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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

MEMORANDUM OF LAW IN RESPONSE TO ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT CONTINUE THE TRIAL FOLLOWING THE SEPTEMBER TRIAL DATES TO ALLOW DISCOVERY CONCERNING NEWLY-DISCLOSED EVIDENCE

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H. P. Kravitt
Matthew D. Ingber
Christopher J. Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

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PRELIMINARY STATEMENT

In the eighth week of trial, some Objectors[1] ask the Court to start over. Their motion seeks additional depositions, leave to recall witnesses for further testimony, and more documents. The Court has ruled repeatedly on the Objectors' multiple efforts to extend discovery and delay the trial with assertions that the Trustee either has waived, or cannot assert, the attorney-client privilege.

The latest motion seeks exactly the same relief that the Objectors have sought countless times already—privileged documents and delay. The Motion should be denied.

ARGUMENT

I. The Objectors Have Not Identified Any Waiver of Privilege or Work Product Protection.

If the Court considers the Motion on the merits, it should find that there was no waiver. Each of the dozens of examples cited in the Objectors' brief falls into one of the following categories[2]:

Information that was disclosed to the Institutional Investors. The Trustee and the Institutional Investors had asserted a common interest privilege throughout most of the discovery period on their confidential communications in furtherance of their common interest in achieving recovery for the Trusts. The Court ruled, however, that that privilege did not apply. Doc. No. 571. Hence, the disclosure at trial of communications with the Institutional Investors is not a waiver of any privilege. *Compare* 7/8/13 (Kravitt) Trial Tr. 1331:14-22 (why the Institutional

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[1] Only AIG, the Federal Home Loan Banks represented by Mr. Loeser, and Triaxx join this Motion. Ms. Kaswan's clients do not.

[2] A chart listing each cited trial excerpt and the reasons that it is not a waiver is attached to this brief.

Investors' letter of direction was not finalized) *with* 9/20/12 (Kravitt) Dep. Tr. 327:16-23 ("And did you have conversations with Gibbs & Bruns, for example, solely with Gibbs & Bruns, about whether an event of default had occurred? MR. MADDEN: Objection. Don't disclose common interest communications after November 18th, . . . 2010."). The notion that this is "trial by ambush" is laughable. This Court directed that Mr. Kravitt appear for a third day of deposition to testify about common interest communications, but the Objectors never took the deposition. Doc. No. 571. Had they done so, they could have elicited the same testimony provided by Mr. Kravitt at trial. Nearly all of the testimony at issue reveals information that Mr. Kravitt shared with the Institutional Investors.

Testimony on topics subject to the Court's fiduciary exception order. The Objectors also rely on disclosures of information that the Trustee was ordered to make under the Court's fiduciary exception order from April 15, 2013. That order covered "(1) the event of default and the Trustee's related decision to enter into a forbearance agreement; (2) the Trustee's decision not to provide notice to certificateholders at any point before settlement was reached; (3) the broad release of claims BNYM sought for itself at any point before settlement was reached." Doc. No. 805 at 16. Thus, for example, Mr. Kravitt's testimony about his understanding of the "Notice of Event of Default" referenced in a letter from the Institutional Investors was not a waiver, because the Court ordered the disclosure of that information. *See* 7/8/13 (Kravitt) Trial Tr. 1321:8-18 ("The way I understood this letter was that Ms. Patrick, on behalf of her clients, was giving a notice to the servicer and the trustee that in their opinion the servicer had breached its servicing obligations, some of them, under the applicable Pooling and Servicing Agreements, and if this were true, that would start a 60-day clock ticking, at the end of which there would be an outstanding event of default under the various Pooling and Servicing Agreements.").

Information that was discussed with Bank of America during settlement negotiations. The Objectors also rely on testimony about settlement negotiations, which were never privileged. For example, they cite Mr. Kravitt's trial testimony that what the "Institutional Investors and the Trustee f[o]und was to be far more valuable, to create value going forward that would . . . produce a higher standard of servicing than even the agreement required." *See* 7/8/13 (Kravitt) Trial Tr. 1450:7-1451:22. As even the quoted testimony makes clear, however, Mr. Kravitt was discussing settlement negotiations, not confidential attorney-client discussions. *See* 7/8/13 (Kravitt) Trial Tr. 1449:22-1449:25 ("During the negotiations, were there any discussions among the negotiating parties concerning what monetary value, if any, could be attributed to the servicing provisions in the agreement?"). The Trustee has consistently taken the position (never disputed by the Objectors) that settlement communications are not privileged.

Testimony about general topics, rather than the substance of privileged advice or work product. Another category of non-privileged information on which the Objectors rely is testimony about the general topics or types of work that the Trustee performed, rather than the substance of privileged advice. Such testimony does not waive the privilege. *See, e.g.*, *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 340-41 (Sup. Ct. N.Y. Cnty. 1991) ("Disclosure of the mere fact of a consultation is no basis for a waiver as to the content of that consultation."); *Deutsche Bank Trust Co. of Ams. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 67-68, (1st Dep't 2007) (no waiver when plaintiff's executive testified that advice of counsel was the reason that plaintiff settled).

For example, the Objectors cite AIG's examination of Mr. Kravitt:

> Q. And when we say you had then a chance to make a presentation time after time to Bank of America that says, our litigation team has put together facts or here are the discovery requests we're going to hit you with, or here is how

> we're going to put together the case against you, those kinds of analyses were never given to Bank of America, were they?
>
> A. That's correct.
>
> Q. Because they were never performed by the Trustee?
>
> A. No, the Trustee, through its counsel, performed its own legal analysis. Subsequently to that analysis we hired experts for the purpose of finding out what national experts felt on the subject.

7/12/13 Trial Tr. (Kravitt) at 1860:16-1861:5. A statement that the Trustee "performed its own legal analysis" is too vague even to serve as a description on a privilege log. It cannot be a waiver.

Information that the Objectors agree is not privileged. Finally, the Objectors argue that the privilege was waived because the witnesses testified at trial (almost always on cross-examination by the Objectors) to facts that other witnesses had not disclosed at deposition. *See* Motion at 6 (comparing Kravitt trial testimony to Lundberg deposition testimony). This complaint is a red herring. If one party believes that another party makes a groundless privilege objection at a deposition, the remedy is to move to continue the deposition. The objection does not *create* a privilege over otherwise non-privileged testimony, which is then waived when the non-privileged information is later disclosed. Here, as previously discussed with the Court, at certain depositions, the Objectors at times compelled the Trustee's instructions not to answer by refusing to agree that the disclosure of *facts*, if learned through discussions with counsel and disclosed at a deposition, would not constitute a waiver:

> MR. INGBER: . . . We're trying our best to give Ms. Lundberg some leeway here to answer your questions and to testify about the underlying facts. Will you agree that to the extent she is revealing facts that were communicated to her by counsel, you won't argue that her testimony here today about those underlying facts constitutes a waiver of the privilege?
>
> MR. REILLY: I can't do that.

MR. INGBER: Why not?

MR. REILLY: Because I don't think it's true. She's talking about conversations she had with her counsel voluntarily.

MR. INGBER: And is it your view that the disclosure of underlying facts that occurred in tri-party, non-privileged tri-party communications is privileged information?

MR. REILLY: My position is that the verified petition is a waiver of the attorney-client privilege.

MR. INGBER: Okay. That wasn't my question.

MR. REILLY: Well, that's my answer. That's my position.

10/2/12 (Lundberg) Dep. Tr. 180:14-181:17.

That was obviously an untenable position. During an October 12, 2012 status conference, the Court agreed.[3] The Court noted that there would be no such waiver, and that, if the Objectors felt that they needed additional information, they could issue written discovery requests, which they never did. It is absurd to now argue "ambush"—and *waiver*—because Messrs. Kravitt and Bailey disclosed *non*-privileged information that Ms. Lundberg was instructed not to disclose because of the Objectors' own gamesmanship at deposition.

II. The Appropriate Remedy for Any Waiver Would Have Been to Strike the Testimony, Not to Reopen Discovery and Continue the Trial.

In any event, the extreme remedy that the Objectors seek—complete waiver of the privilege, followed by delay via discovery, followed by more delay via a continuation of the trial—is unnecessary to correct any supposed prejudice. If the Trustee actually had waived any privilege at trial, the Objectors could have avoided any prejudice by moving to strike the

[3] In a subsequent deposition, Mr. Reilly's partner, Mr. Rollin, agreed too. 1/3/13 (Griffin) Dep. Tr. 246:5-12 ("What we can do is to express our understanding of the law and that our understanding of the law is that the disclosure of underlying facts, the underlying facts are not privileged and in our questioning we are not asking for privileged information, we're asking for underlying facts.").

testimony at the time the testimony was given (or not eliciting it themselves). As explained in our July 18 brief (docket #908), however, and as the Objectors do not dispute, a motion to strike is untimely when it comes weeks after the testimony.

Even the authorities on which the Objectors rely—*Wigmore* and a 1961 student note—illustrate the need for contemporaneous objection. They state that if the *holder* of the privilege affirmatively seeks to introduce privileged information (which the Trustee did not do) *over objection* (which the Objectors did not make), the court should permit the testimony, subject to discovery, rather than *excluding* it. That approach protects the *holder's* right to introduce evidence. Neither source says that when the holder does *not* intend to waive privilege, its adversary may, by *failing* to object (or indeed by eliciting the testimony itself), profit from what is, at most, an inadvertent waiver. Here, the Objectors failed to object at the time, then waited many weeks to file this motion. The exceptional relief that they seek is not warranted.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Motion.

Dated: September 23, 2013
New York, New York

Respectfully submitted,

s/Matthew D. Ingber

Jason H.P. Kravitt
Matthew D. Ingber
Christopher J. Houpt
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

Hector Gonzalez
James M. McGuire
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Testimony Chart from Objectors' Memorandum of Law In Support of the Order to Show Cause Why the Court Should Not Continue the Trial Following the September Trial Dates to Allow Discovery Concerning Newly Disclosed Evidence

Citation & Relevant Testimony	Reasons Testimony Was Not a Waiver
7/15/13 Trial Tr. (Kravitt) at 2132:24-2134:24 *Q Could you tell us why did the Trustee choose, as you described it, a forward-looking remedy, rather than a remedy seeking monetary damages for alleged past servicing breaches? A Notwithstanding the cross-examination that we have had today – Mr. Reilly: Can we – I think it's an inappropriate comment. Move to strike.* *The Court: Let it go. Let it go.* *A I believe and still believe, that any damages – we believe that actually look at the servicing standard, look at the level of liability that the Master Servicer had, look at the damages that could be proved, that we were much better off focusing on the future remedies that we were going to get because they would be worth a lot more than any damages we could get for the alleged past violations of servicing. We didn't feel that – first of all, we did the investigation of what documents were missing and we analyzed how serious it was, how serious were the missing documents or not. We decided that documents that made the most difference were the mortgaging, excuse me, were the mortgage, something wrong with the mortgage file and/or the title insurance policy. When we looked at the lost documents or missing documents, excuse me, we didn't feel that missing notes would have made that big a difference. There weren't that many to begin with, and they could be cured through lost note affidavits.* *So we, first of all, with regard to the document cures, we focused on what would actually make a difference. Secondly, with regard to the servicing standard, as I have stated before, we actually got, to my mind, the best servicing relief we could possibly get. If you didn't even have to negotiate*	Discussed with the negotiating parties. Described the Trustee's decision and Mr. Kravitt's current views, not the content of privileged advice.

with, but just was able to pick your most effective servicing relief, the problem we had with trying to decide whether or not to replace the Master Servicer was balancing the job demands the Master Servicer was probably doing, versus the tremendous dislocation that would occur if you tried the replace a Master Servicer pursuant to a fight. *What we were able to do was replace the Master Servicer, about whom everybody was concerned not being sufficiently effective, with what we consider to be some of the best specialist servicers in the United States. . . .* *We negotiated the time period so that these could be phased in without dislocation, and for the loans that didn't go to the specialty servicers, we forced the, we negotiated to pay a cash, the equivalent of a cash penalty by having a credit against servicing compensation, otherwise owed them, to the extent that they didn't meet what we took as a proxy to the industry standards.*	
7/8/13 Trial Tr. (Kravitt) at 1450:7-1451:22 *Q What do you recall about those discussions?* *A Well, if – there's several ways to go about looking at servicing remedies. One thing you could try to do is get compensation for what you believe was breached in the past. Okay? A different way to focus on them would be to focus on what will occur in the future. Now, the way Pooling and Servicing Agreements were written, the ones in this case and the way they are generally written, but the way they were written in this case is that the servicing standard was a very vague, general standard which was for the most part that the Master Servicer will service the portfolio in accordance with prudent servicing standards, in effect where the property was located.* *So that is a very amorphous standard. It's*	Discussed with the negotiating parties. The question was: "What do you recall about those discussions?" Preceding questions also make clear that questioner was asking about negotiations. ("During the . . . negotiations, were there any *discussions among the negotiating parties* concerning what monetary value, if any, could be attributed to the servicing provisions in the agreement?")

very difficult to prove when or how much that's violated. For example, if you could compare servicing between two servicers, it's very difficult because everybody has a different portfolio. But if you could, if one servicer were 10 percent less effective than another is that a breach of employing prudent servicing standards? *You could argue about what their protocols were, what their processes were, how fast they did things et cetera, but that would only try to get you a measurement, it wouldn't tell you if that reached the standard of a breach. Certainly it couldn't be that if you were below average that was a breach because that would mean half of the servicers in America were in breach of prudent servicing standards. I don't think if you got damages you could pull yourself up to average.* *Secondly, the way I construed the Pooling and Servicing Agreement, and as I stated several times to the Institutional Investors and their counsel, you can only go after the Master Servicer if they acted in bad faith or were grossly negligent, and that's even a tougher standard to try to figure out than the amorphous consistent with prudent servicing standards.* *So what we thought, with Institutional Investors and the Trustee fund [sic] was to be far more valuable, to create value going forward that would be produce a higher standard of servicing than even the agreement required.*	
7/15/13 Trial Tr. (Kravitt) at 2101:11-2102:8 *Q You testified earlier that you did not evaluate servicer claims because one, the servicing, the servicing standard, the servicing standard was vague, and two, the standard of proof is very high; isn't that correct?* *A There was a three.* *Q The three is the servicer enhancement?* *A The first was because the standard itself is*	Discussed with the negotiating parties.

extremely amorphous. The second was that the, in order to find the servicer liable, you had to find bad faith, intentional wrongdoing, reckless disregard or gross negligence. The fourth, the next reason was that we felt that the remedies we did obtain were so much more valuable than the ones we didn't pursue, that that added to the, our reasoning that we should pursue the remedies we did, as opposed to the ones we didn't pursue. *Q For sure, I am not asking you about the future servicer enhancement. As to evaluation of the past claims, I think we are in agreement as to what your two principle reasons were in finding those claims difficult to evaluate the proof, correct?* *A I apologize for fighting you on this, but part of our decisions making process about what claims to make, included our judgment as to what remedies we could otherwise obtain.*	
7/16/13 Trial Tr. (Bailey) at 2343:26-2344:12 *Q Did you, on behalf of New York Mellon, ever evaluate whether certificate holders in certain trusts had stronger claims against Bank of America than certificate holders in other trusts?* *A We -- I looked at the issues generally across all the trusts. Did I analyze Trust No. 1 versus Trust No. 529? I did not.* *Q And to your knowledge, nobody did, correct?* *A Actually, that's not correct. Mayer Brown reviewed all of the PSAs at issue and I don't recall them saying, to me at least, that there was a material difference among all of the trusts.*	First answer is about legal work that Mr. Bailey did *not* perform. Second answer is about an attorney-client communication that Mr. Bailey did *not* receive.
7/8/13 Trial Tr. (Kravitt) at 1346:20-1347:6 *Q Was a loan file review ever done during the course of the negotiations?* *A No.* *Q And why not?*	Discussed with the negotiating parties ("the three groups of parties started to discuss . . .")

A Between the November meeting and our first – our next meeting, which was in early January, Bank of America entered into some settlements with regard to breach of warrantee claims with one or more of the GSEs. And after that happened, the three groups of parties started to discuss whether an investigation were necessary or could we find some other basis to estimate damages for breach of warrantee and settle on that other basis.	
7/9/13 Trial Tr. (Kravitt) at 1639:14-1640:5 *Q Was there a point between October of 2010 and June 29th of 2011, that it became clear to you that Bank of America and Bank of New York Mellon and Ms. Patrick and its Institutional Investors were going down the route of negotiating without the loan files?* *A Let me try and make this clear, and I apologize if it's a long answer. Okay?* *Whether or not we asked for loan files, again, was a function of how well the negotiations were going with regard to the cash payment and whether we thought we needed to go look at loan files. We thought -- by "we," I mean the Institutional Investors and the trustee -- thought that those negotiations were going well enough, and the information that we had at the time was sufficient that we didn't need to hold out for reviewing loan files. So there was never a decision made on any particular day, we just never reached a point where we felt that we needed to go back and ask for loan files.*	Discussed with negotiating parties.
7/12/13 Trial Tr. (Kravitt) at 1913:24-1914:4 *Q Mr. Kravitt, did you advise your client, the Trustee, that it would have a difficult time getting the loan files if it chose to get them?* *A No.* *Q You mentioned a minute ago --* *A I did advise them it might take awhile.*	Discloses Mr. Kravitt's description of facts and conversations with Bank of America, not legal analysis.

7/18/13 Trial Tr. (Bailey) at 2487:14-2488:8 *Q What's your understanding of whether the Trustee agreed with any of the allegations from the letters that Mr. Reilly highlighted for you during his examination?* *A Ms. Kaswan: Objection, your Honor, and my objection is when Mr. Gonzalez asks Mr. Bailey what is your understanding of what the Trustee thought, he is actually asking for what Mr. Gonzalez has claimed to be attorney client communication.* *So, we are either going to have to ask the witness what's the basis of the understanding and then be blocked, or Mr. Gonzalez has to ask the witness about who he, whose position he is talking about.* *Mr. Reilly: I join in that, your Honor. The question is compound.* *The Court: I will let you answer.* *A I apologize. So, the question is, did the Trustee agree to the positions staked out by Ms. Patrick in her letter that I was shown by Mr. Reilly?* *Q Yes.* *A The answer to that question is no.*	Contemporaneous objection was overruled. Within the fiduciary-exception order (event of default/decision to enter into Forbearance Agreement). Discusses Trustee's understanding of facts, not legal advice. Addresses discussions between Trustee and Ms. Patrick, not internal deliberations.
7/8/13 Trial Tr. (Kravitt) at 1321:8-18 *Q And in this letter there is reference to a "Notice of Event of Default," and in the context of this letter, what did you understand that to mean?* *A The way I understood this letter was that Ms. Patrick, on behalf of her clients, was giving notice to the servicer and the trustee that in their opinion the servicer had breached its servicing obligations, some of them, under the applicable Pooling and Servicing Agreements, and if this were true, that would start a 60-day clock ticking, at the end of which there would be an outstanding event of default under the various Pooling and Servicing Agreements.*	Within the fiduciary-exception order (event of default/decision to enter into Forbearance Agreement). Discusses Mr. Kravitt's understanding of the letter, not legal advice.

7/12/13 Trial Tr. (Kravitt) at 1860:16-1861:5 *Q And when we say you had then a chance to make a presentation time after time to Bank of America that says, our litigation team has put together facts or here are the discovery requests we're going to hit you with, or here is how we're going to put together the case against you, those kinds of analyses were never given to Bank of America, were they?* *A That's correct.* *Q Because they were never performed by the Trustee?* *A No, the Trustee, through its counsel, performed its own legal analysis. Subsequently to that analysis we hired experts for the purpose of finding out what national experts felt on the subject. The Trustee was advised as to the strength or weakness of their case by their own counsel which was Mayer Brown.*	Discloses topic of legal work, not substance of advice.
7/12/13 Trial Tr. (Kravitt) at 1958:12-23 *Q And so, sir, you would agree with me then that you couldn't look at the GSE repurchase experience in order to obtain an indication of the number of loans in the private label securitizations that violated the prudent underwriting and origination practices if, in fact, the GSEs didn't have that representation, right?* *A Well, actually we reviewed the representations of the GSEs and we reviewed the private label representations. It all took a long time because of the number of trusts. And we compared them and we found that the GSE underwriting -- excuse me, the GSE reps and warranties to be meaningfully stronger.*	Describes factual survey of GSE and PSA representations.
7/12/13 Trial Tr. (Kravitt) at 1802:24-1803:12 *Q Well, then, did you hire an investigator or group of investigators to say I want to put*	Discloses topic, not substance of advice. "Research" relates to the quality of Countrywide

together the brief for purposes of settlement or litigation proving that Countrywide's methodologies of originating loans were among the worst in the city and did not rise up to the standards of the industry. Was that person hired? *A That person was not hired because we started doing our own research in 2010/2011.* *Q On Countrywide?* *A On Countrywide.* *Q And you determined that it was at the bottom of originators, in terms of its practices?* *A They were not a high-quality originator, but I didn't rank them.*	loans, not any legal topic.
7/15/13 Trial Tr. (Kravitt) at 2014:14-26 *Q And, sir, is this the chart that you had mentioned earlier that compared the representations and warranties in the GSE contracts versus the governing agreements for the private label securitization trusts?* *A This is the chart that BofA presented, but we did our own study.* *Q And when you say you did your own study, was that a document that you developed?* *A I don't recall now if it was a document that I saw, you know, other of my colleagues might have, but I received an extensive oral report on differences in warranties between the parties. I don't remember if a document exists summarizing that or not.*	Discloses topic, not substance of legal advice.
7/9/13 Trial Tr. (Kravitt) at 1478:16-1479:11 *Q You testified yesterday there was no requirement, basically agreed there was no requirement in any of the 530 pooling and servicing agreements or indenture agreements that the Trustee had court approval for --* *A I did.* *Q Did you yourself review all 530 Pooling and Servicing Agreements?* *A I did not.*	Discloses topic, not substance of legal advice.

Q Did someone on your team review each and every one of the 530 Pooling and Servicing Agreements? *A We had a team of lawyers who reviewed all the Pooling and Servicing Agreements or trust indentures for various aspects of them.* *Q And when was that done?* *A It was done not all at once. It started – I don't remember when it started, it continued throughout the seven month period.* *Q Was it completed by New Year's Eve 2010?* *A No, because different issues kept arising and we would go back and check the agreements on the portions of them that applied to the different issues that kept arising.*	
7/12/13 Trial Tr. (Kravitt) at 1922:12-17 *Q And are you telling the Court that you have reviewed all of the 530 ProSupps and all of 530 PSAs and identified all the instances in which the ProSupps say something different than the PSAs, prior to the entry of the settlement?* *A I didn't do that. I didn't do all 530 prior to entering into the settlement. I have done all 530 since then.*	Discloses topic, not substance of legal advice.
7/15/13 Trial Tr. (Kravitt) at 2007:2-17 *Q Did the Trustee confirm that 2.03, 3.01 and 7.01 were largely the same as they pertained to the Master Servicer's obligation among the governing agreements?* *A The Trustee, of course, through its counsel, studied those provisions on the Trust many, many times. All I can tell you now is that they're generally similar, but they are not identical.* *Q And did the Trustee examine each of those provisions to determine whether the Trustee's obligations under 2.03 and 7.01 were largely the same?* *A We studied those provisions many times. I don't recall enough of those studies to tell you whether or not they were largely the*	Discloses topic, not substance of legal advice, then makes factual summary of the text of the PSAs.

same. I can tell you that generally they were the same, but they were not identical. I'm not trying to avoid any omission or admission. I'm just telling you what my memory is.	
7/15/13 Trial Tr. (Kravitt) at 2150:3-2152:15 *Paragraph H reads: "The Settlement Agreement is the result of factual and legal investigation by the Trustee and is supported by the Institutional Investors." Based on your personal involvement in the negotiation, is that an accurate statement?* *A Yes.* *Q And what's your basis for that statement?* *A Well, I'll try and summarize the investigation that I'm aware of that the Trustee and his counsel performed. First of all, we reviewed –* *Mr. Reilly: Your Honor, can we get clarity on when he's talking about factual and when he's talking about legal. They asserted a privilege, an attorney-client privilege throughout the discovery on the legal investigation that Mayer Brown did in this process and did not produce any documents or give us testimony about that.* *So if in fact they're now waiving that, then, you know, that will be – I don't think he can ask this question without the compound nature of factual and legal –* *Mr. Gonzalez: Your Honor, I'll rephrase it.* *The Court: Thank you.* *Q Mr. Kravitt, let's just deal with the factual prong first.* *A Okay. We read the correspondence between our client, The Bank of New York, and the Institutional Investors, and we continued to read that correspondence as the Settlement Agreement went on. We supervised or the Trustee supervised and performed the review of the mortgage files to find out what was missing. We tried to keep track of other -- if what we did is read a legal document, is that a legal investigation or a factual investigation?*	Discloses fact of legal work ("we tried to read cases"; "we read the 530 trust documents"; "we tried to research and think about those issues"), without even disclosing topic, let alone substance.

Q You can tell us what you did. *A All right. We tried to read cases that were decided while we were conducting the settlement negotiations. We read the 530 trust documents many different times with regard to the many different issues as they arose. In fact, when this is over, I never want to read a PSA again.* *The Court: Me neither.* *A We hired experts to perform certain additional investigations; RMS to do an investigation as to the appropriate range of damages for the alleged breach of warranties; RMS to lend us their expertise on the servicing as those provisions were negotiated; Capstone to evaluate the ability of Countrywide to pay for damages under the governing documents; Professors Daines and Adler on the legal issues they gave us advice on. We tried to keep track of press articles in the subject area.* *And tell me if this is going too far with regard to privilege. We gave advice –* *Mr. Reilly: Your Honor, I'm not advising. He's looking at me.* *The Court: I don't think he thought you were going to –* *Mr. Reilly: No, he looked at me like I thought –* *The Witness: I was trying to make you happy, Mr. Reilly.* *Mr. Reilly: Keep going.* *A (Continuing) To the extent there were legal issues that arose, we tried to research and think about those issues and discuss them with the Trustee.*	
7/16/13 Trial Tr. (Bailey) at 2254:24-2255:8 *Q And through this process, meaning this process beginning in June 2010 through June 2011, did you, in your view, become intimately involved and familiar with the 530 Pooling and Servicing Agreements?* *A With each of the individual agreements?* *Q Right.* *A No. I would have -- I looked at a handful*	Discloses topic, not substance of legal advice.

of the PSAs. There were certain -- I don't recall -- there were certain distinctions among the groups, and then Mayer Brown looked at all 530 or however many there were.	
7/9/13 Trial Tr. (Kravitt) at 1537:5-1538:14 *Q There would be nothing wrong and everything right with trying to advocate for the largest possible recovery for your beneficiaries. Do you see that?* *A I do.* *Q Unless Mr. Gonzalez wants me to read the objection I'll skip it.* *A That's a different question but yes, of course, you are attempting in various ways to get the largest possible recovery that you can.* *Q And in fact, that was the duty of Bank of New York Mellon in this case, was it not?* *A Act in the best interest of your beneficiaries with due care -- I think it is rather than duly care. Do you agree with me on that?* *A I would.* *Q -- with due care, skill and caution, yes. When we say act in the best interest of the beneficiaries what's going on in this case is financial, that's what the case is about, we agree?* *A Yes.* *Q So what was in the best interest of the beneficiaries is to maximize the settlement amount?* *A Yes. Do you agree with that?* *A I agree that in a case such as this the Trustee should be trying to maximize the recovery. But you can't enter into a settlement agreement if it's an option. Nobody is going to sign a settlement agreement if the parties they sign with have the option of attempting to get a better agreement the day after it's signed. So the price of entering into the settlement agreement was agreeing to support the*	Discloses Mr. Kravitt's current views, not content of any legal advice to the client, or mental impressions formed in preparation for litigation.

settlement agreement after it was signed. And that's what we thought would get the best recovery for the certificate holders.	
7/18/13 Trial Tr. (Bailey) at 2380:25-2382:12 *Q With regard to the question of whether or not the Trustee had an obligation to maximize the certificate holders' recoveries, in the time frame that this issue was being negotiated, was it your belief that Bank of New York Mellon had an obligation to maximize recovery in these trusts as to the claims that could be brought against Bank of America or Countrywide?* *A The Trustee had an obligation to achieve a result that was reasonable and fair to all certificate holders.* *Q And what would you say to my question. Did the Trustee have a responsibility to maximize the recovery in these trusts?* *A I'm struggling over the use of "maximize." I'm not sure I know the answer to that question.* *Q Okay. During the time that you were participating in this process, did you believe that Bank of New York Mellon had a fiduciary obligation to evaluate strength and weaknesses of the claims that the Trustee could bring against Bank of America or Countrywide?* *A The Trustee did evaluate those claims, the nature of those claims.* *Q That's not my question.* *A I understand. Was it a fiduciary duty? Again, my understanding of the PSA is that prior to a servicer event of default, the Trustee is largely in a ministerial capacity. Following a servicer event of default, it becomes subject to the prudent person standard, which I sort of equate to the fiduciary duty standard.* *Q If I understand your testimony, you would say that before a servicer event of default, it*	Discloses former bank employee's understanding of his employer's duties, not specific work product.

was your belief that during this settlement process, that Bank of New York Mellon did not have a fiduciary duty to evaluate the strengths and weaknesses of the claims that the Trustee could bring against Bank of America or Countrywide, correct? *A It had an obligation to evaluate those claims. Is that obligation properly characterized as a fiduciary duty? I don't know.*	
7/16/13 Trial Tr. (Kravitt) at 2180:5-11 *Q And the Trustee had fiduciary duties or has fiduciary duties to all certificate holders in all of the 530 trusts, correct?* *A Well, the two fiduciary duties are not to be negligent and to not have a conflict of interest. And I don't think that that issue, as you're raising it, would apply a conflict of interest.*	Discloses Mr. Kravitt's current views, not content of any legal advice to the client, or mental impressions formed in preparation for litigation.
7/9/13 Trial Tr. (Kravitt) at 1539:16-1540:23 *"Q Now, at that point Bank of America is sharply adversarial to what the beneficiaries are alleging, are they not?* *"A Bank of America has an interest adverse to the beneficiaries in the sense that Bank of America would like to pay out as little as it can to discharge the alleged liabilities."* *Q You would agree with that, wouldn't you?* *A Yes.* *"Q And the Trustee is there to represent the interest of the beneficiaries only?* *"A Yes."* *Q Would you agree with that?* *A The Trustee is there to represent the interest of the beneficiaries only, subject to the rights that it has by the terms of the various trust indentures and Pooling and Servicing Agreements.* *Q But not to be representing the interest of Bank of New York Mellon if they are contrary to the interest of the certificate holders, correct?* *A I would not agree with that in theory, though in practice that's almost always the*	Discloses Mr. Kravitt's current views and general industry experience, not content of any legal advice to the client, or mental impressions formed in preparation for litigation.

case. For example, the document gives -- the various Pooling and Servicing Agreements and indenture give the Trustee the right to ask for additional indemnity. If -- let's say the B of A had not been willing to grant the guarantee, and Bank of New York Mellon in that circumstance refused to enter into the settlement agreement. I think the Bank of New York Mellon would not be violating any right or obligation that it had because it had that right in the settlement agreement -- excuse me, in the governing, 530 governing documents. But subject to that type of qualification, I agree.	
7/16/13 Trial Tr. (Bailey) at 2270:2-2271:8 *Q That the Trustee only acted at the direction of Certificate Holders through the settlement process?* *A No, there was not, under the PSA, there was not a direction in indemnity to engage in settlement negotiations.* *Q And the Trustee did so anyway, right?* *A The Trustee engaged in settlement negotiations.* *Q Without any Investor demanding that it do so from the perspective of the Trustee in a way that complied with the Pooling and Servicing Agreements, correct?* *A Was there a binding instruction to engage in settlement negotiations?* *Q No, I didn't actually ask you that question, but if you want to answer that one, answer it as to Bank of New York Mellon's position on that. Was that binding instruction, did Bank of New York Mellon take the position, there was a binding instruction from Certificate Holders in these 530 Trusts to engage in settlement negotiations?* *MR. GONZALEZ: Your Honor, objection, to the extent this is calling for the witness to answer in terms of a litigation position, that the Trustee might take, or the reading of the PSA from the legal position that the*	Discusses Mr. Kravitt's understanding of the factual history (whether a binding instruction was received).

corporate entity is taking. This witness is not being put forward as a corporate representative for that purpose. So, if he has an understanding, that's fine. *THE COURT: I think he can answer that based on his -- I think that's what he would be answering from, based on his understanding.* *A Based on my understanding, there was not a binding instruction from the Certificate Holders to engage in the settlement negotiations.*	
7/8/13 (Kravitt) at 1331:14-22 *Q Now, Mr. Kravitt, the attached draft letter of direction was that letter ever finalized?* *A No.* *Q And why not?* *A We didn't reach agreement on all of the issues raised in the letter of direction prior to going the alternative route, which was attempting to negotiate the settlement. And in that process of negotiation the Trustee ended up being indemnified by Bank of America.*	Discusses negotiations with Institutional Investors and factual history, not substance of any legal advice.
7/8/13 Trial Tr. (Kravitt) at 1404:16-1407:26 *Q And what is your understanding of the structure of the settlement agreement?* *A Well, the settlement agreement is organized as follows: First there is the normal set of recitals explaining the facts. Then there is the section on definitions that are used. Then there is a discussion of what constitutes final approval of the settlement agreement, including what has to happen in judicial proceedings. The tax rulings needed to be obtained and notice given to Certificate Holders with an opportunity to object. Then after dealing with what final approval is the agreement goes into the cash payment, the amount that it will be, how it will be allocated among the 530 trusts, and how it will be allocated in the trust once the cash*	Factual summary of the structure of the Settlement Agreement.

portion is obtained and distributed. There also is a section on what happens if -- which hasn't happened so far -- if the Court provides that some trust may leave the settlement. If that eventuated, then the Bank of America had the option of dropping out of the settlement if a certain threshold is met. Then the settlement agreement goes into the servicing remedies. The first servicing remedy is the transfer of high risk loans to specialist high touch sub servicers. Those sections deal with how to define what a high risk loan is. The qualifications for a special sub servicer, the process that's gone about in choosing them, and then the schedule for transferring loans quarter by quarter to the designated sub servicers. *Then the settlement agreement has a provision on costs for Bank of America in the following sense. First of all, there is an exhibit which lists how the sub servicers are to be compensated and they are to be compensated by B of A. And there is also a section on reduction of the cash that B of A, as Master Servicer, can take out of the deals as they liquidate if it doesn't perform to certain agreed upon benchmarks for loans that are in default or in foreclose.* *Then the -- moving on to Section 5, the settlement remedies next dealt with are guidelines for the bank in how it treats borrowers who are having difficulty paying, principally focusing on loan modifications to deal with borrowers who can't pay. And there are provisions in that on how to go about calculating the net present value calculation that has to be made in order for a loan to qualify for modification.* *There's also a provision in the settlement remedies that provides for any requirements of law affecting execution of the settlement remedies being required to be paid for by Bank of America Countrywide. After the servicing remedies the agreement has a section on documentary exceptions, and it deals principally with the two most serious*	

types of documentary exceptions where there's something wrong or there's something missing about a mortgage or an assignment of mortgage and the title insurance policy. *The section defines what those exceptions are, and there's a provision that requires Bank of America to make the trusts whole with regard to any loan that is missing both a proper mortgage or assignment of mortgage and an enforceable title policy. In that case, after the appropriate time period, Bank of America will make the appropriate trust whole where the difference in the amount of the loan then outstanding and any accrued interest and audit obtained from liquidating the underlying property or not being able to liquidate the underlying property.* *Then there is the section which deals with the forbearance agreement and the tolling of the statutes of limitations, we've been through that section, basically leaves the parties in the condition they were before the settlement agreement was entered into on the date of the first forbearance agreement, if the settlement agreement is not approved, finally approved, and otherwise if the settlement agreement is approved then the notice of default is deemed withdrawn that was originally given -- I should say the notice of non-compliance which, if true, could ripen into an event of default that notice is withdrawn if the settlement is finally approved.* *By the way, as I'm reciting this I realize that when I talked about section 2 as to what constituted final approval, I left out that a final order and judgment has to be approved as well or adopted by the Court.* *After the section dealing with the forbearance agreement and any statutes of limitation there's a section on what is released, what the Trustee releases B of A from. Then there's a section clarifying what B of A is not released from -- B of A and Countrywide, I should say.*	

7/8/13 Trial Tr. (Kravitt) at 1326:15-1328:5 *Q And in the context of your discussion of your testimony, what do you mean by the term either "instruction" or direction"?* *A Well, the way most Pooling and Servicing Agreements are written, a trustee has a Safe Harbor to liability if it follows an instruction from the holders of not less than some given percentage of the dollar amount of the certificates in the Pooling and Servicing Agreement. In addition, the trustee is free to ask for any reasonable indemnity to indemnify it against expense or loss as part of that instruction or direction. So normally, before a trustee will take action, at the request –* *Mr. Reilly: Excuse me, Mr. Kravitt. Your Honor, can we get clarity whether he is talking about these Pooling and Servicing Agreements or whether he is talking about Pooling and Servicing Agreements generally that have nothing to do with this case?* *Mr. Gonzalez: I believe he started in his answer by saying "generally, in his experience."* *The Court: Yes, I think he is just talking about it generally.* *Mr. Reilly: And not these Pooling and Servicing Agreements?* *The Court: That is how I understood it.* *Mr. Reilly: Okay.* *The Court: Am I correct?* *Mr. Reilly: Then I would argue it's irrelevant, but…* *The Court: I am allowing it. I think it is.* *A Fortunately, what is true generally is true specifically, and in this case the Pooling and Servicing Agreements and the applicable indentures provide that a trustee has a Safe Harbor if it takes directions from the holders of a required percentage of the dollar amount of outstanding certificates and the trustee, in taking that direction, has the right to ask for and receive a reasonable indemnity loss or expense before taking such instruction. So, in this case, the trustee*	Discusses Mr. Kravitt's understanding of PSAs generally, and specifically his use of terms in his testimony, not the substance of any legal advice provided to BNYM.

started the normal way of operating with an investor group, which would be to try and negotiate a letter of instruction and an acceptable indemnity.	
7/12/13 Trial Tr. (Kravitt) at 1921:18-1922:11 *Q Well, my question was: Whether you changed the meaning of the loan modification provisions in the PSAs. Could you answer that question?* *A All words are susceptible to – most of the time, no matter what you write, it's susceptible to several interpretations.* *One of the Sections of 10.01 says that if the description of whatever subject matter is covered both in the PSAs and in the ProSupp that the description in the ProSupp can govern the -- the provision in the PSA. So, for example, if the PSA says that you can modify the interest rates pursuant to refinancing, provided that you repurchase it, you could look to the ProSupp to give additional meaning to or additional context or meaning to that provision. For example, if the ProSupp in the Loan Modification Section describes refinancing loan modifications and also in the Servicing or Risk Factor Section describes credit mitigation, loan modifications and says you don't have to repurchase those, then the intent in the ProSupp governs.*	Discusses Mr. Kravitt's understanding of the PSAs, not the substance of any legal advice provided to BNYM. Mr. Loeser's question may have called for a legal conclusion, but it did not call for the disclosure of legal advice.
7/12/13 Trial Tr. (Kravitt) at 1990:10-18 *Q Well, sir, there's actually nothing in the PSAs that require an event of default to be proven, is there?* *A I disagree with you. If you look at the definition of event of default in Section 7, the way I interpret -- this could be 702, I think, or 701(b), the second default, which is the servicer default, the way I interpret it is that the facts have to be true which are alleged for there to be an event of default. If the*	Discusses Mr. Kravitt's understanding of the PSAs, not the substance of any legal advice provided to BNYM. Ms. Kaswan's question may have called for a legal conclusion, but it did not call for the disclosure of legal advice.

alleged facts are not true there is no event of default.	
7/15/13 Trial Tr. (Kravitt) at 2009:22-2010:16 *Q Sir, what I'm asking you is whose job was it to enforce the repurchase rights under the governing agreements, as you understood it?* *Mr. Gonzalez: Objection, your Honor, to the extent it calls for a legal conclusion.* *Ms. Kaswan: Your Honor, Mr. Gonzalez must have asked this witness at least 20 times what his understanding was.* *The Court: I'll allow it. Go ahead. You can answer it.* *A I think if anyone had an obligation to enforce the breach of warranties, it would either be the Trustee, if it received a direction from certificate holders, or the Master Servicer, if you read into the general standard that it was its obligation to do that.* *Q So is it your understanding that the Trustee never had an obligation to enforce the repurchase rights unless there was a group of certificate holders owning 25 percent of the Trust's interests to give a direction?* *A Correct*	Discusses Mr. Kravitt's understanding of the PSAs, not the substance of any legal advice provided to BNYM. Ms. Kaswan's question may have called for a legal conclusion, but it did not call for the disclosure of legal advice.
7/15/13 Trial Tr. (Kravitt) at 2026:24-2027:2 *Q Now, sir, is it correct that the Trustee in fact had the power under the governing agreements to sue to enforce the repurchase rights?* *A Yes.*	Discusses Mr. Kravitt's understanding of the PSAs, not the substance of any legal advice provided to BNYM. Ms. Kaswan's question may have called for a legal conclusion, but it did not call for the disclosure of legal advice.
7/15/13 Trial Tr. (Kravitt) at 2125:14-2129:15 (examination by Ms. Patrick) *Q Directing your attention to the bottom of*	Discusses Mr. Kravitt's understanding of the PSAs, not the substance of any legal advice provided to

the area, carry over paragraph on section 2.02 and to the top of the next page, who is the party obligated under this provision to correct defects in mortgage documents? *A The obligation to cure in the last -- that starts in the last sentence on the preceding page and then continues to the following page, is the obligation of Countrywide, not the Master Servicer on its own behalf and the other three sellers.* *Q So, the obligation is the obligation of Countrywide to cure; is that what you are saying?* *A My understanding is that it's the obligation of Countrywide, the seller, and the other three sellers to cure a lack of delivery of required documents in the mortgage file to the Trustee.* *Q And, what is your understanding of about what's the obligation of the Master Servicer?* *A It's not the obligation of the Master Servicer.* *Q All right. Directing your attention to paragraph 20.3(c), of Petitioner's Exhibit 11, which is at pages 11.63 to .64? This paragraph C please.* *Are you familiar with the repurchase obligation in the Pooling and Servicing Agreements.* *A Generally.* *Q And, can you tell Justice Kapnick, who is the party that is obligated to repurchase the mortgage loans?* *A It's the seller.* *Q And, when does that obligation to repurchase get triggered under 2.03(c), as you understand it?* *A Well, this is with regard to the C you are showing me, is the repurchase in the event of breach of warranty and the obligation of the each seller.* *Q And, yes, and the sellers' obligation, does it say that upon discovery by any of the parties hereto of a breach, the party discovering such breach shall give prompt notice thereof to the other parties?*	BNYM. Ms. Patrick's questions may have called for a legal conclusion, but they did not call for the disclosure of legal advice.

A Yes. *Q So, what is your understanding about whether notice is required to trigger the repurchase obligation?* *Ms. Kaswan: Your Honor, I am just going to object.* *She is reading the agreement, but if she is referring generally to the body of law, with respect to whether notice would be excused under certain circumstances, then I think it's a legal argument.* *The Court: What are you basing it on, this PSA?* *Ms. Patrick: Yes.* *Q What do you understand about whether notice is required to trigger a repurchase obligation under this?* *A What the highlighted sentence says, if the seller itself, what I -- the highlighted sentence says, that each seller, within 90 days or the earlier of its discovery of a breach or its received notice of a breach, then it has to do the repurchasing.* *Q And, turning over to the next, to the continuation of that paragraph, Mr. Kravitt, what was your understanding about whether, upon discovery of a breach, seller could attempt to cure it by locating a missing document?* *Mr. Reilly: Can we get the time period? Counsel said what was, and I am not clear if she was talking about a minute ago or three years ago.* *Q Before the settlement was entered into, Mr. Kravitt, which is the relevant timeframe here --* *Mr. Reilly: I will object to that comment. We have a dispute --* *The Court: Everybody has made comments here, not just her -- everybody has. I don't think comments are necessary. So, just ask the questions.* *Q Mr. Kravitt, for purposes of my question, directing your attention to the timeframe prior to the settlement.* *A Well, I understood that each seller always*	

had a chance to cure. *Q Had a chance to cure the breach upon notice or just a long time ago?* *A Had an opportunity to cure the breach if it discovered it or upon notice.* *Q And, Mr. Kravitt, just to round this out, what was your understanding of the obligation of the Master Servicer to cure any document defects under the Pooling and Servicing Agreement at or prior to the settlement?* *Mr. Wollmuth: Your Honor, I object to this question and even if your Honor let's it go in, I ask we be mindful of the scope of cross. I never asked this witness, I am unaware of any questions about the identity of the party that had to repurchase. Examination was focused on the failure to give notice and breaches.* *The Court: She is responding to a whole week's worth of cross-examination. I will allow it.* *Mr. Wollmuth: I think she has her sections confused and misstates the questions. I won't go into it, but I just ask we be mindful of the scope of cross, which is vast, I agree.* *The Court: All right.* *Q Mr. Kravitt, directing your attention to section 2.203 of the Pooling and Servicing Agreement first, in the timeframe prior to this settlement, what was your understanding about whether the Master Servicer had any obligation to repurchase or cure defective mortgages?* *A I understood the obligation to repurchase, cure or substitute with regard to mortgage loans that were, allegedly breached warranties, that was it was the obligation of any of the sellers, but not the Master Servicer.*	