SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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),

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.

THE INSTITUTIONAL INVESTORS' RESPONSE TO THE OBJECTORS' ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT COMPEL PRODUCTION OF COMMON INTEREST COMMUNICATIONS

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I. Introduction

The Objectors have failed repeatedly to satisfy the legal test for discovery of settlement communications, including common interest communications between the Trustee and the Institutional Investors. They have also failed in each of their prior attempts to compel the production of settlement communications. Nonetheless, they have been permitted, *by agreement*, to engage in wide ranging discovery of settlement communications. They have been provided with all settlement communications: (i) between the Trustee and BofA/Countrywide, (ii) among the Trustee, the Institutional Investors, and BofA/Countrywide, and (iii) between the Institutional Investors and BofA/Countrywide. They have also been permitted to depose the lead negotiators for the Trustee, the Institutional Investors, and BofA/Countrywide, as well as countless other witnesses presented by each party to these three-way negotiations. Despite having obtained this large volume of settlement discovery—to which they had no entitlement at all—the Objectors are not satisfied. They will *never* be satisfied, because their aim is not to uncover the facts. They have those and have had them for months. Rather, their goal is to delay these proceedings by any means possible, so as to further their own, private agenda.

That is not a proper ground on which to seek to invade the clear, common interest privilege the Objectors have again attacked. As has been repeatedly demonstrated, and as this Court has repeatedly ruled, these communications – between a trustee and its trust beneficiaries, made in the course of a joint and collaborative effort to negotiate a satisfactory settlement of trust claims – are shielded from discovery by the common interest privilege. The Court has already entertained argument on this issue *three times*, based on two prior rounds of briefing.[1] Each

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[1] The issue was argued to the Court at its hearings of May 8, 2012, August 2, 2012, and October 10, 2012, and was briefed in the Objectors' April 4, 2012 show cause motion (Doc. No. 213-1) and in their October 9, 2012 15 page single spaced letter brief (Doc. No. 368).

time, the Court has refused to order the production of common interest communications between the Trustee and the Institutional Investors. Nothing in the Objectors' *fourth* try warrants a different decision from the Court's prior rulings.

II. The Objectors Have Failed to Demonstrate Collusion and Are Therefore Not Entitled to Discovery of Settlement Communications Between the Trustee and the Institutional Investors

As the Court is aware, "case law has consistently applied the principle that objectors are not entitled to discovery concerning settlement negotiations between the parties in the absence of evidence indicating that there was collusion between plaintiffs and defendants in the negotiation process."[2] This rule is premised on the understanding that: (i) "settlement negotiations involve sensitive matters,"[3] and their disclosure has an "obviously chilling effect on the desire to settle cases . . . [and] carries a great risk of exposing legal strategy and attorney client privileged communications;"[4] (ii) discovery into such negotiations can lead to unnecessary delay;[5] and (iii)

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[2] *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 24, 28 (D.D.C. 2001). *Accord Lobatz v. U.S. West Cellular of Calif.*, 222 F.3d 1142, 1148 (9th Cir. 2000); *Thornton v. Syracuse Sav. Bank.*, 961 F.2d 1042, 1046 (2d Cir. 1992); *Mars Steel Corp. v. Continental Ill, Nat'l Bank and Trust Co. of Chicago*, 834 F.2d 677, 684 (7th Cir. 1987); *In re Wachovia Corp. "Pick-a-Payment" Mortgage Marketing and Sales Practice Litigation*, 2011 WL 1496342, at *3 (N.D. Cal. 2011); *Klein v. O'Neal, Inc.*, 2010 WL 234806, at * 4 (N.D. Tex. 2010); *Smith v. Sprint Comm. Co. L.P.*, 2003 WL 715748, at *1-2 (N.D. Ill. 2003); *White v. Nat'l Football League*, 822 F.Supp. 1389, 1429 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992); *Bowling v. Pfizer, Inc.*. 143 F.R.D. 141, 146 (S.D. Ohio 1992); *Cho v. Seagate Tech. Holdings, Inc.*, 99 Cal. Rptr.3d 436, 448 (Cal. Ct. App. 2009); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 438 (Tex. App. – Texarkana 1994), *aff'd*, 916 S.W.2d 949 (Tex. 1996). *See also* MCLAUGHLIN ON CLASS ACTIONS § 6:10 (7th ed. 2010) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion between plaintiffs and defendants in the negotiating process.").

[3] *Lobatz*, 222 F.3d at 1148.

[4] *Id.*; *see also Thornton*, 961 F.2d at 1046.

[5] *See Smith*, 2003 WL 715748, at *1-2 (If "a disagreement about the merits of the settlement agreement [could be] the basis for a ruling permitting discovery of settlement negotiations . . .

the merits of a settlement agreement can be evaluated "on its face, and [therefore the court] need not analyze the negotiations that led up to it."[6]

Despite this law, despite the Court's stated concern that "in most cases, settlement communications are off limits,"[7] and despite the fact that the Court has repeatedly *declined* to order the production of settlement communications, the Objectors reurge their demand for these communications. Again, as has been true in the three prior arguments, Objectors ignore the law: they do not even *attempt* to demonstrate collusion of *any* type in the negotiation of the Settlement, because there was none. Their silence on this critical point is notable, given that they have now deposed *every single one* of the key negotiators for the parties. On that basis alone, their motion should again be denied.

Because they cannot meet their burden to demonstrate collusion, the Objectors again retreat to simple "relevance" cases—none of which address settlement communications. This, too, does not meet their clear burden of proof. *Wyly v. Milberg Weiss*, the Objectors' first case, concerned an attempt by a class member to obtain attorney work product and time sheets from class counsel *after* a class settlement had been reached and approved in a prior federal action.[8] Although the *Wyly* court noted the rule that collusion is required to obtain discovery of settlement negotiations, it held it was inapplicable, <u>not</u> (as the Objectors' claim) because the court disagreed with the rule or believed it was inapplicable under New York law, but instead

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discovery would be available in virtually every proposed class settlement to which there is an objection.").

[6] *Klein*, 2010 WL 234806, at * 4.

[7] *See* Transcript of August 2, 2012 Hearing at 28:4-5.

[8] *Wyly v. Milberg Weiss Bershard & Schulman, LLP*, 15 Misc.3d 583 (N.Y. Sup. Ct. N.Y. Cnty. 2007) *rev'd* 49 A.D.3d 85 (1st Dep't 2007).

because the issue before the court was whether the class member was entitled to the attorney's work product and time records by virtue of its status as a client of class counsel.[9] Thus, *Wyly* in no way stands for the proposition that settlement communications are discoverable in a settlement approval proceeding absent evidence of collusion.

The Objectors' citation to *DH Holdings Corp. v. Marconi Corp.* is also misplaced.[10] There, the issue was whether a party obligated on an indemnity could obtain discovery of privileged work product and time records relating to settled claims for which indemnity was sought. Settlement communications were not in any way at issue in that case, nor was the question whether objectors in a settlement approval hearing could obtain discovery of settlement communications absent evidence of collusion.[11]

Thus, the relevant test is what it has always been: whether the Objectors have presented evidence of collusion in the negotiation process. They have not even attempted to do so. For this reason, the Objectors' attempt to obtain discovery of common interest communications should be denied.

III. The Communications Between the Trustee and the Institutional Investors Satisfy All of the Elements of the Common Interest Privilege

The common interest privilege applies to communications that are: (i) "made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship;" (ii) "primarily of a legal rather than a commercial nature;" and (iii) made in a context "where an interlocking relationship or limited common purpose necessitates disclosure to

[9] *Id*. at 591-92.

[10] *DH Holdings Corp. v. Marconi Corp.*, 10 Misc.3d 530 (N.Y. Sup. Ct. N.Y. Cnty. 2005).

[11] *Id*. at 531-35.

certain parties," although a "total identity of interest among the participants is not required."[12] All of these requirements are met here.

On November 18, 2010, counsel for the Institutional Investors met with representatives and counsel for the Trustee and CW/BofA in New York.[13] During that meeting, CW/BofA indicated a willingness to engage in negotiations, between themselves on the one hand and the Trustee and the Institutional Investors on the other, to attempt to reach a settlement of the trust claims at issue in this proceeding.[14] Prior to this time, the Institutional Investors had taken numerous actions to attempt to bring about the prosecution of these claims.[15] From and after this date, the Trustee and the Institutional Investors, through their counsel, agreed to enter into a joint and collaborative effort to employ a common legal strategy to obtain a common result: the negotiation of a favorable settlement of the trust claims that was acceptable to the Trustee.[16]

In the course of this common and collaborative effort, counsel for the Trustee and the Institutional Investors: (i) shared research, analysis, and other work product concerning relevant legal issues; (ii) shared work product analysis of relevant facts bearing on, among other things, the merits of the claims that were the subject of the negotiations; and (iii) engaged in numerous meetings and telephone calls, and exchanged numerous e-mails, in which joint legal strategies

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[12] *GUS Consulting GMBH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 541-42 (N.Y. Sup. Ct. N.Y. Cnty. 2008) (Kapnick, J.).

[13] *See* Madden Aff. (Ex. A) at ¶ 2; Kravitt Aff. (Ex. B) at ¶ 3.

[14] *Id*.

[15] *See* Madden Aff. (Ex. A) at ¶ 3.

[16] *See* Madden Aff. (Ex. A) at ¶¶ 4-5; Kravitt Aff. (Ex. B) at ¶ 4.

were discussed and agreed on.[17] These communications were made for the purpose of: (i) furthering the Institutional Investors' and the Trustee's common legal strategy and common interest in obtaining a favorable settlement, and (ii) facilitating the rendition of legal advice by counsel for the Trustee and counsel for the Institutional Investors to their respective clients.[18] It was the understanding, agreement, and expectation of the parties and their counsel that these communications would be kept confidential and not disclosed to third parties.[19]

On these facts, all of the elements of the common interest privilege are met. The communications between the Trustee and the Institutional Investors were legal in nature, they were carried out to facilitate the rendition of legal advice, and they were made in furtherance of a common purpose and common legal strategy.[20] Thus, they are shielded from discovery by the common interest privilege.

IV. The Objectors' Arguments Are Meritless

In support of their motion, the Objectors wrongly argue that: (i) the elements of the attorney-client privilege, which are required to establish the existence of the common interest privilege, have not been demonstrated; (ii) there was no agreement between the Trustee and the Institutional Investors to pursue a common legal strategy; (iii) the Trustee and the Institutional Investors did not share a common legal interest; and (iv) the Objectors are entitled to invade the Trustee's and the Institutional Investors' privilege because the Objectors share the same legal interest. These arguments are meritless, as explained below.

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[17] *See* Madden Aff. (Ex. A) at ¶¶ 4-8; Kravitt Aff. (Ex. B) at ¶ 4.

[18] *Id.*

[19] *Id.*

[20] *GUS Consulting*, 20 Misc. 3d at 541-42.

A. The Elements of the Attorney-Client Privilege Are All Present

The Objectors cite the *U.S. Bank* case for the proposition that "[b]efore a communication can be protected by the common interest rule, the communication must satisfy the requirements of the attorney-client privilege."[21] They then argue, wrongly, that the Institutional Investors and the Trustee have failed to satisfy this test.

As the *U.S. Bank* decision explains, the elements of the attorney-client privilege require a demonstration that "the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a legal rather than a commercial nature." As discussed above, all of these elements are present here. The communications at issue were made by counsel for the Trustee and the Institutional Investors in order to permit them to provide legal advice and provide legal services to their clients in connection with their attempts to negotiate a favorable settlement of the Trusts' legal claims.[22] On these facts, all elements of the attorney-client privilege are met.

B. The Trustee and the Institutional Investors Agreed to Pursue a Common Legal Strategy

The Objectors acknowledge this Court's opinion in *AMP Services*, that "[t]he party asserting the common interest rule bears the burden of showing that there was an agreement, <u>*though not necessarily in writing*</u>, embodying a cooperative and common enterprise towards an identical legal strategy."[23] Then, inexplicably, the Objectors argue the common interest privilege

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[21] *U.S. Bank, N.A. v. APP Int'l Fin. Co.*, 33 A.D.3d 430, 431 (1st Dep't 2006) (cited in Objectors' Common Interest Brief at 10).

[22] *See* Madden Aff. (Ex. A) at ¶¶ 1, 2, 5; Kravitt Aff. (Ex. B) at ¶¶ 1, 4.

[23] *Amp Services Ltd v. Walanpatrias Foundation*, 2008 WL 5150654 (N.Y. Sup. Ct. N.Y. Cnty. 2008) (emphasis added) (cited in Objectors' Common Interest Brief at 11).

fails here because the Trustees and the Institutional Investors have failed to demonstrate the existence of a *written* joint interest agreement. This assertion is frivolous.

The evidence before the Court is that, from and after November 18, 2010, the Trustees and the Institutional Investors "*agreed* to, and entered into, a common and identical legal strategy embodying a cooperative and common enterprise, to obtain a common result: the negotiation of a favorable settlement of the CW RMBS Trusts' repurchase and servicing claims with CW and BofA, on terms that were acceptable to BNYM and which BNYM could enter into consistent with its duties and obligations as indenture trustee for the trusts."[24] The fact that this agreement was not in writing is irrelevant. Its existence is plainly evident, both from the sworn statements of the lawyers who operated under it, as well as by the course of conduct of the Trustee and the Institutional Investors who, *it is undisputed*, worked side by side for seven months to accomplish the common purpose of negotiating a favorable settlement of the Trusts' claims.

C. The Trustee and the Institutional Investors Shared a Common Legal Interest

Misstating the proper test, the Objectors next claim the Trustee and the Institutional Investors cannot rely on the common interest privilege because they "did not have *identical* interests during the relevant time period in which they have asserted this objection."[25] That is not the law. As this Court has made clear, a "*total identity of interest among the participants is*

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[24] *See* Madden Aff. (Ex. A) at ¶ 4 (emphasis added). *See also*; Kravitt Aff. (Ex. B) at ¶ 4 ("Following the [November 18, 2010] meeting, BNYM and the Institutional Investors *agreed* to pursue a common legal strategy to negotiate a favorable settlement of potential repurchase and servicing claims against Countrywide.").

[25] *See* Objectors' Common Interest Brief at 14 (emphasis added).

not required" for a common interest privilege to exist.[26] Rather, all that must be shown is "an interlocking relationship or limited common purpose [that] necessitates disclosure to certain parties."[27]

Here, that test is plainly met. A joint and collaborative attempt to negotiate a settlement of trust claims – by a trustee who seeks to protect the interest of trust beneficiaries, and trust beneficiaries who have a significant financial stake in the resolution of the claims – is plainly the type of "interlocking relationship or limited common purpose" that is sufficient to give rise to a common interest privilege. Courts in other states have addressed this very issue, and have held that a common interest privilege exists for communications shared between counsel for a trustee and counsel for trust beneficiaries, when they are jointly engaged in the common goal of pursuing trust claims.[28] As one court noted, "[i]t is difficult to see how the Noteholders and the Trustee's interest in prosecuting claims of this nature could be more closely aligned."[29]

Not surprisingly, the Objectors have not cited a single case in which a court has agreed with their assertion that trustees and trust beneficiaries do *not* share a common interest in pursuing trust claims. Instead, they rely on out of context statements from cases on wholly unrelated facts. For example, the Objectors cite the decision in *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Prop. LLC*, among others, for the proposition that "[s]haring a desire to

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[26] *GUS Consulting*, 20 Misc. 3d at 541-42 (emphasis added).

[27] *Id*.

[28] *U.S. Bank N.A. v. U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2037353, at *1-2 (Del. Ch. 2005) ("It is clear that the Trustee and the Noteholders share a common interest."); *Barnett Banks Trust Co., N.A. v. Compson*, 629 So.2d 849, 851 (Fla. 2d Dist. Ct. App. 1993) ("In this case, the trustee and the aligned beneficiaries share the common interest of regaining the trust assets from [the defendant].").

[29] *U.S. Bank*, 2005 WL 2037353, at *2.

succeed in an action does not create a common interest."[30] What the Objectors fail to mention is that the *SR Int'l* court's holding was premised on the fact that one of the parties to the communication, for which a common interest privilege was claimed, was not a party to the litigation at issue and would be unaffected by its outcome.[31] The remaining case cited by the Objectors for this proposition is likewise factually inapposite.[32]

The Objectors are also incorrect, on both the law and the facts, when they claim that an "adversarial tension" or disagreements between the Trustee and the Institutional Investors prevented a common interest privilege from arising between them. On the law, "courts have held that a common interest exists despite an adversarial relationship" so long as the parties are pursuing a common legal strategy.[33] In addition, disagreements between parties do not preclude the creation of a common interest privilege because, as this Court has made clear, a "*total identity of interest among the participants is not required*," all that must be shown is "an interlocking relationship or limited common purpose [that] necessitates disclosure to certain parties."[34] Thus, the existence of disagreements or adversarial tension is irrelevant.

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[30] *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Center Props. LLC*, 2002 WL1334821 (S.D.N.Y. 2002).

[31] *Id*. at *3.

[32] In *Shamis v. Ambassador Factors Corp.*, 34 F.Supp. 2d 879, 893 (S.D.N.Y. 1999), the court found no common interest because there was no evidence of an agreement to pursue a common legal strategy and no evidence of coordination between the parties on legal strategy.

[33] *Mt. McKinley Ins. Co. v. Corning, Inc.*, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. 2009) (citing cases).

[34] *GUS Consulting*, 20 Misc. 3d at 541-42 (emphasis added).

The Objectors' overwhelming failure to meet their burden is evident from their various attempts to manufacture adversarial tension or disagreements between the Trustee and the Institutional Investors. Even if these were relevant (they are not) they do not alter the analysis:

- The Objectors assert that the Institutional Investors and the Trustee *would have become* adversaries if no settlement was reached. That is belied by the evidence that the Trustee made clear to CW and BofA in the negotiations that if no settlement was reached the Institutional Investors and the Trustee *would act together* to pursue the Trusts' claims.[35]

- The Objectors assert that Mr. Kravitt's testimony demonstrates This ignores his explanation that [36]

- The Objectors assert that a Trustee trust officer, Richard Stanley, testified the Trustee and the Institutional Investors This is simply false. What Stanley testified was that there was [37]

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[35] Madden Aff., Exh. 1, Koplow Depo. at 246:24-247:16 (emphasis added).

[36] Madden Aff., Exh. 2, Kravitt Depo. at 346:11-25 (emphasis added).

[37] *See* Objectors' Common Interest Brief, Loeser Aff., Ex. 5, Deposition of Richard Stanley at 80:9-81:13.

- The Objectors assert that the testimony [redacted] This is belied by these facts: [redacted]

- The Objectors assert that there was [redacted] This is belied by the fact [redacted]

Thus, there is no basis for the Objectors' assertion that the Trustee and the Institutional Investors did not share a common legal interest. They acted together to pursue common claims, to carry out a common strategy, and to obtain a common benefit. On these facts, the common interest privilege applies.

D. The Objectors' Claim That They Share the Same Interests as the Trustee and Institutional Investors is Neither Accurate Nor a Basis for an Invasion of the Common Interest Privilege

Finally, the Objectors assert they are entitled to invade the common interest privilege because they claim to share an interest in the pursuit of Trust claims. This is meritless. The

[38] Madden Aff., Exh. 1, Koplow Depo. at 263:6-13, 266:10-267:5 [redacted]

common interest privilege permits parties – *by agreement* – to share privileged communications in pursuit of a common legal strategy, while at the same time preserving their privileged nature. It does not create a right *in favor of a third party* to *force* others to reveal privileged communications simply because the third party has (or claims to have) the same interest.

The Objectors have not cited a single case that stands for this proposition. The only case they cite in this section of their brief, *Major League Baseball Properties*, held only that privileged documents that *were* shared among baseball clubs and their licensing organization, MLBP, in connection with a suit where they sought to protect their trademark rights, were protected by the common interest privilege because "MLBP and the Clubs have a common legal interest in enforcement of the Clubs' trademark rights."[39] Nothing in this holding supports the Objectors' assertion that they can *force* the Trustee and the Institutional Investors to share common interest communications *with the Objectors* based on the Objectors' claim that they also share an interest in pursuing Trust claims.

The Court also cannot and should not ignore the evidence of what it has observed with its own eyes. It is abundantly clear that the Objectors do *not* share a common interest with the Trustee and the Institutional Investors. They are trying, by any means possible, to prevent the Trustee from closing this settlement. They are trying, again by any means possible, to hold the more than $8.5 billion in settlement benefits—and the interest of 97% of Certificateholders who *want* this settlement to close—hostage to their own litigation agendas. Unlike the Trustee and the Institutional Investors, who have acted together to pursue the common purpose of obtaining a prompt and favorable resolution of Trust claims, the Objectors (who represent a tiny minority of certificateholders) have taken every opportunity over the last 18 months to hinder and delay a

[39] *Major League Baseball Prop., Inc. v. Salvino, Inc.*, 2003 WL 21983801, at *1 (S.D.N.Y. 2003).

favorable resolution of these claims, all in an attempt to obtain an individual benefit for themselves, to the detriment of other certificateholders.

All but one of the members of the Objectors' steering committee is currently pursuing securities claims against Countrywide and BofA arising out of certificates issued by the Trusts.[40] That their individual interests are at odds with those of the Trusts, and the vast majority of certificateholders, has been evident for some time. A case in point is the lead objector, AIG. Since the inception of this proceeding, the Institutional Investors have warned that AIG is attempting to use its settlement objection (and the procedural roadblocks it has sought to erect in this proceeding) to "leverage" a settlement of its securities claims against BofA/Countrywide, most overtly by threatening to obstruct this proceeding unless BofA agrees to settle AIG's separate securities claim. Though AIG has denied this, it has now filed documents in its securities case that confirm it is true. Included in these documents is an October 11, 2011 letter from Thomas Baxter, General Counsel for the Federal Reserve Bank of New York, to Thomas Russo, the General Counsel of AIG, sent three months after the filing of this proceeding. In this letter, Mr. Baxter informed AIG that:

> We believe the settlement of the Countrywide/Bank of America litigation is in the best interests of ML II and Maiden Lane III LLC ("ML III"), vehicles in which the Federal Reserve Bank of New York and AIG have an interest. The Federal Reserve Bank of New York, as the managing member of these vehicles, has concluded that the settlement will benefit both vehicles and we strongly support it. My request that AIG withdraw AIG's objection to Bank of New York Mellon's Article 77 proceeding is based upon my view that the settlement is good for the vehicles and therefore good for the Federal Reserve Bank of New York and AIG. While I understand AIG's desire to use its objection in the Article 77 proceeding as leverage to advance settlement discussions with Bank of America related to claims made in *American International Group et al. v. Bank of America, Corp. et al.*, I believe that it is harmful to the financial interests of the vehicles.[41]

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[40] *See* Patrick Letter (Doc. No. 391) (listing currently pending securities cases asserted by Objectors against Bank of America / Countrywide).

[41] Madden Aff., Exh. 3 at 2 (emphasis added).

AIG's response to this letter attempts to justify its conduct, but it cannot avoid admitting that: "*AIG has stated that it would agree not to pursue its objection in the Article 77 proceeding if there is an agreement to resolve its fraud and other claims against BofA . . . .*"[42]

These documents confirm there is no common interest between the Objectors on the one hand, and the Trustee and the Institutional Investors on the other. The Trustee and the Institutional Investors are trying in good faith to obtain the confirmation of a highly favorable settlement that inures to the benefit of all certificateholders. In contrast, AIG and the other litigating members of the so-called "Steering Committee" have sought to steer this $8.5 billion settlement right off a cliff. The evident hope is that by threatening to "kill the hostage," i.e. the $8.5 billion settlement, they will extract significant litigation settlements for themselves, at the expense of innocent certificateholders who otherwise want (and are entitled to receive) the $8.5 billion Bank of America wants to pay them.[43]

V. Conclusion

For all the foregoing reasons, the Institutional Investors respectfully request that the Court deny the Objectors' motion to compel the production of their common interest communications with the Trustee.

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[42] Madden Aff., Exh. 4 at 2 (emphasis added).

[43] The only member of the "Steering Committee" that has not filed securities claims is Triaxx. The founder, owner and president of Triaxx's investment manager, however, has recently entered into a consent judgment and been barred from the securities industry for falsely pricing RMBS securities, and its investment manager, which is directing Triaxx's activities here, is subject to significant injunctive relief from the same conduct. *See* Amended Complaint and Final Judgment (Doc. 54, 226) in Case No. 1:10-cv-04791-LAK, *SEC v. ICP Asset Mgmt, et al.*, in the United States District Court for the Southern District of New York. This record can give the Court no assurance that Triaxx has *any* common interest with the Trusts or any other certificateholder.

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