REDACTED VERSION

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 EVIDENCE PURPORTEDLY PROTECTED UNDER THE COMMON INTEREST PRIVILEGE

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I. INTRODUCTION

On April 3, 2012, the Steering Committee of the Intervenor-Respondents and Objectors ("Intervenors") moved pursuant to CPLR § 3124 to compel the production of certain documents being withheld by The Bank of New York Mellon ("BNYM" or "Trustee") and the Inside Institutional Investors on claims of relevance and privilege. The parties have made progress on some of the disputes arising out of the Intervenors' original motion to compel. Several critical issues remain unresolved, however, including one fundamental issue that is the subject of this motion: The Trustee and the Inside Institutional Investors continue to resist production of highly relevant and discoverable communications exchanged between them from November 18, 2010 through June 28, 2011 pursuant to the common interest exception to the waiver of the attorney client privilege, and also continue to thwart the Intervenor's efforts to elicit this information during depositions on the same basis.[1]

The Trustee's and Insider Institutional Investors' assertion of a common interest is simply wrong. These entities did not share a common interest on several fundamental aspects of the proposed Settlement. And even if they did share a common interest, all Intervenors share in this interest as it should not be restricted to a select group of investors. Either way, the Court should order production of the withheld materials. Whether collusion must be shown is irrelevant to the materiality of the evidence requested herein.

[1] The Steering Committee submits this supplemental memorandum on behalf of all Intervenors 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; 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.

Furthermore, the Court has not yet ruled on the validity of the Trustee's and Inside Institutional Investor's use of this objection. During the August 2, 2012 hearing, the Court held: "I appreciate Mr. Madden speaking about the common interest privilege. *I don't think we reach it at this point*. We might, at some other point. The law, I am sure, won't change much between now and then." *See* Affirmation of Derek W. Loeser ("Loeser Aff."), Ex. 1, Aug. 2, 2012 transcript at 90 (emphasis added). The Court further invited the Intervenors during the October 12, 2012 hearing to "bring an order to show cause" and to "focus in on just the cases you want [the Court] to look at." Loeser Aff., Ex. 2, Oct. 12, 2012 transcript at 134. Most recently, the Court permitted the parties to file formal briefs to raise remaining discovery issues during the December 7, 2012 teleconference.

Thus, the Intervenors respectfully request that the Court compel production of all documents currently being withheld under the common interest privilege by the Trustee and the Inside Institutional Investors. These documents have all been identified by the Inside Institutional Investors in a previously disclosed privilege log to the Intervenors on May 21, 2012, and comprise a total of 548 communications, most of which are emails. The Intervenors also request the Court reopen, at a minimum, the deposition of Jason Kravitt, an attorney who was indisputably one of the primary negotiators of the proposed Settlement for BNYM. The deposition would be confined *solely* to topics Mr. Kravitt was instructed not to answer or otherwise objected to on the basis of the common interest exception.[2] These key and fundamental topics to this proceeding include, *inter alia*, (1) whether the Trustee and the Inside Institutional Investors actually contemplated litigating put-back claims against Bank of America,

[2] To the extent the Intervenors succeed in proving that the fiduciary exception justifies production of evidence normally protected under the attorney-client privilege for the reasons set forth in a concurrently filed brief, the Intervenors also request that they be able to ask questions of Mr. Kravitt that he was instructed not to answer based on the attorney-client privilege.

and what, if anything, they did to prepare for such litigation, (2) whether an Event of Default had actually occurred, (3) whether the Trustee considered conducting loan sampling, (4) whether the Trustee evaluated the quality of the master servicing of loans in the Covered Trusts, (5) whether Mayer Brown, counsel for Trustee, had a conflict in representing the Trustee versus representing the rights of other Certificateholders, and (6) the scope of the Trustee's indemnity.

Alternatively, the Court should order an *in camera* review of the documents listed in the disputed privilege log. A limited universe of documents exists that are purportedly protected by the common interest exception, and there is no added burden on either the BNYM or the Inside Institutional Investors to produce such documents. Courts in general and this Court in particular have conducted *in camera* inspections when the common interest rule has been invoked and is disputed. In a proposed settlement involving billions of dollars that attempts to forever extinguish the rights of all Certificateholders who seek to obtain more information about this settlement, the Court should test the veracity of the Trustee's and Inside Institutional Investors' assertion of the common interest privilege.

The documents and deposition testimony sought herein by the Intervenors—evidence unjustifiably withheld pursuant to improper claims of a common interest—are unquestionably relevant to the issue of whether the proposed Settlement is in fact in their best interests and whether the Trustee acted reasonably. Thus, the Court should order their production and reopen Mr. Kravitt's deposition.[3]

[3] The Intervenors also refer the Court to the arguments made with respect to the common interest exception to the attorney client privilege in their underlying Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery, *see* ECF No. 213-1, those made in their reply, *see* ECF No. 278, as well as those made in their Supplemental Memorandum of Law in Support of the Motion to Compel the Inside Institutional Investors' Settlement Communications, *see* ECF No. 337.

II. BACKGROUND

Since the Intervenors first sought to compel production of documents purportedly protected under the common interest exception to the waiver of the attorney client privilege, and through the guidance of the Court in five hearings from April 24, 2012 through October 12, 2012, the Trustee, the Inside Institutional Investors, and Bank of America (the "Settlement Proponents") have slowly produced relevant discovery regarding the proposed Settlement to the Intervenors. The production has revealed important information regarding the circumstances of the proposed Settlement, and has unquestionably undermined the Settlement Proponents' initial (and now incorrect) assertion that all relevant materials were produced as part of their voluntary disclosure in the fall of 2011. Though this piecemeal production has shed some light on how the proposed Settlement was reached, the full transparency necessary to fully and fairly evaluate the Settlement has not yet been achieved.

As demonstrated by the Inside Institutional Investors' unchanged privilege log from May 21, 2012, the Trustee and the Inside Institutional Investors continue to withhold 548 documents between November 22, 2010 and June 28, 2011—the majority of which are emails between attorneys involved in this proceeding—pursuant to the common interest privilege. As previously set forth in the Steering Committee's Supplemental Memorandum of Law in Support of the Motion to Compel the Inside Institutional Investors' Settlement Communications, the nature of these communications cover several key aspects of the proposed Settlement.[4] ECF No. 337 at 3-4. Of the 548 communications contained in the Trustee's privilege log, at least 48 are identified by the Trustee as "communication[s] regarding settlement negotiations" with the Inside

[4] Significantly, the Intervenors' also sought binary communications between the Inside Institutional Investors and Bank of America ("Bofa"). Following the October 12, 2012 hearing, Bofa voluntary produced these communications, though the Inside Institutional Investors have curiously refused to certify the completeness of this production.

Institutional Investors, and at least 148 are binary communications regarding conference calls or meetings related to settlement discussions. *See* ECF No. 341. There are at least 41 additional "communication[s] regarding the terms of [the] settlement" or the Settlement Agreement, and there are at least 35 binary "communication[s] regarding draft pleadings" of the Settlement Agreement. *Id.* The privilege log also details substantial binary communications between the Trustee and the Inside Institutional Investors "relating to settlement discussion[s]," communications "regarding the terms of the settlement," and communications "regarding settlement negotiations." *Id.* In addition, it is evident that from April, 2011 through June, 2011—the two months leading up to the filing of this Article 77 proceeding—the Inside Institutional Investors communicated frequently with the Trustee. The privilege log ultimately reveals that there are a significant number of binary communications regarding fundamental aspects of the proposed Settlement.

The Trustee and the Inside Institutional Investors have also asserted objections during depositions and instructed witnesses not to answer any questions by the Intervenors during depositions regarding binary communications between BNYM and the Inside Institutional Investors based on the common interest exception. Indeed, the Court recognized the frequent use of such objections during the last hearing. *See* Loeser Aff., Ex. 2 at 54, 123-24 ("[Y]ou seem to object to almost every other question based on what I am looking at in the transcript and what I am seeing on the video."); ("I have to see things. So to the extent that you objected to every single question through this deposition, many, many, many of the questions. I mean, everything you guys read to me had objections that were longer than the answers. It is going to be a long process. It is going to be problematic.").

Mr. Kravitt's deposition has been especially fraught with common interest objections. Mr. Kravitt—one of the primary representatives of the proposed Settlement for BNYM—was specifically instructed not to answer an alarming amount of key topics, including (1) whether the Trustee and the Inside Institutional Investors actually contemplated [redacted] (*see* Loeser Aff., Ex. 3, Deposition of Jason Kravitt ("Kravitt Depo.") at 238:19-241:13); (2) whether [redacted] (*id.* at 327:16-329:23; 444:21-447:12); (3) whether the Trustee considered [redacted] (*id.* at 283:18-284:10); (4) whether the Trustee [redacted] (*id.* at 341:18-342:5); (5) whether Mayer Brown, counsel for Trustee, [redacted] (*id.* at 138:4-141:2); (6) [redacted] (*id.* at 361:19-362:25); and lastly, (7) which topics the Trustee [redacted] (*id.* at 347:13-20).

The instructions not to answer these questions are especially troublesome when considering that Mr. Kravitt admits [redacted][5] *See* Loeser Aff., Ex. 3, Kravitt Depo. at 345:14-21. The frequency of these conversations are further evidenced by documents which generally describe that such

[5] These illustrative examples reveal the instances in which Mr. Kravitt was instructed not to answer, and do not account for the countless objections raised by the Trustee and the Inside Institutional Investors in which Mr. Kravitt gave partial answers. For instance, even a cursory review of the transcript reveals that the common interest objection was employed at an alarming rate.

binary conversations occurred specifically between the Trustee and the Inside Institutional Investors, without revealing the substance behind what was discussed. *See* ECF No. 341. Significantly, these are not peripheral topics; instead they are *fundamental* topics that directly relate to whether, even under the Trustee's narrow view of this litigation, they acted reasonably in settling the claims of all the Covered Trusts for the price that they did. Any doubt as to their relevancy is completely erased by the Trustee's own Proposed Final Order and Judgment, which as the Court knows, seeks broad and expansive relief for the Trustee and its settlement-related activities.

Though the Settlement Proponents erroneously believe that the Court has settled this issue (*see* Loeser Aff., Ex. 2, Oct. 12, 2012 transcript at 80) (Kathy Patrick: "The common interest privilege, you ruled on it, you know what the law is"), the Court has in fact not yet decided the issue. In fact the Court has made clear that the Intervenors could revisit the issue if necessary. Thus, consistent with the Court's invitation to do so during the parties' most recent December 7, 2012 teleconference with the Court, the Intervenors respectfully request that the Court compel disclosure of the highly relevant and discoverable documents identified in the May 21, 2012 Inside Institutional Investors' privilege log, or at a minimum to conduct an *in camera* review of these documents. In addition, the Intervenors request that the Court grant the Intervenors the right to reopen at least the deposition of Mr. Kravitt on topics solely objected to on common interest grounds, and topics reasonably following from his answers.

III. ARGUMENT

A. Binary settlement communications between the Trustee and the Inside Institutional Investors are relevant and discoverable in this Article 77 proceeding.

As an initial matter, the Trustee and the Inside Institutional Investors are incorrect in suggesting that the Intervenors must first show collusion in order to justify their production. No

such showing is required. New York law is clear that the test of whether such communications should be produced, even in the course of a settlement, is measured by materiality and relevance. *See* CPLR § 3101(a). In fact, no New York court *has ever* suggested that the party seeking disclosure must first show collusion, and the Trustee and the Inside Institutional Investors cannot deny that they have not cited to a single New York case to support their claims. To the contrary, New York courts dealing with this issue have actually rejected the notion that collusion must be shown in order to justify production of confidential materials. *See*, *e.g.*, *Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 15 Misc.3d 583, 591, 834 N.Y.S.2d 631 (Sup. Ct. N.Y. Cnty. Feb. 8, 2007) (rejecting argument made by party shielding discovery that collusion must be shown in order to compel purportedly confidential documents) *rev'd on other grounds*, 49 A.D.3d 85 (1st Dep't 2007). This misleading legal argument raised by the Inside Institutional Investors should be put to rest once and for all.

The proper test for disclosure under New York law, consistent with the plain language of CPLR § 3101(a), is that settlement communications are plainly discoverable if they are material and necessary to a party's case. *Masterwear Corp. v. Bernard*, 298 A.2d 249, 250 (1st Dep't 2002); *see also Mahoney v. Turner Const. Co.*, 61 A.D.3d 101, 104 (1st Dep't 2009) ("The touchstone for determining whether information is discoverable in an action is whether the information is 'material and necessary'"); *Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968) ("The words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity"); Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR § 3101:18a ("The central inquiry in resolving . . . disclosure requests [regarding settlement-related documents] should

focus on relevance."). This should come as no surprise. Where a settlement is at issue—as is without question the case here—negotiations leading to the settlement are relevant and discoverable. *See DH Holdings Corp. v. Marconi Corp. PLC*, 809 N.Y.S.2d 404, 407 (Sup. Ct. N.Y. Cnty Oct. 24, 2005) (compelling disclosure of settlement related documents because "[t]he heart of this matter is to determine if the settlement was appropriate, and if so, was it reasonable.").

Here, the Trustee and the Inside Institutional Investors cannot seriously contend that the documents sought by the Intervenors are not necessary or material to both the Intervenors and the Court. As the Trustee itself admits, "its evaluation of the claims and the Settlement is discoverable." *See* ECF No. 263 at 2. And given that the Trustee "considered information provided by the [Inside] Institutional Investors" in order to make these evaluations, *see id.* at 4, and because the privilege log reveals that the Trustee and the Inside Institutional Investors communicated almost daily in the months leading up to the settlement—a fact corroborated Mr. Kravitt who confirms he spoke to Ms. Patrick on a daily basis—these documents are without question relevant. Even under the Trustee's view of the case that the only conduct at issue in this proceeding is the Trustee's decision to enter into the Settlement and bind the Trusts," *see id*. at 2, binary communications the Trustee had with the Inside Institutional Investors regarding settlement terms are plainly material and relevant.

Relevance is not a zero sum game. The Trustee and the Inside Institutional Investors will undoubtedly argue that they have produced substantial discovery, or that the Intervenors can get this information from other sources. Yet simply because some relevant discovery has been produced and witnesses have been produced for depositions does not mean that all obligations cease. And as evidenced by Mr. Kravitt's deposition, one of the primary representatives who

dealt with settlement negotiations for the Trustee, he was instructed not to answer on at least seven key topics of the proposed Settlement as discussed above. There should be no doubt that the evidence sought by the Intervenors here is relevant and material to this proceeding.

B. The Trustee and the Inside Institutional Investors have failed to make the requisite showing that the common interest exception to the attorney client privilege applies.

1. Parties invoking the common interest exception must first establish the existence of the attorney-client privilege.

In addition to being relevant, the discovery at issue is not subject to the common interest exception to the waiver of the attorney client privilege because this narrow exception has been incorrectly asserted. The burden is on the party invoking common interest to initially show that a proper attorney client privilege exists. *See U.S. Bank. N.A. v. APP Int'l Fin. Co.*, 33 A.D.3d 430, 431 (1st Dep't 2006) ("Before a communication can be protected under the common interest rule, the communication must *satisfy the requirements* of the attorney-client privilege . . .") (emphasis added). This important principle reflects that the common interest exception is not a separate privilege, but an exception to the rule that disclosure of the attorney client privilege is waived once a communication is made to a third party. *See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 470-71 (S.D.N.Y. 2003) (applying New York law).

The Trustee and the Inside Institutional Investors have failed to identify, at a minimum, which communications are attorney client communications (which are subject to an entirely distinct test) consistent with their burden to do so. They have instead chosen to assert blanket objections both in their privilege log and during depositions under the common interest rule. And in prior briefings and arguments to the Court regarding this issue, they have never established that these communications are properly protected under the attorney-client privilege.

2. The common interest exception does not apply.

Putting aside their failure to meet this threshold burden, the Trustee and the Institutional Investors also cannot meet the narrowly construed elements of the common interest exception. The common interest rule applies only if the parties asserting the privilege have (1) *identical*, and not merely similar interests, and (2) purely *legal*, and not merely commercial interests. *Gulf Islands*, 215 F.R.D. at 471. Additionally, as this Court recognizes, "[t]he party asserting the common interest rule bears the burden of showing that there was an *agreement*, though not necessarily in writing, embodying a cooperative and common enterprise towards an *identical* legal strategy." *AMP Servs. Ltd. v. Walanpatrias Foundation*, 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008) (Kapnick, J.) (emphasis added). Like all privileges, the common interest rule is narrowly construed. *See Aetna Cas. and Sur. Co. v. Certain Underwriters at Lloyd's London*, 176 Misc. 2d 605, 612, 676 N.Y.S.2d 727 (Sup. Ct. N.Y. Cnty. Feb. 17, 1998) (the common interest rule "is subject to severe limitations and a 'narrow construction.'").

Here, there was never an agreement—in writing, orally or otherwise—between the Trustee and the Inside Institutional Investors regarding a common interest. Mr. Kravitt testified:

[redacted]

Loeser Aff., Ex. 3, Kravitt Depo. at 179:11-18. In addition, Robert Bailey, senior in-house counsel for the Bank of New York Mellon, also testified [redacted]

[redacted]

[redacted]

Loeser Aff., Ex. 4, Deposition of Robert Bailey ("Bailey Depo.") at 330:15-331:11. The parties' decision not to enter into an express agreement also reflects that their interests were not always aligned. As Mr. Kravitt testified in response to a question regarding when the parties pursued settlement: [redacted]

Loeser Aff., Ex. 3, Kravitt Depo. at 158:25-159:9. The failure to have an agreement, written or otherwise, is fatal to the Trustee's and the Inside Institutional Investors' use of the common interest exception to the attorney client privilege.

Furthermore, as this Court recognizes, parties retroactively asserting through bald assertions that a common interest covered the evidence at issue is insufficient to invoke the common interest exception. *See AMP*, 2008 WL 5150654 (rejecting use of common interest where agreement failed to identify an oral or written agreement understanding embodying a common legal strategy, and likewise rejecting use of affidavits to cure absence of agreement). Yet that is precisely what the Trustee and the Inside Institutional Investors are purporting to do; they suggest now, when useful, that a common interest existed despite the lack of any evidence that the parties were operating under a common legal strategy. Tellingly, if the parties shared the common interest they claim they had, an agreement evincing the same would certainly have been produced by now.[6]

[6] The absence of any agreement also distinguishes this case from the Trustee's and Inside Institutional Investors' heavy and misplaced reliance on this Court's opinion on *GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 858 N.Y.S.2d 591 (Sup. Ct. N.Y. Cnty. May 22, 2008). In that case, the parties executed a written joint defense agreement to defend against a substantially similar lawsuit brought by a plaintiff. *Id.* at 541. Here,

3. The Trustee and the Inside Institutional Investors disagreed over several fundamental and material terms.

Being parties to a proposed settlement—as is the case here—does not automatically warrant invocation of the exception. For instance, a concern shared by parties regarding litigation does not establish by itself that the parties held a common legal interest. *See, e.g.*, *SR Int'l Business Ins. Co. Ltd. v. World Trade Ctr. Properties LLC*, No. 01-9291, 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002) ("Sharing a desire to succeed in an action does not create a 'common interest' ") (citations omitted); *Shamis v. Ambassador Factors Corp*., 34 F.Supp.2d 879, 893 (S.D.N.Y. 1999) ("Although [the parties] would both benefit from a judgment in favor of the plaintiff, they do not share identical legal interests. Indeed, sharing a desire to succeed in an action does not create a 'common interest'") (citing *Int'l Ins. Co. v. Newmont Mining Corp*., 800 F.Supp. 1195, 1196 (S.D.N.Y. 1992)). Additionally, "adversarial tensions" between parties precludes application of the common interest rule. *See American Re-Insurance Co. v. U.S. Fidelity & Guar. Co.*, 40 A.D.3d 486, 490-91 (1st Dep't 2007) ("[T]he parties' interests in the present action are indisputably adverse, and the mere fact that they shared an interest in the eventual outcome of the underlying coverage litigation is not sufficient to create a common interest.").

New York law also abounds with numerous examples that the common interest does not apply where the interest shared is to further a business strategy, even where litigation or potential litigation is contemplated as is the case here. *See*, *e.g.*, *In re F.T.C.*, 2001 WL 396522, at *5 (S.D.N.Y. Apr. 19, 2001) ("[C]ourts have recognized that a business strategy which happens to include a concern about litigation is not a ground for invoking the common interest rule"); *Walsh v. Northrop Grumman Corp*., 165 F.R.D. 16, 18 (E.D.N.Y. 1996) ("The doctrine does not extend

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no such agreement outlining the scope of the purported common interest between the Trustee and the Inside Institutional Investors exists.

to communications about a joint business strategy that happens to include a concern about litigation") (citation omitted); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447-48 (S.D.N.Y. 1995) (rejecting use of common interest privilege by parties who, despite having similar about litigation, were primarily concerned about whether the bank could assume certain obligations).

The Trustee and the Inside Institutional Investors did not have identical interests during the relevant time period in which they have asserted this objection. The parties disagreed on several material terms arising out of the Pooling and Servicing Agreements governing the Covered Trusts. In general, Mr. Kravitt testified that [redacted] Loeser Aff., Ex. 3, Kravitt Depo. at 431:7-11. He also testified that:

[redacted]

Id. at 136:11-18. Richard Stanley, a member of BNYM's corporate trust committee, confirmed [redacted] well after the period of time the Trustee and the Institutional Investors claim the common interest applies. Loeser Aff., Ex. 5, Deposition of Richard Stanley at 81:11-13 [redacted]

In particular, these entities clearly had distinct positions on whether, for example, an Event of Default occurred. Though the Trustee attempts to disclaim that divergent views ever existed, the evidence and testimony reveals that, at a minimum, the Trustee certainly did not agree with the Inside Institutional Investor's views. As previously disclosed to the Court, email correspondence among the Settlement Proponents reveal that [redacted]

[redacted] Loeser Aff., Ex. 9. Additionally, Mr. Bailey testified as follows:

[redacted]

Loeser Aff., Ex. 4, Bailey Depo. at 207:10-23. As part of the dispute over whether an Event of Default occurred, the Trustee and the Inside Institutional Investors also disagreed [redacted] Meyer Koplow, an attorney for Bank of America who was involved in discussions between the Settlement Proponents prior to the filing of the Verified Petition, testified:

[redacted]

Loeser Aff., Ex. 6, Deposition of Meyer Koplow at 113:23-115:10.

There is also no question that the parties differed sharply when discussing the financial exposure of Bank of America as a result of breaches of representations and warranties in the Covered Trusts. For instance, in response to a question regarding the data presented by the Inside Institutional Investors to the Trustee and Bank of America regarding breach and success rates of the underlying loans, Ms. Patrick testified:

[redacted]

Loeser Aff., Ex. 7, Deposition of Kathy Patrick at 168:15-25 (emphasis added). Mr. Bailey confirmed that [redacted] Loeser Aff., Ex. 4, Bailey Depo. at 84:18-21 [redacted]; *see also id.* at 197:8-11 [redacted]

This divergent view is confirmed by Robert Bostrom, then-general counsel to Freddie Mac, who testified that the Inside Institutional Investors vehemently disagreed with any use of [redacted][7] Mr. Bostrom specifically testified as follows:

[redacted]

[7] Freddie Mac once belonged to the Inside Institutional Investor Group, but withdrew from the group in April, 2011 pursuant to instructions from the FHFA not to participate in the proposed settlement.

[redacted]

Loeser Aff., Ex. 8, Deposition of Robert Bostrom at 99:16-100:3. Yet the Trustee nevertheless concluded that the proposed Settlement is fair, by relying substantially upon that GSE experience.

Furthermore, the parties had the ability to revert back to adversaries at any point before the proposed Settlement was reached. *See Mt. McKinley Ins. Co. v. Corning, Inc.*, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009) ("[E]ven assuming that [the parties] shared a common legal interest, there was a substantial risk the parties would revert to adversaries, which calls the expectation of confidentiality into question.") (Bransten, J.). This simple fact is evidenced clearly by the Inside Institutional Investors' threat to walk away from the settlement as late as June 7, 2011, *see* Loeser Aff., Ex. 10, which would leave all Settlement Proponents—including of course the two parties asserting it here—in fundamentally different positions. These adversarial positions reveal that the common interest has been improperly applied by the Trustee and the Inside Institutional Investors.

C. Should the Court find that a common interest applies, the Intervenors share in that interest.

Alternatively, should the Court find that a common interest does apply, the Intervenors unequivocally share in this interest for purposes of seeking the discovery requested herein. There is no practical reason why—in a proposed settlement for the purported benefit of all Certificateholders— the beneficiaries of the Covered Trusts do not share in the same purported common interest between the Trustee on the one hand, and the Institutional Investors on the other, sufficient to justify the disclosure of such documents. This concept rings particularly true when considering that the Trustee and the Inside Institutional Investors have repeatedly and continuously claimed that the proposed Settlement is entered into on behalf of, and in the best

interests for, the Certificateholders. This is not a case where an independent, outside and/or adversarial third party is seeking disclosure of documents; instead, the beneficiaries who share the same interests as the party who negotiated a settlement on their behalf seek disclosure of documents that pertain to the very rights that were purportedly negotiated on their behalf.

Major League Baseball Properties, Inc. v. Salvino, Inc. is instructive. No. 00-2855, 2003 WL 21983801 (S.D.N.Y. Aug. 20, 2003). In *Salvino*, the court—applying New York law—held that "[t]he common interest rule extends the attorney-client privilege to communications between an attorney and person who, though not the attorney's clients, share the same legal interest." *Id.* at *1. As such, the court held that though the dispute was between Major League Baseball ("MLB") and an entity that violated the terms of a licensing agreement between MLB and retailers, all baseball franchises shared the same common interest as MLB, and the entity seeking disclosure of communications between MLB and the clubs could not seek their disclosure. *Id.* Thus, should the exception apply at all, the Court need not pierce the common interest exception to the attorney client privilege, but simply find that the Intervenors are within it.

The Trustee and the Inside Institutional Investors have nevertheless argued that the Intervenors cannot invade a mythical "protected zone" of communications merely because third parties claim they have a right to do so. *See* ECF No. 349 at 11. This legal fiction—which finds no support in case law—should be put to rest; the Intervenors, Certificateholders with the same rights as the Inside Institutional Investors, are not outside entities but rather entities on whose behalf the proposed Settlement seeks to benefit. And despite what the Trustee and Inside Institutional Investors may conveniently say for purposes of this issue, the Court need look no further than the Verified Petition and the PFOJ to find that in entering into the proposed Settlement, these entities have always purported to act on behalf of, and in the best interests of, e

Intervenors. *See* Verified Petition ¶¶ 10, 15, 36, 58, 59, 61, 78, 81, 92; PFOJ ¶ (k); Ex. D to Verified Petition (June 23, 2011 correspondence from Inside Institutional Investors to Trustee) ("[O]ur clients believe the settlement is in the best interests of all the Trusts included in the settlement . . .").

Additionally, the applicable PSAs preclude any Certificateholder from obtaining a preference or priority over any other Certificateholder, and likewise preclude the Trustee from giving any preference or priority as well. The relevant provision provides:

> [I]t being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement[.]

See ECF No. 11, Ingber Aff., Ex. G, PSA § 10.08. The Intervenors share the same interests as the Inside Institutional Investors, all of whom are beneficiaries under the Covered Trusts.[8]

D. The Court should, at a minimum, order an *in camera* review of the documents at issue.

At the very minimum, the Court should order an *in camera* review of the documents listed in the Inside Institutional Investors' May 21, 2012 privilege log. There are only 548 documents that are purportedly protected by the common interest privilege, and there is no added burden on BNYM or the Inside Institutional Investors to produce such documents. Courts in general and this Court in particular have conducted *in camera* inspections when the common interest rule has been invoked and is disputed. *See GUS Consulting*, 20 Misc. 3d at 541; *see also Masterwear Corp.*, 298 A.D.2d at 250–251 ("Any doubt as to the relevance [of the terms of the

[8] For similar reasons, the fiduciary exception applies to the evidence withheld by the Trustee and the Inside Institutional Investors as the Trustee—a fiduciary to all beneficiaries to the Covered Trusts—made communications on behalf of, and for the benefit of, all Intervenors.

settlement] may be resolved by an in camera inspection" of the settlement agreement and "the settling parties' remaining interest in confidentiality may be protected by an order limiting the disclosure of the settlement agreement to [the nonsettling defendants] and [their] counsel or by such other manner as Supreme Court directs."). In a proposed settlement involving billions of dollars that attempts to forever extinguish the rights of all Certificateholders who seek to obtain more information about this settlement, the Court should review the documents at issue in order to determine whether the common interest applies.

If, after conducting an *in camera* review, the Court finds that certain documents specifically demonstrate divergent and adverse positions by the parties, at least with respect to those communications, a common interest would not apply. Thus, the Intervenors request that at a minimum, those documents should be produced.

IV. CONCLUSION

For the reasons set forth above, the Intervenors respectfully request that the Court order BNYM and the Inside Institutional Investors to produce their binary communications from November 18, 2010 to June 29, 2011, all of which are identified in their privilege log and are currently being withheld pursuant to the common interest exception to the waiver of the attorney client privilege. The Intervenors also request that the Court allow them to re-depose Jason Kravitt on topics previously objected to on common interest grounds.

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RESPECTFULLY SUBMITTED,

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