REDACTED VERSION

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

In the matter of the application of THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), Petitioner, -against- WALNUT PLACE LLC, et al., Intervenor-Respondents,	Index No. 651786/2011 Assigned to: Kapnick, J.

STEERING COMMITTEE'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO COMPEL THE INSIDE INSTITUTIONAL INVESTORS' SETTLEMENT COMMUNICATIONS

REILLY POZNER LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
(303) 893-6100
Attorneys for AIG Entities

MILLER & WRUBEL P.C.
570 Lexington Avenue
New York, New York 10022
(212) 336-3500
Attorneys for the Triaxx Entities

GRAIS & ELLSWORTH LLP
1211 Avenue of the Americas
New York, New York 10036
(212) 755-0100
Attorneys for Walnut Place and Federal Home Loan Bank of San Francisco

KELLER ROHRBACK LLP
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
(206) 283-1900
Attorneys for Federal Home Loan Banks of Boston, Chicago, and Indianapolis

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PRELIMINARY STATEMENT

During the May 8, 2012 hearing, the Court directed the parties with respect to the production of Bank of New York Mellon's ("BNYM" or "Trustee") settlement communications but reserved decision on the discoverability of the Inside Institutional Investors' settlement communications. (*See* Tr. of 5/8/12 Hrg. at 58:18-59:3; 63:15-64:18, attached to the 7/18/12 Affirmation of Michael A. Rollin ["Rollin Aff."] as Ex. 1.) In anticipation of the August 2, 2012 hearing, the members of the Steering Committee respectfully request that the Court now consider the discoverability of the Inside Institutional Investors' settlement communications.[1] Specifically, the Steering Committee respectfully requests that the Court compel the production of the Inside Institutional Investors' "binary" communications, which include:

1) the Inside Institutional Investors' settlement communications with the Bank of New York Mellon; and

2) the Inside Institutional Investors' settlement communications with Bank of America.

The Inside Institutional Investors have withheld these communications on grounds of relevance and privilege, while also claiming that production of the documents will be prejudicial because it would hinder their efforts to reach settlements elsewhere. None of these arguments have any merit. As set forth in more detail below, the recent privilege logs and partial production of settlement communications make clear [redacted]. Further, the Inside Institutional

[1] The Steering Committee submits this supplemental memorandum on behalf of all Respondents except: the Federal Housing Finance Agency; the National Credit Union Administration Board; the Maine State Retirement System; Pension Trust Fund for Operating Engineers; Vermont Pension Investment Committee; the Washington State Plumbing and Pipefitting Pension Trust; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; and Cranberry Park II LLC.

Investors' common interest privilege claim over one subset of communications (their communications with the Trustee) fails because an interest in obtaining a settlement and judicial approval is insufficient to create such a privilege. Finally, and with respect to the Inside Institutional Investors' contention that disclosure of their "binary" settlement communications will affect their ability to negotiate similar settlements, that contention cannot serve as the basis to withhold discovery. The standard for discoverability is relevance, and the Inside Institutional Investors' argument that communications which are plainly relevant should not be produced because it may disadvantage them in the negotiation of other settlements is an attempt to confuse the straightforward relevance requirement under New York law. In sum, both subsets of the Inside Institutional Investors' settlement communications are relevant, not privileged, and discoverable.

FACTUAL BACKGROUND

After reviewing the partial production of settlement communications as well as the settlement proponents' privilege logs, [redacted] Indeed, there is now evidence that [redacted]

[redacted]

Moreover, from the beginning of this case, the Inside Institutional Investors' counsel has proclaimed that "when Bank of America came to the table, [the Inside Institutional Investors] *negotiated a settlement* . . . ." (Tr. of 9/21/11 Hrg. at 64:7-9 [7/18/12 Rollin Aff., Ex. 2] [emphasis added].) Even the Trustee's counsel has suggested that the Trustee took a backseat in the negotiations, stating that the Trustee "was *presented* with a settlement that involved these 530 trusts[.]" (*See* Tr. of 9/21/11 Hrg. at 9:8-10 [7/18/12 Rollin Aff., Ex. 2] [emphasis added].)[2] The partial production of settlement communications and the privilege logs produced to date both confirm that [redacted] and highlight why this Court cannot effectively evaluate the reasonableness of the negotiation process and the final settlement without production of the Inside Institutional Investors' settlement communications with both BofA and the Trustee. An initial and partial chronology of events, which the Steering Committee has constructed from the communications produced to date, is attached as Exhibit A to this brief and [redacted]

Between November 2010 and June 2011, the Inside Institutional Investors and the Trustee engaged in at least 48 binary "communication[s] regarding settlement negotiations," and at least 148 binary communications regarding conference calls or meetings related to settlement discussions. (*See* Inst. Inv. 5/21/12 Priv. Log. [7/18/12 Rollin Aff., Ex. 3].) There were at least

[2] The settlement proponents have in the past taken positions that are inconsistent as to the roles played by the Trustee and the Inside Institutional Investors in negotiating the settlement. *Compare* Tr. of 9/21/11 Hrg. at 9:8-10, 7/18/12 Rollin Aff., Ex. 2 ("The trustee was presented with a settlement that involved these 530 trusts . . . .") *with* Doc. No. 250 at 13 ("The Trustee then exercised its independent discretion and struck its own deal with Bank of America."). As shown below, the Inside Institutional Investors were in fact key and active participants throughout the period in which the settlement agreement was negotiated.

41 additional "communication[s] regarding the terms of [the] settlement" or the Settlement Agreement, (*id.*), and when the Trustee prepared to file its Verified Petition for approval of the settlement, the Inside Institutional Investors engaged in at least 35 binary written "communication[s] regarding draft pleadings." (*Id.*) In the two months leading up to the filing of this Article 77 proceeding, the Inside Institutional Investors communicated with the Trustee almost daily. (*See id.*)

Further, the Trustee's own evaluation of the settlement often occurred amid repeated binary communications with the Inside Institutional Investors. For example, in a span of three days during which the Trustee evaluated drafts of the Settlement Agreement, the Trustee simultaneously engaged in over 50 separate communications with the Inside Institutional Investors. (*Compare* Trustee's 5/25/12 Priv. Log at 24-27 [7/18/12 Rollin Aff., Ex. 4] *to* Inst. Inv. 5/21/12 Priv. Log at 20-26 [7/18/12 Rollin Aff., Ex. 3].) Those communications include communications "regarding conference call[s] relating to settlement discussion," communications "regarding the terms of the settlement," and communications "regarding settlement negotiations." (Inst. Inv. 5/21/12 Priv. Log at 20-26 [7/18/12 Rollin Aff., Ex. 3].) In total, there are over 500 binary settlement communications between the Inside Institutional Investors and the Trustee that the Inside Institutional Investors are refusing to produce. (*See id.*)

In addition to the over 500 communications between the Inside Institutional Investors and the Trustee, the Inside Institutional Investors also are withholding numerous binary communications with BofA. Those communications have not been logged as privileged and are being withheld on relevance grounds only.

The Steering Committee respectfully submits that both subsets of settlement communications are necessary to a meaningful evaluation of the proposed settlement. Without

access to the Inside Institutional Investors' settlement communications, the Trustee's decisions about the settlement would have to be evaluated out of context and in a vacuum. These communications are also critical for the Court to be able to evaluate the numerous factual findings requested by the settlement proponents, including whether the settlement was the result of "arm's-length negotiations." (*See* Doc. No. 7 at 5.)

For those reasons, and as more fully set forth below, the Steering Committee respectfully requests that the Court compel the production of:

1) the Inside Institutional Investors' settlement communications with the Bank of New York Mellon; and

2) the Inside Institutional Investors' settlement communications with Bank of America.

ARGUMENT

I. The Inside Institutional Investors' Settlement Communications Are Relevant and Discoverable

A. The Inside Institutional Investors' Settlement Communications Bear Directly on the Controversies Before This Court

Based on the existing record, the Inside Institutional Investors' settlement communications will clearly contain facts and information bearing on the controversies before this Court and therefore should be produced. *See Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968) (finding that the scope of disclosure under the rule is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy . . . ."). Specifically, the Inside Institutional Investors' settlement communications will shed light on the nature of the Inside Institutional Investors' involvement, the influence they had on the settlement process, and the specific terms and conditions they bargained for and against during settlement negotiations. This Court has previously recognized that such information is relevant to the issues

raised by the Proposed Final Order and Judgment that the settlement proponents ask this Court to enter:

> I do think that if the petitioners want me to make all of these findings and decide that this was a reasonable settlement and there were no conflicts and there were no special provisions or anything special given to the institutional investors with whom they did negotiate as opposed to [the Respondents] with whom they did not directly negotiate, that there is going to have to be a little bit more discovery[.]

(Tr. of 4/24/12 Hrg. at 13:21-14:4 [7/18/12 Rollin Aff., Ex. 5].) This Court has also recognized that the Proposed Final Order and Judgment incorporates "expansive" findings, (*id.* at 103:8-21), including a finding that the negotiations occurred at arm's-length. The Proposed Final Order and Judgment places the propriety of the negotiations and the reasonableness of the settlement squarely before this Court. Because the Inside Institutional Investors' settlement communications bear directly on those issues as well as others raised by the Proposed Final Order and Judgment, the Inside Institutional Investors' settlement communications are plainly relevant and should be produced during discovery.

B. The Inside Institutional Investors' Settlement Communications Are Necessary to a Meaningful Evaluation of the Settlement and the Settlement Process

The proposed settlement was negotiated by three parties, with the Inside Institutional Investors' [redacted]. (*See generally supra*, Factual Background.) As with any negotiation, the terms of the ultimate agreement are necessarily a reflection of the *negotiating* parties' interests; they are the product of significant compromise where rights and interests are unavoidably leveraged and bargained in exchange. Counsel for the Inside Institutional Investors has admitted that they negotiated the settlement solely on behalf of their clients, despite knowing that the settlement would bind all certificateholders. (*See* Doc. No. 250 at 14 ["[T]he Institutional Investors *never* . . . claimed to be acting on behalf of any

Certificateholders other than themselves and their clients . . . ."].) If in negotiating the settlement the Inside Institutional Investors focused on their own specific (and possibly narrow) interests, those particular interests may have impacted the ultimate agreement in a way that favored the Inside Institutional Investors.

Already there is reason to believe that the Inside Institutional Investors negotiated direct benefits for themselves at the expense of other certificateholders. Apart from the gargantuan $85 million fee BofA will pay directly to counsel for the Inside Institutional Investors, rather than to the settlement fund for the benefit of all holders, the Side Letter appears to have conferred a direct benefit upon the Inside Institutional Investors as well. In agreeing to voluntarily reverse the Inside Institutional Investors' binding instructions to the Trustee, the settlement proponents extinguished the Inside Institutional Investors' indemnity obligation and shifted it back to BofA.[3] Significantly, the Trustee's recent production of settlement communications [redacted] This type of self-interested action may run contrary to the Inside Institutional Investors' obligations under the governing PSAs. As articulated by the Inside Institutional Investors' own counsel during the April 24, 2012 hearing, "there are thousands of certificate holders who invested in these trusts on the express understanding that *the trustee* would decide what to do with litigation claims that

[3] Notably, the settlement proponents have taken inconsistent positions on the "instruction issue." In its opposition to the Steering Committee's motion to compel discovery, the Trustee took the position that the Inside Institutional Investors never issued a direction or instruction. (*See* Doc. No. 263 at 21 ["The [Respondents] have no evidence that the Institutional Investors ever gave a direction, because they did not."].) Yet, just a few months prior to that statement, the Trustee stated before Judge Pauley, "The Bank of New York received an instruction . . . . from holders." (Tr. of 9/21/11 Hrg. at 7:6-8 [7/18/12 Rollin Aff., Ex. 2].) The Trustee also admitted that it "acted . . . because it received a letter from institutional investors," and that "[i]t was that instruction and . . . the nature of the holdings . . . that triggered action by the trustee." (*Id.* at 34:1-12.) Additionally, [redacted] Discovery on this recurring contradiction should shed light on whether the Trustee was acting to protect its own interests or the interests of its beneficiaries.

belong to the trust. And there are provisions that prohibit self interested [certificate holders] from derailing the trustee's effort to act on behalf of all certificate holders . . . ." (*See* Tr. of 4/24/12 Hrg. at 33:24-34:7 [7/18/12 Rollin Aff., Ex. 5] [emphasis added].) Both the $85 million fee and the Side Letter are evidence of the type of self-interested action that may have compromised global benefits due to all certificateholders. Counsel's fee and the Side Letter likely are the result of a bargained-for-exchange during settlement negotiations, but neither the Respondents nor this Court know what was exchanged or compromised in return, and the settlement proponents refuse to produce the communications that would shed light on this issue.

Indeed, the Inside Institutional Investors and the Trustee have gone to great lengths to protect the Inside Institutional Investors' settlement communications. Beyond asserting relevance arguments and privilege claims, they argue that discovery of their communications is "prejudicial." During the May 8th hearing, counsel for the Inside Institutional Investors stated:

> I believe there should be no discovery of [our communications with Bank of America] and the reason there should be no discovery of that is it is deeply prejudicial . . . . What you say to somebody at the end of settlement negotiations as you're getting down to the lit log to say okay, I can do this deal, I can make my clients comfortable that they will not object to this, what you say in that circumstance is your end point that other banks would like to have as their starting point.

(Tr. of 5/8/12 Hrg. at 39:5-14 [7/18/12 Rollin Aff., Ex. 1].) Counsel's argument is telling. The Inside Institutional Investors obviously exerted pressure on BofA and the Trustee until the very end of the negotiations. Identifying those pressure points is crucial to a meaningful analysis of the settlement and the settlement proponents' conduct. If, for example, the Trustee had unindemnified liability and the Inside Institutional Investors used that leverage to force the Trustee to settle, that information would be relevant to whether the Trustee acted in its own interest.

Counsel's argument also exposes the Inside Institutional Investors' vociferous resistance to discovery. That resistance is concerning, particularly in the wake of the Trustee's production of settlement communications which [redacted] Without access to the Inside Institutional Investors' "binary" communications, Respondents are left in the dark about how the Inside Institutional Investors' particular interests permeated the negotiations and ultimately the settlement, whether the proposed settlement agreement was the result of "arm's-length negotiations," and whether the Inside Institutional Investors' interests were in harmony or at odds with the interests of the larger group of certificateholders. *Id.* The Inside Institutional Investors' settlement communications with the Trustee also will reveal:

- Whether *the Trustee* elevated the Inside Institutional Investors' interests over the interests of other certificateholders.

- Whether the Inside Institutional Investors' involvement compromised the Trustee's advocacy for other certificateholders' interests.

- Whether the Trustee intended to or did adopt a passive role during negotiations.

The Inside Institutional Investors' settlement communications with BofA will further reveal:

- Whether the Inside Institutional Investors usurped the role of the Trustee during negotiations with BofA.

- Whether the interests of other certificateholders were adequately represented during negotiations with BofA.

- Whether the Inside Institutional Investors bargained for a direct benefit to themselves.

Moreover, to the extent the Inside Institutional Investors argue that their communications should not be disclosed because that disclosure would interfere with their ability to settle other matters, that argument is without merit. The scope of discovery is interpreted liberally under New York law and requires the disclosure of all information bearing on the controversy. *See Allen*, 21 N.Y.2d at 406; *Accent Collections, Inc. v. Cappelli Enters., Inc.*, 84 A.D.3d 1283, 1283 (2d Dep't 2011). Accordingly, the applicable standard is relevance and the Inside Institutional Investors' attempt to circumvent that standard should fail.

The Inside Institutional Investors' communications with the Trustee, as well as their communications with BofA, are discoverable because they are relevant and an inextricable component of the settlement negotiations. Respondents (who were not involved in the negotiations) and this Court need to know that all certificateholders' interests were adequately represented and protected during the negotiations, and the Inside Institutional Investors'

settlement communications with BofA and the Trustee are necessary for that inquiry.[4]

II. The Inside Institutional Investors' Settlement Communications with the Trustee Are Not Privileged

Disregarding well-settled law, the Inside Institutional Investors seek to shield their settlement communications with the Trustee under a claim of common interest privilege. Their claim fails because they cannot satisfy the common legal interest requirement under New York law. Moreover, any purported common interest between the Inside Institutional Investors and the Trustee during settlement negotiations necessarily extends to all certificateholders—certainly to all certificateholders in Trusts in which the Inside Institutional Investors held 25% of the voting rights and had invoked trust-level rights under the PSAs—and therefore cannot be used to exclude certificateholders from the inner circle of information.[5]

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[4] Counsel for the Inside Institutional Investors previously suggested that if the Inside Institutional Investors' settlement communications with Bank of America are relevant and discoverable, so too are the communications of any Respondent with Bank of America. That proposition is plainly wrong. The settlement communications between and among the *settlement proponents*—including the Inside Institutional Investors—are relevant because those communications led to the proposed settlement *which is before this Court for judicial approval.* In stark contrast, Respondents were not involved in the settlement negotiations. Respondents' communications with Bank of America therefore have no bearing on the issues before this Court—namely, the reasonableness of the settlement and the propriety of the negotiations. To the extent the Inside Institutional Investors claim such communications are discoverable because an objector's motivation for objecting to a settlement is relevant to a court's evaluation of the settlement, they are mistaken under the law. *See generally Donavan v. Shaheen*, 36 Misc. 2d 525, 526 (Sup. Ct. N.Y. Cnty. 1962) (where defendants argued that the suit was controlled by parties who sought to further ulterior objectives, and the court held "the plaintiff's motive, in bringing the suit and asserting his equitable rights, affords no ground for refusing to hear and decide the case . . . . the good faith of the particular plaintiff is immaterial." [internal citations and quotations omitted]); *In re Shapiro's Will*, 36 Misc. 2d 271, 274 (N.Y. Sur. Ct. 1962) (where objections were filed in a probate proceeding and the court stated it was not "concerned with the motives which prompted the filing of objections . . . ."); *In re Silverman*, 1 B.R. 107, 112 (Bankr. S.D.N.Y. 1979), *aff'd*, 13 B.R. 270 (Bankr. S.D.N.Y. 1981) (finding an objector's "motive in filing the objections is irrelevant to the issue of whether or not the bankrupt is entitled to a discharge . . . .").

[5] As a threshold matter, the Inside Institutional Investors' common interest claim fails because they have not satisfied their "burden of showing that there was 'an agreement . . . embodying a cooperative and common enterprise towards an identical legal strategy.'" *AMP Servs. Ltd. v. Walanpatrias Found.*, No. 106462/04, 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008) (Kapnick, J.) (quoting *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004)).

A. The Inside Institutional Investors Have Not Identified a Common Legal Interest that Satisfies the Common Interest Doctrine

The Inside Institutional Investors fail to identify a sufficient common legal interest under New York law.[6] They argue that the following interest is sufficient:

> reaching a settlement of trust claims that was acceptable to the Trustee, Bank of America, and Countrywide, on terms fair to all Certificateholders and that the Institutional investors could support.

(Doc. No. 250 at 10.) They are wrong. Courts repeatedly reject this type of interest as a basis to assert the common interest privilege. *See AMP Servs. Ltd. v. Walanpatrias Found.*, No. 106462/04, 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008) (Kapnick, J.) ("[M]erely having a shared interest in the outcome of the underlying litigation is not sufficient to create a common interest."); *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/2002, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009) ("More than mutual support of a bankruptcy reorganization plan must be shown."); *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 473 (S.D.N.Y. 2003) (finding that a shared desire for a favorable litigation outcome was "insufficient to invoke the common interest rule"); *SR Int'l Bus. Ins. Co. Ltd. v. World Trade Center Props. LLC*, No. 01 Civ. 9291(JSM), 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002) ("Sharing a desire to succeed in an action does not create a 'common interest.'"); *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999) (same).

Mt. McKinley, a case the Inside Institutional Investors rely upon in asserting the common

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[6] For purposes of this supplemental briefing only, we assume *arguendo* that the Inside Institutional Investors have satisfied their burden of establishing that each logged communication is protected under the threshold attorney-client privilege. Respondents expressly preserve their right to contest the applicability of the attorney-client privilege and the work product doctrine to any of the withheld documents.

If the Court finds the fiduciary exception applies to overcome the Trustee's attorney-client privilege claims, then by extension the common interest privilege claim over the Trustee's settlement communications with the Inside Institutional Investors also fails.

interest privilege, is instructive. There, defendant Corning Inc. (a successor in interest to the liabilities of an asbestos company) negotiated a settlement agreement with certain asbestos claimants. Sometime after the inception of the asbestos litigation, several insurance companies became involved in various disputes. Upon discovering that Corning settled with claimants, the parties involved in the insurance disputes sought settlement-related materials. Corning withheld the settlement-related materials and asserted the common interest privilege. Like the Inside Institutional Investors here, Corning argued that once it reached an agreement with the asbestos claimants, "they became united in the bankruptcy context in the common interests of achieving approval of such a plan and in opposing objections being filed against their shared goals and interests by objecting insurers." *Mt. McKinley*, 2009 WL 6978591 (internal quotations omitted). The court rejected that argument. It found that a shared interest in achieving judicial approval of the reorganization plan was insufficient to create a common interest privilege. The court also noted that, "even assuming that [the parties] shared a common legal interest, there was a substantial risk the parties would revert to adversaries, which calls the expectation of confidentiality into question." *Id.*[7]

Similar to *Mt. McKinley*, the Inside Institutional Investors' claimed common interest with the Trustee—of reaching a settlement and achieving judicial approval of it—does not satisfy the common interest doctrine. Further, the settlement agreement at issue here expressly contemplates that the parties may revert to an adversarial relationship. (*See* Doc. No. 3 at 6 [stating that if "Final Court Approval" is not obtained, "the Parties hereto shall be deemed to

[7] The court explained that adversaries (or former adversaries) are not automatically precluded from asserting the common interest privilege, but a formerly adversarial relationship is certainly a "factor that weigh[s] against finding the common-interest privilege exist[s]." *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/2002, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009) (citing *Am. Re-Insurance Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, 491 (1st Dep't 2007)).

have reverted to their respective status as to all claims, positions, defenses, and responses"].) The Inside Institutional Investors' common interest privilege claim fails.

B. Any Common Interest Between The Inside Institutional Investors and the Trustee During Settlement Negotiations, Necessarily Extends to All Other Certificateholders

Assuming *arguendo* that the shared interest articulated by the Inside Institutional Investors is a sufficient common legal interest (which it is not), that interest necessarily extends to all certificateholders in the Covered Trusts. By the Inside Institutional Investors' own articulation of the purported common interest ("reaching a settlement of trust claims . . . on terms fair to all Certificateholders . . ."), *all* certificateholders are interested parties in the shared interest of reaching a settlement.

The Inside Institutional Investors' reliance on *U.S. Bank N.A. v. APP International Finance Co.*, 33 A.D.3d 430 (1st Dep't 2006), to argue that the common interest privilege keeps the Inside Institutional Investors on the inside of the privilege and all other certificateholders on the outside is misplaced. (*See* Doc. No. 250 at 10 n.33.) First, the noteholder in *U.S. Bank* could not pierce the privilege in part because it had not acquired an interest in the notes at the time the common interest materials were generated. 33 A.D.3d at 431. Second, the noteholder's representative "testified that his company had mutual interests with the . . . defendants," and the court held this made it plausible that the noteholder would share with the defendants any information it received. *Id.* at 431-32.

Distinguishably here, the Respondents seeking production had a stake in the negotiations when the purported common interest materials were generated, *and* there is no allegation or indication that Respondents are in any way aligned with the adversary, in this case BofA. Moreover, the Inside Institutional Investors tout that the proposed settlement confers "value" on

all certificateholders in the Covered Trusts. (*See* Doc. No. 250 at 3.) It is axiomatic that a settlement which purports to benefit *all* certificateholders was the result of negotiations that affected the rights of *all* certificateholders. Thus, any purported common interest that creates a wall around the settlement communications, necessarily extends to *all* certificateholders affected by that settlement—not just a handful of them. In short, there is no justifiable reason to exclude covered certificateholders from the inner circle of information.

CONCLUSION

There is no basis in law or fact to withhold the Inside Institutional Investors' settlement communications about the very settlement this Court is being asked to approve. Indeed, it would be fundamentally unfair to deny certificateholders substantive information about the process by which their rights and claims were bargained away. Not only are the Inside Institutional Investors' settlement communications relevant to the issues before this Court, they are necessary to determining, among other things: (1) the propriety of the negotiations, (2) the extent to which the Inside Institutional Investors' particular interests influenced the negotiations, (3) the extent to which other certificateholder interests may have been compromised during negotiations, and (4) the reasonableness of the Trustee's conduct during the settlement negotiations. Further, the settlement communications between the Trustee and the Inside Institutional Investors are not privileged. Accordingly, the Steering Committee respectfully requests that the Court compel the production of:

1) the Inside Institutional Investors' settlement communications with the Bank of New York Mellon; and

2) the Inside Institutional Investors' settlement communications with Bank of America.

DATED: July 18, 2012
New York, New York

Respectfully submitted,

REILLY POZNER LLP

By: *s/ Daniel Reilly*
Daniel Reilly
Michael Rollin
1900 Sixteenth St., Ste. 1700
Denver, Colorado 80202
Telephone: (303) 893-6100
Fax: (303) 893-1500
dreilly@rplaw.com
mrollin@rplaw.com

Attorneys for AIG Entities

MILLER & WRUBEL P.C.

By: *s/ John G. Moon*
John G. Moon
Claire L. Huene
570 Lexington Avenue
New York, New York 10022
Telephone: (212) 336-3500
Fax: (212) 336-3555
jmoon@mw-law.com
chuene@mw-law.com

Attorneys for the Triaxx Entities

GRAIS & ELLSWORTH LLP

By: *s/ Owen L. Cyrulnik*
Owen L. Cyrulnik
David J. Grais
Leanne M. Wilson
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 755-0100
Fax: (212) 755-0052
ocyrulnik@graisellsworth.com
dgrais@graisellsworth.com
lwilson@graisellsworth.com

Attorneys for Walnut Place and Federal Home Loan Bank of San Francisco

KELLER ROHRBACK LLP

By: *s/ Derek W. Loeser*
Derek W. Loeser
David J. Ko
1201 Third Avenue, Suite 3200
Seattle, Washington 98101
Telephone: (206) 623-1900
Fax: (206) 623-3384
dloeser@kellerrohrback.com
dko@kellerrohrback.com

Gary A. Gotto
3101 North Central Avenue
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Fax: (602) 248-2822
ggotto@krplc.com

Attorneys for Federal Home Loan Banks of Boston, Chicago, and Indianapolis

EXHIBIT A

[REDACTED]