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 OPPOSITION TO MOTION TO COMPEL DISCOVERY

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## PRELIMINARY STATEMENT

The objectors are clear on one thing—they want more discovery. Before the Court has even ruled on the legal standard that will govern this proceeding, the objectors demand communications among the parties that negotiated the Settlement, documents that the Trustee did not consider necessary to the decision to enter into the Settlement Agreement, and *all* of the Trustee's communications with its own attorneys. What they are less clear about is *why* they need any of these documents. The Settlement Agreement is by far the most important document in this case, and yet this motion betrays the objectors' total lack of familiarity with that document. They attempt to justify many of their discovery demands on the ground that they somehow relate to the "meaning" of the Settlement Agreement, yet every one of the questions that they raise about the Agreement is answered directly in the contract itself. Finally, even assuming that the Trustee's attorney-client communications were relevant, they plainly are not discoverable, because the Trustee is not a fiduciary and the objectors have not demonstrated good cause to invade the privilege.

## ARGUMENT

The objectors begin with a red herring, arguing that they are "entitled to all discovery relevant to the relief BNYM seeks." Motion to Compel Discovery ("Motion") 5. There is no dispute about that—in fact, that is exactly what the Trustee argued in its own motion. The question, of course, is whether the expansive discovery they seek is relevant to the core issue in this case: whether the Trustee acted within its reasonable discretion in entering into the Settlement. The objectors' piecemeal discovery demands are premature and depend on how the Court decides the "threshold issues" that it outlined at the March 19 telephone conference: "Respondents may make something relating to . . . transforming [this proceeding] into a different

type of case and the Petitioners may bring something dealing with what is the scope of review, and those may be the two threshold issues we have to deal with and once we decide them, other things can flow. . . . [G]iven the parameters that I've said[,] . . . there will probably be two orders to show cause." Ingber Aff., Ex. A (3/19/12 Hr'g Tr. 31:12-17, 32:4-6); *see also id.* 22:11-22 ("And then I think everything else will flow from those things, but I think those are the two major things that have to be dealt with in the first instance").

**I. Settlement Communications Are Irrelevant.**

The objectors first argue that they need access to "settlement communications" exchanged among the Trustee, the Institutional Investors, and Bank of America. Motion 9-11. They argue that these documents are relevant for four reasons, none of which compel production. *First*, they argue that production could show "the roles that BNYM and the Institutional Investors played in the negotiations." *Id.* at 10. Why those roles are relevant, they do not explain. The only conduct at issue in this proceeding is the Trustee's decision to enter into the Settlement and bind the Trusts and settlement communications have no bearing on that issue. *See* Institutional Investors' response brief. *Second*, the objectors argue that they need information about "the process by which BNYM purportedly evaluated the underlying claims and the terms of the settlement." *Id.* The Trustee agrees that its *evaluation* of the claims and the Settlement is discoverable, and it has already produced (or soon will produce) all documents relevant to that issue. *See, e.g.*, BNYM_CW-00120217-24 (expert report of Brian Lin regarding settlement amount); BNYM_CW-00120294-300 (expert report of Brian Lin regarding servicing improvements); BNYM_CW-00120115-28 (expert opinion of Professor Barry Adler regarding Countrywide's causation defense); BNYM_CW-00120143-200 (expert opinion of Professor Robert Daines regarding Bank of America's corporate separateness defense); BNYM_CW-00120201-16 (Countrywide valuation analysis by Capstone Valuation Services). It was on that

basis that the Trustee entered into the Settlement Agreement. What the objectors seek here is not information about evaluation, but information about negotiation, which is irrelevant.

*Third*, the objectors seek to learn about "the compromises that were made in reaching the terms." *Id.* Like many of the other topics on which they seek discovery, these compromises are set forth in the Settlement Agreement, and they are hardly a mystery—in exchange for consideration from Bank of America and Countrywide, the Trusts agreed to release claims against them. Likewise, "whether BNYM and/or the Institutional Investors negotiated for individual benefits to the detriment of the trusts and other beneficiaries" (*id.*) can be determined from the Settlement Agreement itself. If there are no "individual benefits" in the Agreement (and the objectors so far have not identified any), then that can be no basis for discovery.

*Fourth*, the objectors suggest that the Trustee has waived this issue by producing some communications with counsel for the Institutional Investors, though they never identify any. Motion 10-11. In November 2011, the Trustee made a voluntary production of information that it provided to its experts, and because certain communications with counsel for the Institutional Investors had been provided to the experts, they were produced. It does not follow that all such communications, not part of the experts' analyses, are relevant or discoverable.

Even if the settlement communications were relevant (which they are not), as addressed at length by the Institutional Investors, the communications of the Trustee's counsel with counsel for the Institutional Investors are covered by the common interest privilege. The objectors try to blur the line between the common interest privilege and the fiduciary exception (discussed below). But there is no "common interest exception"—that is, even if the objectors succeeded in showing that they share a common interest with the Trustee and the Institutional Investors, that would not entitle them to disclosure of privileged communications.

## II. Discovery Is Not Necessary Into Information That the Trustee Did Not Consider.

The objectors also seek massive volumes of data that the Trustee did not consider in entering into the Settlement, in particular loan underwriting files that are in the possession of Countrywide.[1] As has been disclosed since the start of this proceeding, the Trustee did not engage in a massive and time-consuming review of loan files to determine, for hundreds of thousands of loans, whether there was a breach, whether the breach was material, and whether the breach caused harm to the Certificateholders. Instead, it looked to other sources, including a robust set of data produced by Countrywide concerning Countrywide's prior repurchase experience with Fannie Mae and Freddie Mac, and also considered information provided by the Institutional Investors. The Trustee determined that this approach, which was more efficient and less costly than a loan-by-loan review or a disputed sampling methodology, was a reasonable way of determining a settlement range.[2]

As the Trustee already argued in its pending Motion Regarding the Standard of Review and Scope of Discovery, it is axiomatic that disclosure "must be relevant to the issue or issues in

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[1] The objectors state that they "significantly narrowed" their original request for 530,000 loan files (each of which can be hundreds of pages long). Motion 15 n.10. The Trustee is not aware of any such proposal, other than a vague offer to consider a smaller number of files.

A recent report by the Royal Bank of Scotland estimated that, for approximately 78,200 loans in a subset of the Covered Trusts, even in the non-litigation context, it "would take at least two years and would potentially take much longer" to complete a full review. *See* Institutional Investors' Statement in Support, Ex. 20, at 1 (S.D.N.Y. 11-cv-5988 Oct. 31, 2011).

[2] The objectors misstate the conclusion of Brian Lin, one of the Trustee's advisors. Motion 14. He was not asked to calculate a settlement "range." *Id.* Rather, he was asked to determine, based on the information presented by Bank of America and the Institutional Investors, a range of potential recovery, assuming that the Trustee prevailed in litigation and could collect the full judgment from Countrywide. That the $8.5 billion settlement payment (even ignoring the additional value of servicing improvements and document exception cures) is only slightly below the bottom of Lin's $8.8 to $11.0 billion range is strong evidence that the settlement is reasonable, because that range was not discounted for the risk of loss (and zero recovery) or the collectability of the judgment.

controversy." *Stephen-Leedom Carpet Co. v. Arkwright-Boston Mfr. Mut. Ins. Co.*, 101 A.D. 2d 574, 577 (1st Dep't 1984). And the issue in controversy when a court considers a settlement (even under the broader scope of review applicable to class action settlements) is not the underlying claims. *See Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971) ("In determining whether to approve the compromise or not, the Court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that." (emphasis added)); *Nachison v. Phoenix of Hartford Ins. Co.*, 30 A.D.2d 499, 503 (3d Dep't 1968) (in settlement approval hearing, insurance carrier's request for expansive discovery to conduct "full scale trial of the issues" properly denied). Here, the issue is not the Covered Trusts' underlying claims against Bank of America or Countrywide, but rather whether the Trustee acted within its reasonable discretion in deciding to enter into the Settlement. The objectors have given no explanation of how the loan files would bear on that issue.

Even a lengthy review would not produce a "true breach rate." Motion 15. It would result only in competing subjective determinations and a battle of the experts that would have to be resolved in a series of mini-trials. The results of this extended process would not shed any light on whether the process *that the Trustee undertook* in entering the Settlement was within the bounds of its discretion (except perhaps by illustrating the wisdom of the Trustee's decision not to review loan files). The objectors are free to argue that "the process BNYM undertook in reaching [its] decision" (Motion 15) was unreasonable because it decided not to review loan files, but they do not need to look at loan files to do so.[3]

[3] Objectors might argue that loan files are relevant to the securities-fraud claims that many of them have brought separately against Countrywide, but those claims are not affected by the Settlement Agreement and are not at issue in this proceeding. Ingber Aff., Ex. B (Settlement Agreement ("SA") ¶ 10(c)).

## III. Discovery Is Not Necessary Into the "Meaning of the Settlement Agreement," Because the Settlement Agreement Is Not Ambiguous.

The objectors also claim to have "real question[s]" about the meaning of the settlement terms. Motion 13-17. In fact, all of those questions are resolved by the plain text of the Settlement Agreement. Because parol evidence would not be admissible to alter the unambiguous terms of the Settlement Agreement, discovery into that evidence is therefore not necessary or appropriate. *See, e.g.*, *RM Realty Holdings Corp. v. Moore*, 64 A.D.3d 434, 437 (1st Dep't 2009) ("Nor is discovery necessary. Any such discovery would simply be an opportunity for plaintiff to uncover parol evidence to attempt to create an ambiguity in an otherwise clear and unambiguous argument. Unless this court were to find an ambiguity, such parol evidence would be inadmissible at trial or on a subsequent motion for summary judgment."); *JPMorgan Chase Bank v. Lowell*, 309 A.D.2d 541, 542 (1st Dep't 2003) (holding that because the contract was unambiguous, "there was no need for the court to resort to parol evidence" or permit discovery).

This makes perfect sense. Why a particular provision was included in the Settlement Agreement or what the parties may have debated about a particular term has no bearing on the fundamental issue in this case: whether the Trustee acted within its reasonable discretion in agreeing to enter into the Settlement Agreement. The Settlement Agreement speaks for itself.

### A. The Settlement Amount

The first question that the objectors claim to have is whether the Master Servicer will be able to retain some portion of the Settlement Payment to reimburse servicing advances. Motion 2, 15. Paragraph 3(d)(i) of the Settlement Agreement answers exactly this question:

> the Master Servicer shall not be entitled to receive *any portion of the Allocable Share distributed to any Covered Trust*, it being understood that the Master Servicer's other entitlements to payments, and to reimbursement of recovery, including of Advances and Servicing Advances under the terms of

> the Governing Agreements shall not be affected by this Settlement Agreement except as expressly provided in this Subparagraph 3(d)(i) and in Subparagraph 5(c)(iv).

Thus, the Master Servicer is expressly prohibited from receiving any of the Settlement Payment, including as reimbursement for servicing advances.[4]

### B. The Payment Allocation

The objectors also argue that they do not "know how—or how much of—the $8.5 billion settlement will be allocated among the Covered Trusts." Motion 2; *see also* Plenary Action Motion 12 ("The settlement agreement is deliberately vague about how the settlement amount will be distributed to the 530 trusts."). One need only look at the Settlement Agreement. *All* of the settlement payment will be allocated among the Covered Trusts (SA ¶ 3(b), (d)), and it will be allocated on the basis of actual and projected future losses in each Trust. *See* SA ¶ 3(c) ("Allocation Formula"). The Trustee also disclosed how the Allocation Formula will be applied, attaching as Exhibit E to the Verified Petition the written methodology of the Trustee's outside advisor, NERA Economic Consulting ("NERA"). On top of that, the relevant data for applying that allocation is available (though the actual allocation would depend on current data as of the Approval Date): actual losses are published each month in the Trustee's reports to investors, and various iterations of the master deal lists prepared by Countrywide in connection with the Settlement contain detailed information about actual and projected future losses for each Trust and were produced in document discovery. *See, e.g.*, BNYM CW 00000065-86, BNYM CW 00000087-108, BNYM CW 00033324-45, BNYM CW 00033346-67.

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[4] The paragraph goes on to state that it does not modify the Governing Agreements, except as expressly set forth in two subparagraphs—3(d)(i) and 5(c)(iv). As just explained, 3(d)(i) modifies the Master Servicer's entitlements to payments by providing that it "*shall not be entitled* to receive any portion of" the Settlement Payment. And 5(c)(iv) requires the Master Servicer to "*deduct* the Master Servicing Fee Adjustment from unreimbursed Advances due to it"—that is, it *reduces* the Master Servicer's ability to reimburse Advances.

In any event, even if the Settlement Agreement and available data left open any questions about the allocation, the requested discovery would hardly answer them. The Settlement Agreement expressly delegates the application of the Allocation Formula to *NERA*, and not to an investigation of settlement communications, loan files, or attorney-client communications. NERA's report has already been made public. Thus, even if the objectors could show a need for further information on the Allocation Formula, they could not justify disclosure of the documents that they have actually requested.

### C. Excluded Trusts

The objectors assert that "[t]he Settlement Agreement also allows BAC/CW to exclude an undisclosed number of Covered Trusts . . . [and] retain those trusts' allocable shares of the settlement amount." Motion 15. Again, they never quote or even discuss the relevant paragraph of the Settlement Agreement that answers this question. Paragraph 3(d)(iv) states that:

> For any of the Covered Trusts in which there is a third-party guaranty or other financial guaranty provided for one or more tranches by an entity that has not previously released the right to seek repurchase of Mortgage Loans, . . . Bank of America and Countrywide shall, up to the Approval Date, have the option to exclude such Covered Trust from the Settlement, unless and until an agreement is reached by Bank of America, Countrywide, and the third-party guarantor or financial-guaranty provider, pursuant to which the third-party guarantor or financial guaranty provider agrees not to make any repurchase demands with relation to that Covered Trust.

For certain Trusts whose securities are "wrapped" by monoline insurance policies, the insurer has an independent right to enforce the Seller's loan repurchase obligations. This subparagraph provides that Bank of America may exclude a Trust from the Settlement Agreement if it cannot reach agreement that the insurer will not seek to enforce the obligations that the Trustee is attempting to settle. This provision does not allow Bank of America simply to hold back part of the Settlement Payment. If a Trust is excluded, then its claims against Bank of America are not

released: "The release and waiver in Paragraph 9 does not include claims with respect to any Excluded Covered Trust." SA ¶ 10(g).

This topic is not a ground for further discovery, for two reasons. First, the number of affected Trusts is not "undisclosed." Whether a Trust's securities are insured is a matter of public record, disclosed in the securities offering documents, in the contracts, and also in documents that have been produced.[5] Second, Paragraph 3(d)(iv) cuts off Bank of America's right to exclude trusts on "the Approval Date." Third, the objectors cannot explain what information discovery could provide. The circumstances in which a Trust *could* be excluded are detailed in the Settlement Agreement, and if a particular Trust actually *is* excluded in the future, the Trustee will disclose that. Discovery into the negotiations is totally unnecessary.

The objectors also assert that "[u]nder conditions that remain unclear, BAC/CW can walk away from or otherwise refuse to perform certain of the settlement terms even if judicial approval is obtained." Motion 3. The Motion, however, does not cite to any provision of the Settlement Agreement that gives Bank of America any such right. The objectors may be referring to Paragraph 4(b), which permits Bank of America to withdraw from the Settlement if Trusts with more than a certain percentage of unpaid principal balance is excluded. Withdrawal would have "like effect as if Final Court Approval had become legally impossible" (¶ 4(d)), meaning that neither the Settlement Payment *nor* the release would take effect (¶ 10(g)). For the same reason, this provision cannot apply *after* judicial approval, as the Motion mistakenly says. These provisions are not ambiguous, and even if their inclusion could be a basis for a substantive objection, there is no reason to think that discovery would serve any purpose.

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[5] *See*, *e.g.*, BNYM CW 00000065-86, BNYM CW 00000087-108, BNYM CW 00033324-45, BNYM CW 00033346-67.

### D. Servicing and Document Cures

Though they do not even try to identify relevant ambiguities in the Settlement Agreement, the objectors also seek discovery on its document cure and servicing provisions. Motion 16-17. This discovery is unnecessary for the same reasons as set forth above. These provisions speak for themselves. The objectors are also wrong about what the Settlement Agreement says. They cite no provision of either the Settlement Agreement or the PSA to support the assertion that "BNYM narrowed and then released BAC/CW's document-related liabilities . . . by limiting the circumstances under which BAC/CW would be required to compensate Certificateholders for document deficiencies." Motion 16. To the contrary, the Settlement Agreement establishes, for the first time, a clear procedure for identifying losses caused by document deficiencies and receiving compensation from Countrywide. *See* SA ¶ 6. The Settlement Agreement also expressly does not amend the PSAs. *See* SA ¶ 21.

In one of the rare instances in which they quote the Settlement Agreement, the objectors observe that the Master Servicer is not "obligated to modify loans." Motion 17. That is correct. *Id.* at 16-17 (quoting SA ¶ 5(d)). Why investors in RMBS trusts would want to "obligate[]" the Master Servicer to reduce loan balances is not explained; nor is the relevance of discovery on the meaning of this unambiguous term.

Finally, the objectors wonder whether Bank of America "will be able to avoid its servicing obligations under a carve out in the agreement for 'commercial impracticability' and an express provision of the National Mortgage Settlement superseding the servicing improvements in the Settlement Agreement." Motion 17. Yet they never identify how the national settlement and the Settlement Agreement here—both of which are publicly available—actually conflict, or what discovery could show.

## IV. The "Fiduciary Exception" Does Not Apply.

Next, the objectors demand production of all of the Trustee's and the Institutional Investors' communications with their counsel, based on the "so-called 'fiduciary exception' to the attorney-client privilege." *Nunan v. Midwest, Inc.*, 11 Misc. 3d 1052(A), at *7 (Sup. Ct. Monroe Cnty. 2006). The fiduciary exception itself "is controversial" (*id.*), and the objectors' extraordinary demand to invade the privilege falters on several grounds. The first is that the Trustee is not a fiduciary—denying the Motion on this ground would comport with a mountain of caselaw recognizing that "the corporate trustee has very little in common with the ordinary trustee." *AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (quoting *Hazzard v. Chase Natl. Bank of City of N.Y.*, 159 Misc. 57, 83-84 (Sup. Ct. N.Y. Cnty. 1936)). As objectors' counsel argued to the Second Circuit, "this trustee is an indenture trustee, ***not a fiduciary trustee***." Ingber Aff., Ex. C (2/15/12 Hr'g Tr. at 23:15-16) (emphasis added). Second, before ordering production, the Court must find good cause to compel production of each document, and the objectors have not met that high standard. Third, though the objectors seek a categorical ruling that the fiduciary exception applies to all communications "about the proposed settlement," many communications are work product or materials prepared in anticipation of litigation and not subject to any exception.

### A. The Fiduciary Exception Does Not Apply.

#### 1. <u>The Trustee is not a fiduciary.</u>

Section 8.01 of the PSAs states that, before an Event of Default, the Trustee "shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement" and "no implied covenants or obligations shall be read into this Agreement against the Trustee." PSA §§ 8.01, 8.01(i) (cites to the PSAs are to the CWALT 2006-OA19 PSA, Exhibit G to the 6/29/11 Ingber Affirmation). For decades, courts applying New York law have

held that such language means that trustees under bond indentures and PSAs are not fiduciaries. *See, e.g.*, *Hazzard*, 159 Misc. at 83-84 ("The trustee under a corporate indenture . . . has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement."); *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985) ("Unlike the ordinary trustee . . . an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement."); *Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A., N.J.*, No. 95-CV-1924, 1996 WL 694345, at *5 (S.D.N.Y. Dec. 4, 1996) (Mukasey, J.) ("plaintiff's claim for breach of the prudent person standard, breach of fiduciary duty and negligence based on the trustee's pre-petition non-feasance must fail"); *Sterling Fed. Bank, F.S.B. v. DLJ Morg. Capital, Inc.*, No. 09-C-6904, 2010 WL 3324705, at *7 (N.D. Ill. Aug. 20, 2010) ("Indenture trustees are held to a different standard than trustees in other contexts."; dismissing claim under New York-law PSA).[6]

Though securitization trustees are subject to some implied duties, courts carefully distinguish them from fiduciary duties. *See AG Capital*, 11 N.Y.3d at 157 ("the alleged breach of such [implied] duty [does not] give[] rise to *fiduciary* duties") (emphasis in original); *Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.*, No. 10–CV–0419, 2011 WL 2470226, at *5 (M.D. Fla. Mar. 17, 2011) ("That duty [to perform ministerial tasks with due care], however, is not a 'fiduciary' duty."); *Sterling Fed. Bank v. Credit Suisse First Boston Corp.*, No. 07-C-2922, 2008 WL 4924926, at *15 (N.D. Ill. Nov. 14, 2008) ("Nor does Plaintiff offer any evidence, contractual or otherwise, suggesting that Bank of New York's responsibilities toward the certificateholders [under a PSA] rose to the level of fiduciary duties in any event.").

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[6] "[T]hese constraints apply with similar force to securitization trustees subject to PSAs." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing*, No. 08-CV-2437, 2011 WL 6034310, at *17 (S.D.N.Y. Dec. 5, 2011) (collecting cases on PSAs).

In particular, the duty of loyalty on which the objectors rely (Motion 19), does not make a securitization trustee a fiduciary. The securitization trustee's duty of loyalty is narrow. *See Meckel*, 758 F.2d at 816 ("An indenture trustee is not subject to the ordinary trustee's duty of undivided loyalty."); *United Republic Ins. Co. v. Chase Manhattan Bank*, 168 F. Supp. 2d 8, 15 (N.D.N.Y. 2001) ("Unlike an ordinary trustee, an indenture trustee's duty is not undivided loyalty. It is the duty of an indenture trustee 'not to profit at the possible expense of [its] beneficiary.'") (quoting *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952)).[7]

That narrower duty is not fiduciary in nature. The Southern District explained in *Ellington Credit Fund* that "an indenture trustee's duty is governed solely by the terms of the indenture, with two exceptions . . . . These two pre-default obligations are not construed as '*fiduciary* duties,' but as obligations whose breach may subject the trustee to 'tort liability.'" 2011 WL 6034310, at *16 (quoting *AG Capital*, 11 N.Y.3d at 157) (emphasis in original) (internal citations omitted); *see also First Bank Richmond, N.A. v. Credit Suisse First Boston Corp.*, No. 07-CV-1262, 2008 WL 4410367, at *15 (S.D. Ind. Sept. 24, 2008) ("as BNY points out, an indenture trustee generally owes only a duty to perform its ministerial duties with due care, but does not owe a fiduciary duty to certificateholders.") (internal citations omitted).

Consistent with that rule, the one case that the objectors cite concerning a securitization trustee, *United States Trust Co. v. First National City Bank*, imposed only a limited duty to avoid conflicts and did not turn the trustee into a fiduciary. 57 A.D.2d 285, 296 (1st Dep't 1977). In *AMBAC Indemnity Corp. v. Bankers Trust Co.*, then-Justice Baer read *U.S. Trust* as "consistent

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[7] *See also Philip v. L.F. Rothschild & Co.*, No. 90-CV-0708, 1999 WL 771354, at *1 (S.D.N.Y. Sept. 29, 1999) (Pauley, J.) (same); *Peak Partners, L.P. v. Republic Bank*, 191 F. App'x 118, 122 (3d Cir. 2006) ("It is hornbook law that a trustee owes a strict fiduciary duty of undivided loyalty to the beneficiaries of the trust. An Indenture Trustee, such as U.S. Bank, however, is a different legal animal.") (citations omitted).

with what I understand to be the controlling law—that the duties of an indenture trustee can be limited to those set forth in the indenture and, as a result, the trustee does not owe the broad fiduciary duties of an ordinary trustee prior to an event of default, except that the trustee is at all times obligated to avoid conflicts of interest with the beneficiaries." 151 Misc. 2d 334, 338-39 (Sup. Ct. N.Y. Cnty. 1991); *see also Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (citing *U.S. Trust* for the proposition that "the duties of an indenture trustee are strictly defined and limited to the terms of the indenture, although the trustee must nevertheless refrain from engaging in conflicts of interest") (internal citations omitted).

Thus, even after an event of default (which the objectors have not demonstrated), when trustees are subject to a heightened "prudent person" standard of care, the Trustee's obligations are still contractual, not fiduciary. This "relatively minor change in the legal landscape, if change it is," leaves the "trustee's obligation . . . still circumscribed by the indenture." *Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 12 (1st Dep't 1995). Courts are careful to say that the post-default contractual standard "resembles" or "is akin to" a fiduciary duty, and not that trustees actually are fiduciaries after an event of default. *See, e.g.*, *Ellington Credit Fund*, 2011 WL 6034310, at *16 ("Following an event of default . . . an indenture trustee's duties to noteholders 'come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture.'") (quoting *Beck*, 218 A.D.2d at 12).[8] That is because, unlike a fiduciary, a securitization trustee's duties are defined by the contract at all times, including when the contract requires that those duties be carried out

[8] *See Howe v. Bank of New York Mellon*, 783 F. Supp. 2d 466, 483-84 (S.D.N.Y. 2011) ("It is recognized that post-default, an indenture trustee's obligations 'more closely . . . resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture.'") (also quoting *Beck*); *Sterling Fed. Bank, F.S.B.*, 2010 WL 3324705, at *7 ("After an event of default the trustee's duties are more akin to those imposed on traditional trustees.").

prudently. *See Howe*, 783 F. Supp. 2d at 483 ("Following an event of default, the duties of a trustee are to act prudently 'but only in the exercise of those rights and powers granted in the indenture.'") (quoting *Beck*, 218 A.D.2d at 11).

2. The fiduciary exception does not apply to non-fiduciary trustees.

Because the Trustee is not a fiduciary, the fiduciary exception does not apply. *See Bank of New York v. River Terrace Assocs., LLC*, 23 A.D.3d 308, 311 (1st Dep't 2005) ("Even though BNY is called 'Agent' in the credit agreement, the agreement and the case law make it clear that BNY is not a fiduciary. Thus, we reject the other banks' argument that BNY, as agent, lacks standing to assert the attorney-client privilege against its principals.") (internal citations omitted); *Mui v. Union of Needletrades, Indus. and Textile Employees, AFL-CIO*, No. 97-CIV-7270, 1998 WL 915901, at *1 (S.D.N.Y. Dec. 30, 1998) (declining to apply exception because "it is not clear that the requisite fiduciary relationship exists between the parties"); *In re Colcotronis Tanker Secs. Litig.*, 449 F. Supp. 828, 833 (S.D.N.Y. 1978) (same, "these agreements are arms-length contracts between relatively sophisticated financial institutions and do not establish fiduciary relationships").[9]

Indeed, the differences between a fiduciary and a securitization trustee go directly to the rationale for the exception. The exception is derived from an implied duty of disclosure that

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[9] In a contract that is over 100 pages long, the objectors find one reference to the Trustee's "fiduciary capacity." Motion 18 (quoting PSA § 3.05). The full sentence reads: "The Trustee in its fiduciary capacity shall not be liable for the amount of any loss incurred in respect of any investment or lack of investment of funds held in the Certificate Account, the Supplemental Loan Account, the Capitalized Interest Account or the Distribution Account and made in accordance with this Section 3.05." PSA § 3.05. This provision simply limits the Trustee's liability in its capacity as holder of specific cash accounts; it does not override the other sections of the contract that expressly negate any implied duties, or the caselaw to the same effect.

As for the Institutional Investors' assertion that the Trustee has "fiduciary duties" (quoted at Motion 18), they are wrong for all the same reasons that the objectors are wrong. And as noted above, even the objectors' counsel argues that the Trustee is not a fiduciary. *See supra* 11.

does not apply to securitization trustees: "The common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust." *Martin v. Valley Nat. Bank of Ariz.*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991). Relatedly, *Hoopes v. Carota* relied "on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is *obligated to serve as to all of his actions*." 142 A.D.2d 906, 910 (3d Dep't 1988) (emphasis added). That is precisely what a securitization trustee need not do—it has express (and expressly limited) *contractual* obligations and does not have any duty to serve beneficiaries with "all of his actions." That may explain why the objectors cannot cite a single case in which a court has applied the fiduciary exception to any type of securitization trustee.

The Delaware Chancery Court made just that distinction in *Riggs National Bank of Washington, D.C. v. Zimmer*, where it discussed an earlier New York case that had refused to apply the fiduciary exception. 355 A.2d 709, 714 (Del. Ch. 1976) (discussing *In re Prudence-Bonds Corp.*, 76 F. Supp. 643 (E.D.N.Y. 1948)). *Prudence-Bonds*, which had refused to apply the exception, "emphasize[d] the necessity of having the *corporate trustee* free to exercise its own judgment after consulting with counsel and that such freedom should be unhindered by the threat of future disclosure of the attorney-client communication." *Id.* (emphasis added). The Delaware court found the difference between the securitization trustee in *Prudence-Bonds* and the testamentary trustee in *Riggs Bank* itself to be "the key difference and a firm basis for distinguishing the *Prudence-Bonds* case." *Id.* at 714.

**B. The Objectors Have Not Shown Good Cause.**

The fiduciary exception also does not apply to any document unless the objectors demonstrate, on a document by document basis, good cause to compel its disclosure.[10] *See Mui*,

[10] The objectors rely on the good cause factors delineated in *Hoopes*, 142 A.D.2d at 910. Other New York courts have cited the (sometimes overlapping) factors in *Garner*, 430 F.2d at

1998 WL 915901, at *2 ("The burden of establishing good cause to pierce the attorney-client privilege, is on the [party seeking discovery]."); *AMBAC*, 151 Misc. 2d at 340 (upholding attorney-client privilege because plaintiff failed to show good cause); *Nunan v. Midwest, Inc.*, No. 2004/00280, 11 Misc.3d 1052(A), 2006 WL 34450, at *7 (Sup. Ct. Monroe Cnty. Jan. 10, 2006) (same). The objectors agree that "good cause" requires a showing that five factors are present. Motion 20-21 (citing *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 114) (Sup. Ct. N.Y. Cnty. 2003)) (emphasis added).

1. Availability from other sources

One prerequisite to disclosure is "the necessity or desirability of plaintiffs having the information and its availability from other sources . . . . Courts finding good cause tend to stress this factor." *See In re Int'l Bus. Mach. Corp. Sec. Litig.*, 1993 WL 760214, at *5. The objectors contend that the information sought "may be the best, if not the only, evidence of whether BNYM and the Institutional Investors in fact acted in the best interests of all certificateholders or sought to obtain individual benefits." Motion 21. This assertion reflects the objectors' stubborn refusal to acknowledge the availability of the Settlement Agreement. As explained above, every one of the questions on which discovery is supposedly needed is answered by the Settlement Agreement itself. The objectors give no reason whatsoever to think that contractual benefits will be found in any document other than the contracts, let alone that *privileged* documents will be the "best, if not the only" place to find them.

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1104. *See*, *e.g.*, *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260, 1993 WL 561125, at *13-14 (S.D.N.Y. Dec. 23, 1993); *In re Int'l Bus. Mach. Corp. Sec. Litig.*, No. 92 Civ. 9076, 1993 WL 760214 (S.D.N.Y. Nov. 30, 1993).

The First Department recently held that privileged communications are not necessary to evaluate a settlement. Addressing an indemnitor's defense that it need not pay for a settlement unless it was in good faith, the Appellate Division refused discovery of privileged documents:

> Tri–Links argues that it is entitled to inquire into the advice and opinions of Bankers Trust's attorneys for the purpose of determining whether Bankers Trust settled the WMI action "in good faith," . . . . Insofar as Tri–Links is making the point that it can be required to indemnify Bankers Trust only for a settlement that was made in good faith, Tri–Links is clearly correct. *The good faith requirement does not, however, give Tri–Links warrant to invade Bankers Trust's attorney-client privilege.* To reiterate, Bankers Trust has not placed its attorneys' legal advice or work product at issue, and *the reasonableness of its settlement with WMI can be determined on the basis of the extensive non-privileged documentary record already available*. Furthermore, Tri–Links does not suggest *any specific grounds to suspect that Bankers Trust entered into the settlement in bad faith*, or (assuming grounds for such suspicion existed) to believe that *invasion of the attorney-client privilege would be the only way to lay bare such suspected bad faith*. If the privilege could be deemed waived by nothing more than the theoretical possibility of an issue concerning the settlement's good faith (and that is all that Tri–Links offers), a similar waiver would have to be implied in every case in which the bad faith of the plaintiff would constitute a defense.

*Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 67 (1st Dep't 2007) (emphasis added and citations omitted); *see also River Terrace*, 23 A.D.3d at 311 ("BNY merely alleged that it had neither been grossly negligent nor engaged in willful misconduct. If such allegations constituted a waiver, a waiver would have to be found in a huge number of lawsuits, a disfavored result.") (internal citation omitted). The same analysis applies here: the reasonableness of the Trustee's decision to settle can be determined on the basis of non-privileged documents, and the objectors lack any "specific grounds to suspect" bad faith or to think that privileged documents "would be the only way to lay bare such suspected bad faith."[11]

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[11] The objectors conclude by suggesting that because "the information that [the Trustee] considered and its deliberations about the settlement are relevant," privileged communications are, too. Motion 24. If this is an attempt to invoke an at-issue waiver, it is misguided for the same reasons that are explained in this paragraph.

Even a possibility that the same information is already available weighs very heavily against violating the privilege. *See Mui*, 1998 WL 915901, at *2 ("it is not free from doubt that the information plaintiffs seek to obtain from defendants' arbitration counsel cannot be secured from other sources so that the attorney-client privilege can remain intact."); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (N.D. Ill. 1988) ("Although the attorney-client communications were not publicly available, the information presented in them may have been known by other corporate employees or contained in other business documents. Plaintiffs cannot simply assert that the information was unavailable and expect that unsupported assertion to satisfy the requirement that they show good cause.") (internal citations omitted); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 608 (N.D. Tex. 1981) ("Perhaps the deciding factor in this case, however, is the availability of the information sought by the class from other non-privileged sources.").

2. <u>The unlimited breadth of the demand</u>

The objectors must also show that "the information sought is highly relevant and specific." *Stenovich*, 195 Misc. 2d at 114. They claim that their request covers a "limited universe of documents" (Motion 21), but they define that universe as *all* of the Trustees' and the Institutional Investors' communications with counsel, a demand that will require time-consuming *in camera* review of thousands of documents to determine what is relevant and what is work product or material in anticipation of litigation. As *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (the leading federal case on the exception), explained in this context, courts must analyze "the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing." 430 F.2d at 1104. Because the objectors cannot describe any such misconduct, it is inevitable that they demand everything, a classic fishing expedition.

3. The unintelligible theories of self-dealing

Perhaps most importantly, the objectors lack any colorable claim of self-dealing or conflict of interest. The objectors rely on two theories. One rehashes allegations about the Trustee's indemnity, and the other asserts that the Trustee somehow was obligated to cure an Event of Default under the PSAs. Neither makes the slightest bit of sense.

The first theory seems to be that (1) the Trustee had an indemnity from the Master Servicer under the PSAs, (2) the Institutional Investors gave the Trustee a "direction" to negotiate a settlement, which voided the Master Servicer's indemnity as to actions within the scope of the direction, and then (3) the Trustee *entered into the Settlement Agreement* to obtain an indemnity from the Master Servicer—the same indemnity that the Trustee already had under the PSAs—that would cover any expenses or liability that the Trustee incurred in *entering into the Settlement Agreement*. Motion 22-23.

That theory is nonsensical for at least four reasons. First, it acknowledges that the Trustee ended up with exactly what it started out with, namely an indemnity from the Master Servicer. PSA § 8.05 (emphasis added).[12] The pre-existing indemnity plainly covered settlement-related activity—it applied to all expenses "in connection with the performance of any of the Trustee's duties hereunder." There is no logic in the notion that the Trustee would have

[12] Even if the objectors did not intend to acknowledge that, there can be no dispute that Section 8.05 provides an expansive indemnity from the Master Servicer:

> The Trustee . . . shall be indemnified by the Master Servicer and held harmless against *any loss, liability or expense (including reasonable attorney's fees)* (i) incurred in connection with any claim or legal action relating to (a) this Agreement, (b) the Certificates or (c) *in connection with the performance of any of the Trustee's duties hereunder*, other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence in the performance of any of the Trustee's duties hereunder or incurred by reason of any action of the Trustee taken at the direction of the Certificateholder.

given up its indemnity by accepting a direction to enter into a settlement, just so that it could get that same indemnity back in the settlement.

Second, the objectors ignore that the indemnity side letter applies only to the Trustee's actions in connection with the Settlement. If the Trustee were so concerned about expenses and liability relating to the Settlement, it could have avoided those costs by not entering into the Settlement at all. An indemnity that covers only a specific transaction cannot by itself be a motive to enter into that transaction.

Third, the carveout from the PSA indemnity is limited to acts "taken at the *direction* of the Certificateholders," not at the suggestion or with the assent of Certificateholders. The objectors have no evidence that the Institutional Investors ever gave a direction, because they did not. The only document that the objectors cite is a Notice of Non-Performance. Motion 22 n.11. That letter plainly is not a "direction." It purports to notify the Trustee and the Master Servicer of "the Master Servicer's failure to perform its covenants and agreements," and it concludes with a "demand that the Master Servicer immediately cure" those defaults. Ingber Aff., Ex. D. The objectors cannot point to anything in that letter that purports to "direct" any "action of the Trustee" at all, nor does the letter say anything about negotiating a settlement. The objectors admit that the side letter confirmed Countrywide's view that there had been no direction, and they offer nothing to contradict that conclusion.

Fourth, a trustee indemnity does not create a conflict of interest as a matter of law. *See CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) ("As to the indemnifications, the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability . . . so it was reasonable for U.S. Bank to seek indemnification once it became clear that there was a dispute between the Fund and CGML with respect to the Lyondell

substitution.") (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").

The objectors' second theory, that the Trustee entered into the Settlement Agreement in order to avoid an Event of Default, fares no better. Motion 23-24. The objectors say repeatedly that it was the *Trustee's* duty to cure any Event of Default (*id.* at 23), but that is wrong, and they cite no PSA language supporting that conclusion. The defaults that the Notice of Non-Performance described were all alleged breaches by the Master Servicer, and the letter concluded by demanding "that the *Master Servicer* immediately cure" its defaults. Ingber Aff., Ex. D. They assert that the Trustee wanted to avert an Event of Default, ignoring that the Trustee expressly has no "responsibility or liability for any action or failure to act by the Master Servicer," nor is it "obligated to supervise the performance of the Master Servicer." PSA § 3.03. Moreover, the assertion that the Settlement "improperly unwound" potential Events of Default (Motion 24) is unsupportable. The PSAs expressly contemplate that a default may be "cured or waived." PSA § 7.03(b). Here, the Settlement Agreement resolved claims based on those alleged breaches and includes a massive cash payment and contract provisions that impose new standards that go beyond even what the PSAs require. If the Settlement is not approved, of course, the alleged breaches would remain outstanding, but if a negotiated payment and agreement to adhere in the future to even more stringent servicing standards does not cure a servicer breach, it is hard to see what would.

Neither theory indicates that the Trustee "[o]n the face of the Settlement Agreement" is "receiving benefits to which [it is] not entitled" (Motion 21), nor have the objectors shown any other "good cause."[13] The attorney-client privilege is "perhaps the oldest privilege recognized in our adjudicatory system." *Mui*, 1998 WL 915901, at *3. Thus, "where attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure." *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999).

### C. The Fiduciary Exception Does Not Apply to Work Product or Material Prepared in Anticipation of Litigation.

Even if the Trustee were a fiduciary, there is no fiduciary exception to the protection of work product and material prepared in anticipation of litigation. CPLR 3101(c) states that "[t]he work product of an attorney shall not be obtainable." "This privilege is absolute." *In re 91st St. Crane Collapse Litig.*, 31 Misc. 3d 1207(A), at *2 (Sup. Ct. N.Y. Cnty. Oct. 21, 2010). In the rare instances in which the fiduciary exception applies at all, it does not extend to work product. *See Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir. 1994) ("[T]he Fifth Circuit has held that the *Garner* doctrine does not apply to attorney work product. We agree." ) (internal citations omitted); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 687 (W.D. Mich. 1996) ("This Court agrees with those courts that hold that the *Garner* doctrine does not apply to work product immunity."). Refusing to allow the fiduciary exception to abrogate the work product privilege, the Fifth Circuit explained that the justifications for the fiduciary exception are at odds with the reasons for protecting work product:

> *Garner*'s rationale indicates that it was not intended to apply to work product. *Garner* is premised upon the "mutuality of interest" between shareholder and

[13] In *AMBAC*, by contrast, the plaintiff provided evidence of what would indisputably be improper conduct by the trustee—it alleged that the trustee had invaded trust accounts to appropriate funds for its own use and paid fees to itself in advance of payment of superior debts. *See* 151 Misc. 2d 334 at 340.

> management. This "mutuality of interest" may exist for the attorney-client privilege. But once there is sufficient anticipation of litigation to trigger the work product immunity, we think this mutuality is destroyed. To hold otherwise would be to ignore modern corporate realities. The work product privilege is based on the existence of an adversarial relationship, not the quasi-fiduciary relationship analogized to in *Garner*. The joint attorney analogy discussed by the *Garner* court also does not apply to work product. Two parties anticipating litigation against each other do not have a common interest. It is not reasonable to indulge in the fiction that counsel, hired by management, is also constructively hired by the same party counsel is expected to defend against.

*In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 (5th Cir. 1982). New York courts agree. *See Strougo v. BEA Assocs.*, 199 F.R.D. 515, 524 (S.D.N.Y. 2001) ("Moreover, the logic of *Garner* does not require the disclosure of material that is protected under the work product doctrine."); *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 88 (N.D.N.Y. 2003) ("This Court accepts the point of view . . . that *Garner* is not applicable when the work product doctrine is claimed . . . ."); *Mui*, 1998 WL 915901, at *3-*4.

Thus, a finding that a party is a fiduciary "does not end the inquiry . . . . Courts have declined to extend *Garner* to the work product doctrine, so the court must still determine whether the documents in question here are covered by that [work product] privilege as well." *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 244 F.R.D. 412, 423 (N.D. Ill. 2006). The objectors do not explain what they mean by "legal advice about the proposed settlement" (Motion 25), but they have specifically demanded documents related to the Trustee's decision to commence an Article 77 proceeding. They also argued in federal court that they are adverse to the Trustee in this proceeding, and eleven of them sued the Trustee in February 2011 with, in the words of their counsel, "the express purpose . . . to stop the settlement." Ingber Aff., Ex. E (8/5/11 Hr'g Tr. at 33). Obviously, no "mutuality of interest" may be inferred among adversaries in a litigation concerning documents discussing the litigation. *See, e.g.*, *Hoopes*, 142 A.D.2d at 911-12 (exception would not apply to advice sought "as a defensive measure regarding potential

litigation over his disputes with the trust beneficiaries"); *Beck*, 218 A.D.2d at 17-18 (documents not subject to exception if they are "specifically relevant to the handling of the very issues the plaintiffs had been threatening to litigate. It is precisely where, as here, the trustee consults counsel in order to defend itself against the conflicting claims of beneficiaries that the exception delineated in *Hoopes* is inapplicable.") (internal citation omitted). The documents sought by the objectors are protected as work product.

Likewise, "if the role of . . . attorneys was to advise [a fiduciary] as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception." *Fitzpatrick v. AIG, Inc.*, 272 F.R.D. 100, 111 (S.D.N.Y. 2010) (holding that AIG need not turn over privileged documents). It is the objectors' burden to "make [a] showing that the corporate attorneys and their privileged communications, which plaintiffs are targeting *en masse*, did not play this protective advisory role for" the recipient of the advice. *Id.* at 111-12. Here, of course, the objectors argue exactly the opposite—that the whole purpose of the Settlement from the Trustee's perspective was to limit its own liability. *See* Plenary Action Motion 12-13. Those allegations are false, but they are also the only basis that the objectors have for challenging the Settlement and the only ground that they offer for invading the privilege (*see* Part 3 below), and they are utterly inconsistent with the fiduciary exception.

## CONCLUSION

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

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Respectfully submitted,

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