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

In the matter of the application of

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

Petitioner,

-against-

WALNUT PLACE, ET AL.,

Intervenor-Respondents,

Index No. 651786/2011

Assigned to: Kapnick, J.

**AFFIRMATION OF MICHAEL A. ROLLIN**

I, Michael A. Rollin, hereby affirm under the penalty of perjury that the following is true and correct:

1. I am a member of the Bar of the State of New York and of Reilly Pozner LLP, counsel for the AIG entities in this matter. I am familiar with the proceedings in this case and I make this affirmation in support of the Intervenors' Memorandum of Law in Opposition to The Trustee's Motion Regarding the Standard of Review and Scope of Discovery.

2. Attached as Exhibit 1, is a true and accurate copy of a pertinent excerpt from the Transcript of the August 5, 2011, Hearing before The Honorable Barbara R. Kapnick.

3. Attached as Exhibit 2, is a true and accurate copy of a pertinent excerpt from the September 21, 2011, Hearing before The Honorable William H. Pauley, III.

4. Attached as Exhibit 3, is a true and accurate copy of the Joint Letter to the Honorable William H. Pauley, III, dated January 13, 2012.

Affirmed this 13th day of April 2012

Michael A. Rollin

Michael A. Rollin

# EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 39

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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 (Intevenor) Maiden Lane II, LLC (Intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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,

- against -

PROCEEDINGS

WALNUT PLACE LLC, WALNUT PLACE II LLC, WALNUT PLACE III LLC, WALNUT PLACE IV LLC, WALNUT PLACE V LLC, WALNUT PLACE VI LLC, WALNUT PLACE VII LLC, WALNUT PLACE VIII LLC, WALNUT PLACE IX LLC, WALNUT PLACE X LLC, WALNUT PLACE XI LLC, POLICEMEN'S ANNUITY & BENEFIT FUND OF CHICAGO AND THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, TM1 INVESTORS, LLC, FEDERAL HOME LOAN BANK OF BOSTON, FEDERAL HOME LOAN BANK OF CHICAGO, FEDERAL HOME LOAN BANK OF INDIANAPOLIS, FEDERAL HOME LOAN BANK OF PITTSBURGH, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FEDERAL HOME LOAN BANK OF SEATTLE, and V RE-REMIC, LLC,

PROPOSED INTERVENOR-RESPONDENTS,

For an Order pursuant to CPLR 7701 seeking judicial instructions and approval of a proposed settlement.

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INDEX NO: 651786/11

60 Centre Street
New York, New York
August 5, 2011

BEFORE: BARBARA R. KAPNICK, Justice

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NINA J. KOSS, C.S.R., C.M.
Official Court Reporter

PROCEEDINGS

But, here is the point, your Honor. There is nothing, if the Court adopts this stipulation that allows people to appear and say I need more information, then the Court can gather up the universe of requests for information, we can deal with that in an orderly fashion and put it up there.

THE COURT: I agree, to a large extent.

What I am trying to do is find a little bit of a place in the center here, where maybe there are some things that you could put up to make it a little bit easier for this group that's out there in making their determination.

I am not saying it should be a full blown, 25 page discovery request of all kinds of information, but maybe there are certain things that you can go back and say, you know, what some of this, why don't we put some of this up there. I am sure everyone will want this at some time.

What is the down side? I am trying to move it along a little bit at this point, because there is still another four weeks before everyone has to decide to object or not.

MS. PATRICK: Here is the key issue, from my perspective. I think this is something that the Court will have to grapple with, which is why I think it's important to have it in an orderly way.

In connection with our clients' involvement in this

transaction, in connection with our effort to find a solution that our clients would be willing to support publicly, to advocate for in this Court, we received a lot of material, non public information from Bank of America. It's information that is not disclosed by the Bank of America. It's highly confidential.

It has to do with the rates at which they repurchase mortgage loans, and the grounds on which they do it. We have an abundance of information about that.

It's understandable that Bank of America is highly sensitive to having that out there. Why? Because the private label repurchase issues, are not the only issues they face. They face claims by nonaligned insurers, security claims. They face claims by the Attorneys General.

So, when these folks come in and say oh, Judge, it's just little bits of discovery, can't they make it available? You should know we offered many of these Intervenors the opportunity to look at that data on the same basis that we looked at it. Namely, sign the same confidentiality agreement, use it solely for purposes of evaluating this settlement, and they refused.

So I don't -- while I recognize the temptation associated with well, it's a little bit, can't we give people a little bit more? There are rights of the Third-Party, Bank of America, who is no friend to my

clients. We are not here because we think Bank of America has done a fabulous job of servicing these loans. That's why we want to have a servicing remedy.

We don't think they have done a fabulous job of maintaining documents to collateral files. That's why we want the 100 percent loss indemnity.

We have gone after them for a year to get this deal done, but before the Court concludes it's just a little bit of data, a lot of this data belongs to a party that is not before the Court.

So, if you ask us to produce the data that we looked at, relied on, can't you make that available, I don't know what the Trustee looked at. They went through their entire, their process separately. We didn't see their expert affidavits until they posted them on the website.

So, the Trustee has done its own diligence here. And, I really believe that the way to do this, is to hold the date, let people appear and move it forward.

We want to move as rapidly as possible, but with material, non public information and things like that, it's difficult to just say well, throw it up there on the website.

MS. KASWAN: If I could just respond to your Honor's suggestion, because I think I do have a solution.

In fact, we have brought a proposed Order that

# EXHIBIT 2

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE BANK OF NEW YORK MELLON,

Petitioner,

v. 11 Civ. 5988 (WHP)

WALNUT PLACE LLC, et al.,

Respondents.

----------x

RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, et al.,

Plaintiffs,

v. 11 Civ. 5459 (WHP)

THE BANK OF NEW YORK MELLON,

Defendant.

----------x Argument

New York, N.Y.
September 21, 2011
10:30 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

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STEVEN S. FITZGERALD

value of those trusts was.

THE COURT: You know what, I'll take your best guess.

MR. INGBER: Your Honor, I just don't know what the unpaid principal balance of those trusts is.

THE COURT: Wouldn't that be something that one could consider material in deciding whether, as the trustee, you should come forward recommending a settlement in these cases?

MR. INGBER: No, your Honor. The trustee was presented with a settlement that involved these 530 trusts, and it had to make a decision with respect to these 530 trusts. The decision it made to enter into the settlement was based on a number of factors, including some of the issues that we discussed at the last conference, one of which was whether, after several years of litigation, the trustee on behalf of the trust would be likely to recover any more than what Bank of America and Countrywide were willing to pay.

THE COURT: That raises an interesting question, doesn't it? If your client made the decision for 530 trusts to settle but not others, doesn't that suggest that there are more than one plaintiff?

MR. INGBER: No. The trustee is The Bank of New York Mellon in its capacity as trustee.

THE COURT: You just told me that it made 530 separate decisions and decided with respect to other trusts not to settle. Am I correct about that?

# EXHIBIT 3

January 13, 2012

*Via FedEx*

Hon. William H. Pauley
U.S. District Court for the S.D.N.Y.
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007-1312

Re: *The Bank of New York Mellon et al. v. Walnut Place LLC et al* (11-cv-5988 (WHP))

Dear Judge Pauley:

The Bank of New York Mellon ("BNYM"), the Institutional Investors, and AIG jointly submit this letter in accordance with Local Rule 37.2 and your Honor's practice rules. AIG has requested that BNYM and the Institutional Investors produce all documents and communications exchanged among and between BNYM, the Institutional Investors, and/or Bank of America (collectively, "Settlement Proponents") during negotiation of the proposed settlement ("Settlement Communications"). BNYM and the Institutional Investors have objected that the Settlement Communications are not discoverable, because they are not relevant and some are protected by the attorney-client and/or common interest privileges. AIG now seeks to move the Court to compel disclosure of the Settlement Communications.

**Meet and Confer**

The parties conducted the required meet and confer as follows:

- On or about November 21, 2011; December 5, 2011; and December 7, 2011: Dan Reilly, counsel for AIG, twice spoke separately with Kathy Patrick, counsel for the Institutional Investors, and Matthew Ingber, counsel for BNYM, to ask if their clients would produce Settlement Communications.
- December 9, 2011: Counsel for AIG, BNYM, the Institutional Investors, and Bank of America held an hour-long conference call to discuss a possible agreement.
- December 16, 2011: Kathy Patrick sent a proposal to Dan Reilly under which the Settlement Proponents would produce their non-privileged Settlement Communications. A copy of that transmittal is attached as Exhibit 1.
- December 20, 2011: The Institutional Investors served their written discovery responses, attached as Exhibit 2, which formally objected to producing Settlement Communications on grounds of relevance and which asserted the common-interest privilege for communications with BNYM beginning November 18, 2010. *See, e.g.*, Ex. 2 at 24 (Response to Request #1); Ex. 2 at 36 ("Exhibit A").
- December 21, 2011: BNYM served its written discovery responses, attached as Exhibits 3 & 4, which formally objected to producing Settlement Communications on

grounds of relevance, the attorney-client privilege, and the common-interest privilege. *See, e.g.*, Ex. 3 at 7 (Response to Request #3).

- December 23, 2011: AIG declined the Settlement Proponents' discovery proposal. A copy of that transmittal is attached as Exhibit 5.

**AIG's Position Statement**

BNYM continues to side with the Institutional Investors and oppose the interests and reasonable requests for information of other trust beneficiaries, including AIG. BNYM and the Institutional Investors have refused to produce their Settlement Communications, claiming they are not relevant and/or are privileged. BNYM and the Institutional Investors are preventing the other trust beneficiaries—to whom both owe fiduciary duties—from obtaining the basic information needed to assess the reasonableness of the proposed settlement and BNYM's actions as trustee.

For reasons that are not clear, BNYM and the Institutional Investors determined that the settlement they reached with Bank of America (and the conduct and process engaged in to reach it) needed judicial approval. The expansive relief they seek in this action includes, among other things, a ruling that: approves the Settlement Agreement in all respects, approves the actions of BNYM in entering the Settlement Agreement, and forever bars and enjoins AIG and the other trust beneficiaries from bringing causes of action against Bank of America, Countrywide, or BNYM (for its settlement-related conduct). Doc. No. 1-37 ¶¶ g, k-l, n, p.

Consequently, the Settlement Proponents have placed the trustee's conduct in issue. Discovery of the Settlement Communications is necessary to assess, for example: (1) whether and to what degree BNYM represented trust and beneficiary interests; (2) what benefits the Settlement Proponents obtained that were not made available to—or were made at the expense of—the trusts and trust beneficiaries including, for example, Bank of America's indemnification liability, BNYM's liability and releases thereof, and Gibbs & Bruns' $85 million fee; (3) whether BNYM and the Institutional Investors enforced trust and beneficiary rights or whether they made concessions affecting all beneficiaries to obtain individual benefits; and (4) why the Settlement Proponents sought judicial approval of the proposed settlement before implementing any of the settlement terms, including those such as servicing improvements without which there is an on-going harm to trusts and trust beneficiaries.

Under such circumstances, the Settlement Communications are relevant and therefore discoverable. *See, e.g.*, *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979) ("[T]he conduct of the negotiations was relevant to the fairness of the [class action] settlement and [the] trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion."); *NYP Holdings, Inc. v. McClier Corp.*, No. 601404/04, 2007 WL 519272, at *2-4 (N.Y. Sup. Ct. Jan. 10, 2007) (settlement negotiations relevant where indemnitee must prove reasonableness of settlement).

Contrary to the argument made by the Settlement Proponents, evidence of collusion is not required here. *See* Ex. 3 at 7. In neither of the cases BNYM relies upon had the settlement proponents *created* the litigation for the *express purpose* of receiving judicial blessing of a settlement agreement, obtaining a release of liability for their conduct, and extinguishing the rights of other parties. *See Grant Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d Cir. 1992); *Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 607 (W.D.N.Y. 2011). In

*Davis*, moreover, the class members could opt-out of the settlement, which is not an option the Settlement Proponents have afforded objectors here. 775 F.Supp.2d at 607.

Even if collusion were required, which it is not, there is pre-discovery evidence to suggest that this could be a collusive settlement. BNYM and the Institutional Investors have invoked the common interest privilege to shield their Settlement Communications from other investors to whom BNYM serves as trustee and fiduciary. And they further claim a common interest with Bank of America, the opposing party in the underlying case the proposed settlement seeks to resolve, after the Settlement Agreement was signed. *See* Ex. 2 at 36. BNYM's assertion of the common interest privilege *against* certain trust beneficiaries strongly indicates that it is not representing the interests of all trust beneficiaries, but has rather aligned itself with its opponent and a select group of investors to obtain a deal that serves their own interests. *Cf. Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 471 (S.D.N.Y. 2003) (common interest rule exists to "allow clients to share information with an attorney for another party who shares the same legal interest"). As set forth more fully in AIG's Verified Petition to Intervene (Doc. No. 1-175 ¶¶ 19-33), a number of factors further raise the specter of collusion, including: BNYM's additional indemnification from Bank of America and release from certain beneficiary claims, BNYM and the Institutional Investors' "forbearance" of events of default and BNYM's associated heightened fiduciary duties, and Bank of America's willingness to pay Gibbs & Bruns' $85 million fee. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005) (settlement required closer scrutiny where class counsel "negotiated an extremely generous fee").

BNYM's and the Institutional Investors' claims of attorney-client and common interest privilege also fail under the doctrines of fiduciary exception and at-issue waiver. BNYM and the Institutional Investors bear the burden of proving the Settlement Communications are privileged, *see In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003) ("the party invoking a privilege bears the burden of establishing its applicability to the case at hand"), a burden that they have not carried through the skeletal privilege log the Institutional Investors produced. Ex. 2 at 36. Regardless, under New York law (which controls privilege questions in this diversity case) a fiduciary is "not entitled to shield absolutely from his beneficiaries the communications between him and his attorneys regarding pertinent affairs of the trust." *Hoopes v. Carota*, 531 N.Y.S.2d 407, 409 (N.Y. App. Div. 1988). BNYM, as trustee, is a fiduciary to AIG and the other trust beneficiaries. The Institutional Investors also took on a fiduciary role when they voluntarily engaged in negotiations concerning derivative claims and chose to enter into a global settlement on behalf of all certificateholders (the majority of which they had never contacted and whom they did not advise they were claiming to represent). As such, BNYM and the Institutional Investors may not invoke the privilege against certificateholders like AIG. Finally, by seeking judicial approval of their conduct and the terms of the Settlement Agreement, BNYM and the Institutional Investors affirmatively placed the settlement negotiations at issue and have waived any privilege that may have otherwise existed. *See generally Royal Indem. Co. v. Salomon Smith Barney, Inc.*, No. 125889/99, 2004 WL 1563259, at *10 (N.Y. Sup. Ct. June 29, 2004) (finding "that defendants' attorney-client and work product defenses to disclosing all documents relating to 'settlement' and 'assessment' . . . [were] overcome by the 'at issue' doctrine" because those materials were relevant to essential issues). BNYM's and the Institutional Investors' claims of privilege are therefore untenable.

In light of the compressed discovery schedule, AIG asks that this Court resolve the discoverability of the Settlement Communications before any other discovery disputes. Determination of this fundamental issue will shape the scope of discovery. If the Settlement Communications are discoverable then it is imperative that the Settlement Proponents immediately produce the relevant documents and identify the witnesses with personal knowledge of the settlement negotiations. Further, AIG has noticed a Rule 30(b)(6) deposition of BNYM for January 19, 2012. The utility of this and other depositions will be significantly increased if the discoverability of the Settlement Communications is resolved. There is no reason to delay resolution of this critical discovery issue, and any request to do so would fly in the face of the Settlement Proponents' claimed desire for expeditious resolution of this case.

The Settlement Proponents seek to extinguish all future claims of certificateholders against Bank of America and to obtain a judicial ruling that the proposed settlement is reasonable and that BNYM acted in accordance with its duties to beneficiaries. Yet they simultaneously seek to preclude both certificateholders and the Court from obtaining the very information necessary to reach or reject such a conclusion. Certificateholders and ultimately the Court are entitled to evaluate the proposed settlement and the process by which it was reached.

**BNYM's and the Institutional Investors' Position Statement**

AIG's request for settlement communications is without merit, for the many reasons set forth below. More fundamentally, the issue should not be addressed by this Court at this time. AIG notes above that "[d]etermination of this fundamental issue will shape the scope of discovery" in this case. It is inappropriate for a court to exercise judicial supervision of an issue of such fundamental importance when its subject matter jurisdiction is under review and will be decided by the Second Circuit next month.[1]

AIG's demand for settlement communications also creates a risk of substantial and collateral prejudice to the Institutional Investors. As has been publicly disclosed, the Institutional Investors are in the early stages of pursuing repurchase and servicing claims against other banks and servicers. These claims are similar to the claims BNYM settled with Bank of America and Countrywide. Current and potential adversaries to the effort to recover from *other* banks are among the parties to *this* case. The strategy the Institutional Investors have pursued in prosecuting these claims against Bank of America and Countrywide is highly sensitive; compelled disclosure could compromise their efforts to obtain relief on similar claims from other banks. Entry of a protective order is not sufficient to address this concern: the recipients of discovery here are the very entities who should not have the information to use elsewhere. This court has emphasized the principal that "[d]iscovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary," *Alcon*, 225 F.Supp.2d at 342 *quoting Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring), yet "borrowed wits" and prejudice will be the inevitable result if this information is disclosed as AIG has demanded.

None of AIG's arguments demonstrates that Settlement Communications are or should be discoverable. AIG's first three questions that it claims to need answered—whether BNYM "represented trust and beneficiary interests," what benefits the Settlement Proponents obtained at the expense of other investors, and whether BNYM and the Institutional Investors "made

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[1] *See* Dec. 28, 2011 Order (2d Cir. No. 11-5309) (28 U.S.C. § 1453(c)(2) requires decision by February 24).

concessions affecting all beneficiaries to obtain individual benefits"—do not require discovery at all. They can be evaluated conclusively by reference to the Settlement Agreement. If these supposed "concessions" and "benefits" are not in the Settlement Agreement, they do not exist and certainly are not at issue in this case.

To cite just one example, there are no "releases" of BNYM in the Settlement Agreement. The Proposed Final Order and Judgment includes proposed findings concerning BNYM's conduct, but there are obvious differences between a *release* of a claim and a judicial *finding* that no claim exists. As for Gibbs & Bruns's attorney's fee, there is nothing irregular or unusual about putative defendants paying fees to counsel who win a recovery for a group of beneficiaries—and the fee itself is fully disclosed in the Settlement Agreement. Finally, not only is the caselaw uniform in holding that trustee indemnities do not create a conflict of interest,[2] but BNYM here is also contractually excused from taking any action if "adequate indemnity against such risk of liability is not assured to it." PSA § 8.02(vi); Indenture § 6.01(f)).

The assumptions underlying the fourth question AIG proposes to answer in discovery—"why the Settlement Proponents sought judicial approval of the proposed settlement before implementing any of the settlement terms, including those such as servicing improvements without which there is an ongoing harm to trusts and trust beneficiaries"—are simply wrong. Many of the servicing improvements, including transfer of loans to subservicers and loss mitigation requirements regarding modifications, as well as the document deficiency indemnity, went into effect upon signing of the Settlement on June 28, 2011, prior to court approval. *See* Sections 5 and 6 of the Settlement Agreement. Moreover, while BNYM had a right to settle *without* going to court (and has never said that the settlement "*needed* judicial approval"), it equally had a right to commence this proceeding. If AIG means to suggest that the request for approval itself is evidence of collusion, that is contrary to authority that trustees have a right to seek judicial rulings under these very circumstances. *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 192 cmt. d. And even if the decision to seek approval were somehow relevant, that would not make all settlement communications discoverable.

AIG's insistence that the assertion of a common interest privilege shows collusion is equally baseless. BNYM and the Institutional Investors have never asserted a privilege over pre-settlement communications with Bank of America and Countrywide—they are irrelevant.[3] BNYM's communications with the Institutional Investors are equally irrelevant, but also plainly satisfy the "same legal interest" standard. Indeed, one would expect the Trustee and the Institutional Investors to pursue the same interests—that is no evidence of misconduct.

Contrary to AIG's contention, *In re GM* does not hold that mere speculation about collusion entitles an objector to discovery of settlement communications. It found that "*[t]he*

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[2] *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (citing *Elliot Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 70 (2d Cir. 1988)); *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1992) ("the Second Circuit takes a strict view of conflict" and no conflict exists unless there is "a clear possibility of this evident from the facts of the case, e.g., where the indenture trustee is a general creditor of the obligor, who is in turn in financial straits").

[3] BNYM understands AIG's demand to relate solely to communications "during negotiation of the proposed settlement." In any event, *after* the agreement was negotiated, all of the so-called Settlement Proponents, including Bank of America and Countrywide, had a common interest in seeing the settlement approved, albeit presumably for different reasons. Put differently, negotiations to settle litigation claims can be (and here, were) highly adversarial, even though all parties have a common interest in seeing the agreement performed once they reach agreement.

*record before this court contains facts* which cast some doubt on the adequacy of the representation of the class during the settlement negotiations *and* the fairness of the resulting settlement." 594 F.2d at 1125-26 (7th Cir. 1979) (emphasis added). Specifically, the record—before discovery—showed that the settlement was negotiated in violation of a court order. There is no such record here.

Without such a showing, settlement communications are not discoverable. *See, e.g.*, *Grant Thornton*, *supra*; *Davis*, *supra*; 2 *McLaughlin on Class Actions* § 6:11 (7th ed.) ("It is well established that objectors are not entitled to discovery concerning settlement negotiations between the parties without evidence indicating that there was collusion") (citing over a dozen cases). It does not matter who initiated the proceedings, as AIG suggests, because

> [i]t is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

*In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981).[4] Indeed, courts have so held even as to class settlements, where the standard of review is higher. *See* RESTATEMENT § 192 (trustee may settle if it "exercises reasonable prudence").

AIG also seeks a ruling that the "fiduciary exception" nullifies all attorney-client and work product protections. But, as this Court held in *Philip v. L.F. Rothschild & Co.*, an indenture trustee is not a fiduciary: "Unlike the ordinary trustee, who has historic common-law duties beyond those in the trust agreement," it is "more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement." No. 90 Civ. 0708 (WHP), 1999 WL 7711354, at *1 (S.D.N.Y. Sept. 29, 1999); *see also, e.g.*, *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, No. 08 Civ. 2437(RJS), 2011 WL 6034310, at *17 (S.D.N.Y. Dec. 5, 2011) ("Consistent with other courts that have addressed this issue, the Court here finds that these constraints apply with similar force to securitization trustees subject to PSAs").[5] The "at issue" doctrine is also inapplicable, because, as shown above, the negotiations are not "at issue."

For all of these reasons, we respectfully submit that no motion conference is necessary.[6]

Respectfully submitted,

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[4] *See also, e.g.*, *Hemphill* v. *San Diego Ass'n of Realtors, Inc.*, 225 F.R.D. 616, 620 (S.D. Cal. 2005) ("objectors must lay a foundation by adducing from other sources evidence indicating that the settlement may be collusive"); 7B *Fed. Prac. & Proc.* § 1797.4 (discovery into negotiations available "only if there is some evidence that the settlement may be collusive").

[5] *See, e.g.*, *Ellington* 2011 WL 6034310, at *15, *16 ("fiduciary duties present in ordinary testamentary trusts . . . are not applicable with respect to the securitizations governed by PSAs here" (citation omitted); "These two pre-default obligations [to avoid conflicts and to perform ministerial duties with due care] are not construed as '*fiduciary* duties,' but as obligations whose breach may subject the trustee to 'tort liability.'") (quoting *AG Capital Funding Partners, L.P.*, 11 N.Y.3d 146, 157 (2008) (emphasis in *AG Capital*)).

[6] Pending decision by the Second Circuit, AIG can move discovery forward by accepting the reasonable compromise proposed during the meet and confer and rejected by AIG (*see* Exhibit 1 to this letter).

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cc: All counsel of record (via email)