations, the Trustee has placed these communications with its counsel at issue.

Even if the Court determines that any of these three issues have not been placed at issue, the Court should still compel production of BNYM's attorney-client communications with respect to those topics because they fall within the fiduciary exception to the attorney-client privilege.

This Court held on August 2, 2012 that BNYM owed certificateholders certain fiduciary duties and that it was subject to the fiduciary exception. The Court invited the Steering Committee to first undertake depositions to determine if good cause exists to compel production of attorney-client communications under the fiduciary exception. The Steering Committee has since taken 25 depositions and the record now establishes that good cause exists to apply the fiduciary exception to the three targeted categories of information discussed above. With respect to these categories, all three directly affect the interests of certificateholders and are essential to findings that the Court must make in this proceeding. Accordingly, good cause exists to compel production of these communications under the fiduciary exception.

## **ARGUMENT**

### **I. BNYM Has Waived the Attorney-Client and Work Product Privileges by Placing the Advice It Received from Counsel at Issue Throughout the Case**

“[A] party is treated as having waived its privileges where: (1) assertion of the privilege was the result of some affirmative act . . . by the non-disclosing party; (2) through this affirmative act, the non-disclosing party put the protected information at issue; and (3) application of the privilege would have denied the opposing party access to information vital to its ability to resist the non-disclosing party's affirmative act.” *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 4 Misc. 3d 1006(A), 2004 WL 1563259, at \*7 (Sup. Ct. N.Y. Cnty. 2004).

The waiver applies where the party claiming the privilege asserts “that [it] has relied on the advice of counsel,” as well as to “circumstances in which a client does not expressly claim that he has relied on counsel’s advice, but where the truth of the parties’ position can only be assessed by examination of a privileged communication.” *Bolton v. Weil, Gotshal & Manges LLP*, 4 Misc. 3d 1029(A), 2004 WL 2239545, at \*4 (Sup. Ct. N.Y. Cnty. 2004); *see also TIG Ins. Co. v. Yules & Yules*, No. 99 Civ. 3378, 1999 WL 1029712, at \*1 (S.D.N.Y. Nov. 12, 1999) (“This type of waiver is recognized in two circumstances—where the party is in fact invoking the substance of the privileged conversation as a basis for a claim or defense, or where the claim or defense is of such a nature that an assessment of its merits requires an examination of the substance of a privileged conversation.”). At-issue waiver applies to both attorney-client communications as well as attorney work product. *See G.D. Searle & Co. v. Pennie & Edmonds LLP*, 308 A.D.2d 404, 404 (1st Dep’t 2003) (“[B]y reason of the at-issue doctrine, [plaintiff] had waived its attorney-client privilege as to the communications and work product in issue”).

A. The Trustee has placed its communications with counsel at t [REDACTED] meeting at issue.

BNYM has placed its decision to enter into the settlement at the center of this case. In the PFOJ, BNYM seeks several findings regarding this decision:

- ¶ g: “the *decision whether to enter into the Settlement Agreement . . .* is a matter within the Trustee’s discretion”
- ¶ i: “the Trustee appropriately considered the claims made and positions presented by the Institutional Investors, Bank of America, and Countrywide relating to the Trust Released Claims *in considering whether to enter into the Settlement Agreement*”

- ¶ j: “*the Trustee’s deliberations* appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the Settlement”
- ¶ k: “The 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.*”

Doc. No. 7 (emphases added).

The Trustee has gone so far as to state to the Court that “the *only* issue before the Court is whether the *decision to settle* was within the scope of the Trustee’s reasonable discretion.” Doc. No. 228 at 3 (emphasis added). BNYM has conceded that discovery should include “documents, information and testimony concerning the basis for the Trustee’s decision to enter into the Settlement Agreement (including the documents and information considered by the Trustee in making its decision).” *Id.* at 1.

BNYM’s decision to enter into the settlement [REDACTED]  
[REDACTED] Robert Bailey, former in-house counsel for BNYM, testified that “[REDACTED]  
[REDACTED] Ex. 1 at 170:4-16.<sup>2</sup> Robert Griffin, the managing director at BNYM [REDACTED]  
[REDACTED] Ex. 2 at 53:5-8.

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<sup>2</sup> Citations to “Ex. \_\_\_” reference the exhibits to the Affirmation of Clare Pennington In Support of OTSC Regarding At Issue And Fiduciary Exception, dated January 13, 2013, and filed simultaneously with this brief.

Mr. Bailey [REDACTED] Ex. 1 at 172:20-25. Richard Stanley, who chaired the Trust Committee meeting, [REDACTED]

[REDACTED] Ex. 3 at 11:4-10; 12:14-22. Mr. Stanley further testified that [REDACTED]

[REDACTED] *Id.* at 172:6-23. However, BNYM has claimed privilege over the substance of that information and those questions, and has refused to allow testimony on questions about the [REDACTED]

[REDACTED] Ex. 1 at 184:5-15; 187:4-189:15; 190:17-191:10; Ex. 4 at 195:20-196:4.<sup>3</sup>

BNYM's assertion of the privilege over the [REDACTED] meeting was the result of its affirmative decision to bring this Article 77 proceeding and seek findings concerning the decision it made at that [REDACTED] meeting. By doing so, BNYM has placed these communications squarely at issue. Denying the Court and investors access to these communications deprives them of information vital to making any determination as to what the Trustee considered in deciding to enter into the proposed settlement agreement, as well as the overall reasonableness of that decision.

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<sup>3</sup> At the January 8, 2013 deposition of Richard Stanley, BNYM offered to permit the witness to testify concerning what Mr. Bailey said at the trust committee meeting, subject to a number of conditions. BNYM insisted that the Steering Committee agree that: it would not argue that it could redepose witnesses who had already refused to answer questions concerning Mr. Bailey's communications at the meeting based solely on this new position; that the Steering Committee would not use this testimony to argue that BNYM had more broadly waived the privilege; and that the entire Steering Committee agree to the terms. Even though BNYM had already blocked this testimony with respect to six of the eight attendees at the Trust Committee meeting whose depositions the Steering Committee has noticed, the Steering Committee was willing to agree to these terms.

However, BNYM also asked that other intervenors involved in other litigation against the Trustee agree not to argue waiver in the other litigation. The other intervenors did not agree to forego any of their rights in other litigation. BNYM refused to drop this condition, and so no agreement was reached. The Steering Committee has now taken the deposition of all eight individuals who were at the Trust Committee meeting whose depositions were noticed by the Steering Committee, and has been consistently blocked from obtaining discovery about these communications.

*Royal Indemnity* is instructive. In that case, the insurer sought a declaration that it was not obligated to provide coverage for a class action settlement because, among other reasons, it did not receive timely notice of the claims. 2004 WL 1563259, at \*2. The Court held that to the extent any privilege covered these materials, it was waived because Defendants had placed them at issue in arguing that notice was timely.

[T]he defendants bear the burden of establishing that the notice they provided to plaintiffs was timely . . . . In order to carry their burden, defendants will have to establish that the timing and quantity of the demands they received from the class action plaintiffs, and the assessments made of these demands by defendants' own counsel, made it reasonable for notice to have been withheld from plaintiffs until late March of 1997. *Defendants cannot establish that they provided timely notice to [the insurer] while at the same time refusing to disclose the information that would either prove or disprove that threshold assertion.*

*Id.* at \*9-10 (emphasis added).

Similarly, BNYM cannot establish that 1) its decision to enter into the settlement was reasonable, 2) it considered the claims being settled, or 3) its decision was made in good faith, “while at the same time refusing to disclose the information that would either prove or disprove that threshold assertion.” *Id.* Accordingly, because BNYM has put its communications with counsel at the [REDACTED] meeting at issue, BNYM should be compelled to produce any documents concerning those communications and to provide testimony as to those communications.

B. BNYM has placed its communications with counsel relating to the settlement amount, as well as documents generated by counsel relating to the settlement amount, at issue.

Through this Article 77 proceeding, BNYM is asking this Court to both approve its decision to enter into the proposed settlement agreement and to approve the proposed settlement agreement “in all respects.” Doc. No. 7 at ¶¶ k, m. Ms. Lundberg testified that the issues BNYM considered when entering into the settlement agreement were all “discussed in the expert reports that we released in connection with our entering into the Settlement Agreement,”

including the report by Brian Lin at RRMS Advisors discussing “the amounts that could potentially be due as a result of breaches of reps and warranties.” Ex. 5 at 280:10-281:16. Accordingly, both BNYM’s decision to retain RRMS Advisors and its decision to agree to the settlement amount are at issue before the Court. Because both decisions were made by BNYM [REDACTED] the communications with counsel regarding these decisions, as well as any work product generated by counsel, should be produced.

Mr. Stanley [REDACTED]

[REDACTED] Ex. 5 at 461:25-462:6. Mr. Stanley testified that [REDACTED]

[REDACTED] Ex. 3 at 118:6-119:9. Since Mr. Stanley [REDACTED] [REDACTED] [REDACTED] (as well as any of outside counsel’s work product) are at issue in this case. *See Bolton*, 2004 WL 2239545, at \*4 (at-issue waiver applies where party claims “that he has relied on the advice of counsel”).

Not only did the Trustee [REDACTED]

[REDACTED] but the Trustee also [REDACTED]

[REDACTED] Ms. Lundberg testified that [REDACTED]

[REDACTED] Ex. 5 at 459:8-23. Because neither the Trustee nor Mr. Lin reviewed a single loan file, the Trustee also came to the conclusion that loan file review was not necessary to determine the appropriate measure of damages sustained by the trusts. Again, the Trustee [REDACTED] [REDACTED]. *Id.* at 147:21-149:3.

Therefore, BNYM has placed at issue (1) communications and work product concerning BNYM's decision to hire RRMS, (2) communications and work product finding the RRMS report was reasonable, and (3) communications and work product concluding that it was appropriate to forego a review of loan files. BNYM cannot seek a finding that its decision-making process was sound and that the settlement should be approved in all respects "while at the same time refusing to disclose the information that would either prove or disprove that threshold assertion." *Royal Indem.*, 2004 WL 1563259, at \*10. BNYM should thus be compelled to produce these documents.

C. The Trustee's request for approval of its "legal investigation" and its "deliberations" has placed much of its communications with counsel and documents generated by counsel at issue.

The Trustee also seeks a finding that "the Settlement Agreement is the result of factual and legal investigation by the Trustee" Doc. No. 7 at ¶ j. Ms. Lundberg testified that the legal investigation consisted solely of analyses conducted by two of the "experts" retained by the Trustee, as well as by Mayer Brown, its outside counsel. Ex. 5 at 242:10-244:9. When the Steering Committee inquired "What legal investigation did Mayer Brown engage in . . . prior to the trustee determining that it would try to get court approval of the settlement," the Trustee refused to permit Ms. Lundberg to answer. Ex. 5 at 243:13-244:2.

Similarly, the Trustee asks this Court to find that the "Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims, the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries, and the terms of the settlement." Doc. No. 7 at ¶ j. Ms. Lundberg testified that the only alternative to the settlement of which she was aware was litigation. Ex. 5 at 248:9-16; 249:19-250:5. However, when the Steering Committee asked what that litigation alternative that

was considered by the Trustee would have entailed, the Trustee again refused to permit Ms. Lundberg to testify. Ex. 5 at 251:20-253:15.

By seeking findings regarding the Trustee's legal investigation and the Trustee's deliberations, the Trustee has placed those matters at issue in this proceeding. Although the Steering Committee is entitled to all communications with counsel regarding these findings pursuant to the at issue waiver, the Steering Committee is limiting its request to a narrow subset of those communications concerning the related issues of: (1) event of default and the Trustee's related decision to enter into a forbearance agreement; (2) the Trustee's assessment of its own risk and its [REDACTED] (3) the Trustee's [REDACTED] [REDACTED] and (4) the [REDACTED] [REDACTED] These topics are both relevant in their own right and provide evidence that the Trustee acted throughout the settlement negotiations in a self-interested manner.

BNYM's conflict of interest was triggered by, among other things, an October 18, 2010 notice sent by the investor group represented by Gibbs & Bruns. The notice put Bank of America/Countrywide on notice of several violations of the Pooling and Servicing Agreements which, if uncured after 60 days, would trigger an event of default. Douglas Chapman, BNYM's risk officer, testified that [REDACTED] [REDACTED] Ex. 6 at 237:14-25. When an event of default occurs, the Trustee is held to a heightened standard of conduct--a prudent person standard--and is required to give notice of the event of default to certificateholders so that they may bring suit to enforce their contract rights if the trustee fails to do so. Ex. 7 at 201:20-23; Ex. 2 at 143:3-4.

Although it is common to provide notice to certificateholders of significant events, such as an impending event of default or other matters affecting the rights of certificateholders,

[REDACTED] Mr. Griffin stated that he was [REDACTED]  
[REDACTED]

[REDACTED] Ex. 2 at 218:6-14. BNYM's attorney, Jason Kravitt, testified that [REDACTED]  
[REDACTED]

[REDACTED] Ex. 7 at  
187:21-24 [REDACTED]  
[REDACTED]

Remarkably, Mr. Kravitt stated in an e-mail that [REDACTED]  
[REDACTED]

[REDACTED] Ex. 9. Less than two weeks after this e-mail, [REDACTED]  
[REDACTED]

[REDACTED] Pursuant to [REDACTED] as well as the "side letter"  
indemnity agreement attached to the proposed settlement agreement, Doc. No. 3 at Ex. C, [REDACTED]  
[REDACTED]

[REDACTED] Ex. 7 at 537:6-539:14. The  
Trustee never provided any formal notice to certificateholders before it filed the Article 77  
petition, including any notice that [REDACTED]  
[REDACTED]

[REDACTED] Doc. No. 7 at ¶ j.  
[REDACTED]

At the same time BNYM [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] BNYM's deliberations [REDACTED] remain hidden behind the Trustee's privilege

assertions. Mr. Stanley testified that [REDACTED]

[REDACTED]

[REDACTED] Ex. 3 at 274:3-275:14. Similarly, Ms. Lundberg was not permitted to answer the question, [REDACTED]

[REDACTED] Ex. 5 at 401:12-24.

[REDACTED]

[REDACTED]<sup>4</sup>

Finally, investors have now learned that shortly before the proposed settlement agreement was signed, BNYM was [REDACTED]

[REDACTED]

[REDACTED]

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<sup>4</sup> Whether the [REDACTED] is still an open question. Notably, Ms. Lundberg conceded that [REDACTED] Ex. 5 at 411:14-24.

[REDACTED]

[REDACTED] This conduct shows that on the eve of signing the proposed settlement agreement, the Trustee was still seeking to benefit itself.

Thus, throughout these negotiations concerning an event of default, notice to certificateholders, the forbearance and indemnity agreements, and the release of certificateholder claims against the Trustee, the Trustee repeatedly sought to protect itself from potential liability and the significant downside risk it was facing. Whether the Trustee’s deliberations were “appropriately focused” on seeking “remedies for the benefit of the Trust Beneficiaries” is thus highly in doubt and questionable at best. Doc. No. 7 at ¶ j. BNYM has thus placed these communications and work product at issue, as it cannot seek such relief in the PFOJ “while at the

same time refusing to disclose the information that would either prove or disprove” those findings. *Royal Indem.*, 2004 WL 1563259, at \*10.

## **II. Good Cause Exists to Permit Discovery on a Narrow Set of Attorney-Client Communications.**

The Intervenors are also entitled to the communications discussed above because good cause exists for their disclosure under the fiduciary exception to the attorney-client privilege. The fiduciary exception requires that a fiduciary’s “judgment must stand on its merit and not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it was, at least in part, exercised.” *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 111 (Sup. Ct. N.Y. Cnty. 2003). Accordingly, a fiduciary may not withhold communications with its attorneys on the basis of attorney-client privilege where (1) the fiduciary sought legal advice for the benefit of the party seeking disclosure as a result of the fiduciary relationship and (2) good cause exists to compel disclosure. *Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep’t 1988).

The Court has “already decided the fiduciary part” of the exception in holding that BNYM possessed “some fiduciary obligations . . . that would rise to the level of finding there could be a fiduciary exception” to BNYM’s claims of privilege. Ex. 12 at 162:7; 160:8-11. The Court instructed the parties to begin discovery and, if necessary, to return to argue whether the good cause standard for the fiduciary exception is met. *Id.* at 161:22-162:7. Good cause exists where: (1) the moving party is directly affected by the decisions the fiduciary made on his attorneys’ advice; (2) the information sought is highly relevant and may be the only evidence of whether the fiduciary’s actions were in furtherance of the beneficiary’s interests; (3) the communications relate to prospective actions and not advice on past actions; (4) claims of self-

dealing and conflict of interest are colorable, and (5) the information sought is not only relevant, but also specific. *See Stenovich*, 195 Misc. 2d at 114.

After taking 25 depositions, the Steering Committee has been able to narrow its request to the three categories discussed above. Even if BNYM had not waived the privilege with respect to these communications by placing them at issue, good cause exists here to compel their production under the fiduciary exception.

A. Good cause exists for production of the communications at and surrounding the [REDACTED] meeting.

The factors set forth in *Stenovich* have been met here with respect to disclosure of evidence related to the [REDACTED] Meeting. First, *all certificateholders have been directly affected by the decisions made by BNYM.* [REDACTED]

[REDACTED]

[REDACTED] Ex. 1 at 170:4-16 [REDACTED]

[REDACTED] Ex. 2 at 53:5-8 [REDACTED]

[REDACTED]

[REDACTED] There can be no doubt that the decision of the [REDACTED] to enter into the settlement directly affected all certificateholders.

Second, *these communications are highly relevant and may be the only evidence of whether BNYM's conduct was in furtherance of certificateholder interests.* [REDACTED]

[REDACTED]

[REDACTED] Ex. 3 at 172:6-23. [REDACTED]

[REDACTED] For example, [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 207:4-12. BNYM's refusal to

produce this information calls into serious question whether the [REDACTED] was acting in the interests of certificateholders or in the interests of BNYM when it decided to approve the settlement agreement.

Third, *the communications relate to prospective actions, not past actions.* The communications from Mr. Bailey at the [REDACTED] meeting related to the [REDACTED] decision of whether to agree to enter the proposed settlement, which it had not yet done.

Fourth, *allegations of conflict and self-interest are strong.* As detailed at length above, there is ample evidence of self-dealing by the Trustee, including [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 11 at 6.

Lastly, *the information sought is not only relevant, but also specific.* The Steering Committee seeks testimony concerning what Mr. Bailey communicated to members of the [REDACTED] [REDACTED] during the [REDACTED] meeting, any questions asked by members of the [REDACTED] to Mr. Bailey, and any communications between Mr. Bailey and members of the [REDACTED] [REDACTED] leading up to the [REDACTED] meeting concerning the meeting. The [REDACTED] meeting was [REDACTED] Ex. 13, so providing testimony and any relevant documents would be straightforward.

B. Good cause exists for production of communications concerning the settlement amount.

The *Stenovich* factors have also been met with respect to the settlement amount. *All certificateholders have been directly affected by the decisions made by BNYM.* Many investors

have argued that the pennies-on-the-dollar settlement the Trustee has presented to the Court for approval is insufficient. Today, a year-and-a-half after the Trustee brought this Article 77 proceeding, many questions remain about the adequacy of this settlement amount and why the Trustee agreed to it. All certificateholders have been affected by BNYM's decision to agree to this settlement amount and endorse the analysis performed by Mr. Lin.

*These communications are highly relevant and may be the only evidence of the degree to which BNYM's conduct was in furtherance of certificateholder interests.* Whether the settlement is fair and reasonable and whether the trustee acted reasonably and in good faith are the two principal questions the Court must consider in this proceeding. As noted above, the Trustee did not [REDACTED]

[REDACTED] in concluding that the settlement amount report was reasonable, and in concluding it would not review even a sampling of the loan files. Accordingly, to determine whether the Trustee was in fact protecting certificateholder interests when it agreed to such a low settlement amount, investors must have access to the Trustee's communications with its counsel.

*The communications relate to prospective actions, not past actions.* All the requested communications concern BNYM's prospective decisions—i.e., whether to hire RRMS; whether to agree to the settlement amount; whether to forego loan file review—and not past actions.

*Allegations of conflict and self-interest are strong.* As discussed above, the Steering Committee has ample evidence that the Trustee was acting in furtherance of its own self-interest.

*The information sought is not only relevant, but also specific.* The requested communications are specifically focused on the Trustee's decision to retain RRMS Advisors, the Trustee's reliance on the report issued by RRMS Advisors, and the Trustee's decision to forego loan file review.

C. Good cause exists for production of communications concerning whether the Trustee engaged in self-dealing.

There is no question that trustees owe heightened duties to their beneficiaries:

The duty of a trustee, not to profit at the possible expense of his beneficiary, is the most fundamental of the duties which he accepts when he becomes a trustee. It is part of his obligation to give his beneficiary his undivided loyalty, free from any conflicting personal interest; an obligation that has been nowhere more jealously and rigidly enforced than in New York where these indentures were executed.

*Dabney v. Chase Nat. Bank of City of N.Y.*, 196 F.2d 668, 670 (2d Cir. 1952) (Hand, J.).

BNYM's communications with counsel that would enable the Court to determine whether it engaged in self-dealing are central to this case, and good cause exists for their production.

*All certificateholders have been directly affected by the decisions made by BNYM.*

Whether an event of default occurred and whether BNYM actively sought to prevent one from occurring are matters of great importance to certificateholders, who would have received the benefit of notice and a trustee held to a higher standard of conduct if an event of default occurred. Similarly, the Trustee's [REDACTED] throughout the process significantly affected their rights and ability to have any involvement in the settlement negotiations. And most fundamentally, the Trustee's decision [REDACTED]

[REDACTED] seriously calls into question whether the Trustee was acting to protect the interests of certificateholders throughout the course of the settlement negotiations.

*These communications are highly relevant and may be the only evidence of whether BNYM's conduct was in furtherance of certificateholder interests.* Whether the Trustee acted with a conflict of interest is a fundamental question that directly impacts the measure of judicial scrutiny the Trustee's conduct warrants, among other issues. A court must review a conflicted

trustee's conduct and actions "with strict scrutiny and with special care." *Milea v. Hugunin*, 24 Misc. 3d 1211(A), 2009 WL 1916400, at \*8 (Sup. Ct. Onondaga Cnty. 2009) (Article 77 proceeding); *see also Birnbaum v. Birnbaum*, 117 A.D.2d 409, 416 (4th Dep't 1986) ("One of the most stringent precepts in the law is that a fiduciary shall not engage in self-dealing and when he is so charged, his actions will be scrutinized most carefully."). In some cases, an action taken by a conflicted trustee must be set aside altogether. *See City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 132 (1943). The communications BNYM was having with its counsel concerning these issues that go directly to on whose behalf BNYM was acting may be the only evidence of what BNYM was actually trying to protect.

*The communications relate to prospective actions, not past actions.* The Steering Committee seeks only forward-looking communications on these narrowed topics, not communications concerning the Trustee's past actions.

*Allegations of conflict and self-interest are strong.* As discussed above, the Steering Committee has ample evidence that the Trustee was acting in furtherance of its own self-interest.

*The information sought is not only relevant, but also specific.* The Steering Committee has narrowed its original request under the fiduciary exception from all the documents to which it believes it is entitled to the subset of documents specifically targeted at one of the fundamental issues in the case: whether BNYM acted in a self-interested manner.

## CONCLUSION

For the foregoing reasons, the Steering Committee respectfully requests that this Court order BNYM to produce (1) communications with counsel at the [REDACTED] meeting; (2) communications with and documents generated by counsel concerning BNYM's evaluation of the settlement amount, including its decision to retain RRMS Advisors and to

forego a review of loan files; and (3) communications with and documents generated by counsel concerning the event of default and forbearance agreement, BNYM's assessment of its own risk and [REDACTED], BNYM's decision(s) [REDACTED] and [REDACTED]. The Steering Committee also requests that BNYM be compelled to produce one or more witnesses to testify on the above topics.

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RESPECTFULLY SUBMITTED,

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