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.

REPLACEMENT MEMORANDUM OF LAW IN SUPPORT OF THE ORDER TO SHOW CAUSE WHY THE COURT SHOULD NOT COMPEL DISCOVERY

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The Steering Committee of the Intervenor-Respondents and Objectors ("Intervenors") respectfully moves under CPLR § 3124 to compel the production of certain documents currently being withheld by The Bank of New York Mellon ("BNYM" or "Trustee") and/or the Institutional Investors on claims of relevance and privilege.[1]

INTRODUCTION

Through this proceeding, BNYM (and, by intervention, the Institutional Investors) seek judicial approval of a settlement that would bind and extinguish the rights of every investor in 530 separate trusts (the "Covered Trusts"). BNYM purports to bring only one issue before the Court. However, beyond mere approval of the $8.5 billion settlement amount, BNYM seeks at least *seventeen* separate and additional findings from this Court.[2] The Intervenors have asked for discovery intended to shed light on the basis for each of BNYM's requested findings. This discovery focuses upon the three key areas in which BNYM seeks this Court's judicial blessing: (1) the reasonableness of the settlement amount and its terms in light of the strengths and weaknesses of the underlying claims; (2) the process by which the settlement was reached; and (3) the reasonableness of BNYM's and the Institutional Investors' conduct, as it is apparently that group—not BNYM—who negotiated the proposed settlement on behalf of all Intervenors. Despite numerous meet and confers designed to reach compromise, BNYM and the Institutional Investors continue to resist—on meritless privilege and relevance objections—meaningful discovery that will allow the Intervenors to evaluate the findings they ask this Court to issue.

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[1] The Steering Committee submits this motion on behalf of all Intervenors except: the Delaware Department of Justice; the New York State Office of the Attorney General; 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; Ambac Assurance Corporation; and The Segregated Account of Ambac Assurance Corporation. In addition, the Knights of Columbus and the other clients represented by Talcott Franklin P.C., do not join in or oppose the order to show cause/motion at this time. Cranberry Park LLC and Cranberry Park II LLC also do not join in or oppose the order to show cause/motion at this time.

[2] *See* Section I, *infra* for a list of findings BNYM seeks through its Proposed Final Order and Judgment.

Nature of Underlying Claims Being Settled

Each Covered Trust is comprised of securitized mortgage loans. The loans in each trust were represented by Countrywide Home Loans, Inc. (collectively with Countrywide Financial Corporation, "Countrywide") to be of a particular commercial quality. Because loan pools were miserably below the commercial quality promised by Countrywide, the monthly payments into the trusts were drastically less than expected had Countrywide met its contractual obligations to the trusts. As a result, investors (also called certificateholders) in the Covered Trusts have collectively suffered actual and estimated future losses upwards of $100 billion.

Each Covered Trust has claims against Countrywide and/or its successor, Bank of America Corporation and Bank of America Corporation Home Loans Servicing, LP (collectively "Bank of America") on the losses that the Trustee seeks to settle. As set forth in more detail below, the settlement that BNYM and the Institutional Investors propose entering into with Countrywide and Bank of America ("BAC/CW") is so vague on a number of critical issues that certificateholders simply cannot analyze it without more information about the actual meaning of the settlement and the process by which it was reached.

"Unknowns" about the Settlement

Beyond the negotiations, which the certificateholders know virtually nothing about, basic questions about the proposed settlement remain. It is unclear how much money BAC/CW can hold back from the supposed settlement amount of $8.5 billion. Neither do the Intervenors know how—or how much of—the $8.5 billion settlement will be allocated among the Covered Trusts. Under the proposed settlement agreement ("Settlement Agreement") the allocation will not be undertaken until after judicial approval of the settlement is achieved, and an undisclosed number of the 530 Covered Trusts may even be excluded from the settlement altogether.

It is not even certain that BAC/CW will be bound by an approval of the proposed

settlement by this Court. Under 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. It is likewise uncertain what effect the recent $25 billion dollar settlement between the country's five largest loan services, including BAC/CW, and the state attorneys general will have on the purported servicing benefits of the proposed settlement at issue in this proceeding. Further, both BNYM and the Institutional Investors took benefits for themselves in the Settlement Agreement. Neither the Intervenors nor this Court can evaluate whether those benefits were justified or appropriate without information about how and why they came about. The Intervenors bring this motion to obtain the information needed to answer these questions.

Relief Requested in the Present Motion to Compel

The parties agree on one thing: information that is relevant to the issues presented to the Court is discoverable. (*See* March 12, 2012 Letter from Matthew D. Ingber to The Honorable Barbara R. Kapnick at 6, Doc. No. 205 ["March 12 Letter"].) BNYM selected the issues to be presented to this Court in constructing and submitting its claim for relief. Now, when faced with discovery requests about those issues, BNYM (and the Institutional Investors) resist. The parties have been unable to resolve their fundamental dispute over the appropriate scope of discovery. The Intervenors therefore bring the instant motion to request the following three rulings:

(1) that all communications and documents exchanged between or among BNYM, the Institutional Investors, and BAC/CW during negotiation, consummation, and Court submission of the proposed settlement ("Settlement Communications") are relevant, not privileged, and must be produced;

(2) that a sampling of loan files, together with all other information relevant to the meaning, effect, and reasonableness of the settlement terms, is discoverable and must be produced; and

(3) that the fiduciary exception to the attorney-client privilege applies to communications between BNYM and its counsel, and the Institutional Investors and their counsel, when they were seeking legal advice about the proposed settlement (from approximately November 2010 to June 29, 2011).[3]

PROCEDURAL BACKGROUND

The Intervenors served BNYM and the Institutional Investors with document production requests while the case was in federal court. Among other things, the Intervenors sought the Settlement Communications, but BNYM and the Institutional Investors have taken the categorical position that Settlement Communications are irrelevant and/or protected by the common-interest privilege. (*See* BNYM's Responses & Objections to Intervenor-Respondents' First Set of Document Requests at 7-32, attached to Rollin Aff. as Ex. 1; *see also* Institutional Investors' Objections and Responses to Intervenor-Respondents' First Set of Interrogatories and First Requests for Production at 25-34, attached to Rollin Aff. as Ex. 2.)

The Intervenors also requested a sampling of loan files from BNYM and Bank of America. BNYM asserted in response that any information going to the underlying claims being settled, including loan files, is categorically irrelevant. (*See, e.g.*, Ex. 1 to Rollin Aff. at 2, 6, 25; *see also* March 12 Letter at 4-6.)

Further, both BNYM and the Institutional Investors have withheld significant numbers of documents by claiming the attorney-client privilege over communications with counsel that sought legal advice about the settlement. BNYM produced a 35-page First Amended Privilege Log ("BNYM's Privilege Log") claiming attorney-client privilege over hundreds of documents. (*See* BNYM's Privilege Log, attached to Rollin Aff. as Ex. 3.) The Institutional Investors also

[3] The issues taken up by this motion are not exhaustive of the discovery disputes that have developed between the parties. The Intervenors preserve their right to move to compel other withheld documents.

produced a categorical privilege log ("Institutional Investors' Privilege Log") which fails to itemize the documents being withheld, but makes clear the breadth of documents not being produced. (*See* Institutional Investors' Privilege Log, attached to Rollin Aff. as Ex. 4.) The Intervenors have requested that the Institutional Investors generate new logs which include meaningful disclosure of the information they claim is privileged. They have not yet done so.

Contrary to BNYM's representations in its March 12 Letter to this Court, therefore, document discovery is far from complete. Of the documents that BNYM has produced, less than 5% concern the settlement itself and the process by which it was reached. Of those, only a few documents are Settlement Communications. Instead of information bearing directly on the terms of the settlement and the process undertaken to reach it, over 90% of BNYM's document production consists of the governing agreements for the Covered Trusts, post-settlement document exception reports, and monthly trust statements. A small fraction of the production consists of documents regarding the BAC/CW merger, and the remainder consists of cases printed off Westlaw. Thus, it is far from accurate for BNYM to claim that the Intervenors "have everything they need to assess" the settlement and BNYM's conduct. (March 12 Letter at 6.)

ARGUMENT

I. Intervenors Are Entitled to All Discovery Relevant to the Relief BNYM Seeks

Under CPLR § 3101(a), "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The scope of disclosure under the rule is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy . . . ." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968). "[T]he test is one of usefulness and reason." *Accent Collections Inc. v. Cappelli Enters., Inc.*, 84 A.D.3d 1283, 1283 (2d Dep't 2011) (internal quotations omitted).

Disclosure in Article 77 special proceedings is expressly "governed by [A]rticle 31."

CPLR § 408. Moreover, *unlike* other special proceedings, in an Article 77 proceeding, all discovery devices—such as interrogatories, document production requests, and depositions—are available without leave of Court. BNYM's assertion in its March 12 letter to this Court that "the *only* discovery that Article 77 expressly provides for . . . is 'the right to examine the trustees'" is thus misleading. (*See* March 12 Letter at 5 [emphasis in original].) CPLR § 408 expressly governs discovery in an Article 77 proceeding. CPLR § 7701 does not somehow contradict CPLR § 408. Instead, it merely *expands* discovery with respect to one point: depositions of the trustee can occur "either before or after filing an answer or objections," CPLR § 7701, whereas under Article 31 depositions are normally only allowed after the time for a responsive pleading has passed. CPLR § 3106(a). Furthermore, because Article 31 governs disclosure in an Article 77 proceeding, *Allen*'s liberal discovery standard applies regardless of whether the action continues under Article 77 or is converted to a plenary action.[4]

Under this traditionally liberal discovery standard, the Intervenors are entitled to discovery into all facts bearing on the relief BNYM has requested in this action. BNYM's requested relief is set forth in the Proposed Final Order and Judgment ("PFOJ") that it filed with its Verified Article 77 Petition. (PFOJ, Doc. No. 7.) By the express terms of the PFOJ, BNYM seeks at least eighteen separate findings by this Court:

(1) **The "Jurisdiction" Finding:** "The Court has jurisdiction over the subject matter of this Article 77 proceeding." (PFOJ ¶ b.)

(2) **The "Adequate Notice" Finding:** "The form and the method of dissemination of the notice (the "Notice") . . . provided the best notice practicable under the circumstances . . . . The Notice provided due and adequate notice of these proceedings and the matters set forth herein,

[4] By separate motion, the Intervenors request that this Article 77 proceeding be converted into a plenary action. For various reasons set forth in the memorandum of law submitted in support of that motion, Article 77 may not accommodate a litigation of this magnitude and complexity. However, the Intervenors are entitled to full and adequate discovery regardless of whether the action proceeds under Article 77 or otherwise.

including the Settlement and the Court's consideration of the actions of the Trustee in entering into the Settlement Agreement . . . ." (*Id.* ¶¶ c-d.)

(3) **The "Trustee's Authority" Finding:** "The Trustee has the authority . . . to enter into the Settlement Agreement . . . . (*Id.* ¶ f.)

(4) **The "Within the Trustee's Discretion" Finding:** ". . . the decision whether to enter into the Settlement Agreement . . . is a matter within the Trustee's discretion." (*Id.* ¶ g.)

(5) **The "Full and Fair Opportunity" Finding:** "A full and fair opportunity has been offered to all Potentially Interested Persons, including the Trust Beneficiaries, to make their views known to the Court, to object to the Settlement and to the approval of the actions of the Trustee in entering into the Settlement Agreement, and to participate in the hearing thereon." (*Id.* ¶ e.)

(6) **The "Factual Investigation" Finding:** "The Settlement Agreement is the result of factual . . . investigation by the Trustee . . . ." (*Id.* ¶ h.)

(7) **The "Legal Investigation" Finding:** "The Settlement Agreement is the result of . . . legal investigation by the Trustee . . . ." (*Id.*)

(8) **The "Focus on Available Alternatives" Finding:** ". . . the Trustee's deliberations appropriately focused on . . . the alternatives available or potentially available to pursue remedies for the benefit of the Trust Beneficiaries . . . ." (*Id.* ¶ j.)

(9) **The "Appropriate Evaluation of the Underlying Claims" Finding:** "The Trustee appropriately evaluated . . . the strengths and weaknesses of the claims being settled." (*Id.* ¶ i.)

". . . the Trustee's deliberations appropriately focused on the strengths and weaknesses of the Trust Released Claims . . . ." (*Id.* ¶ j.)

(10) **The "Appropriate Evaluation of the Settlement" Finding:** "The Trustee appropriately evaluated the terms, benefits, and consequences of the Settlement . . . ." (*Id.* ¶ i.)

". . . the Trustee's deliberations appropriately focused on . . . the terms of the Settlement." (*Id.* ¶ j.)

(11) **The "Arms-Length Negotiations" Finding:** "The arms-length negotiations that led to the Settlement Agreement . . . appropriately focused on the strengths and weaknesses of the Trust Released Claims . . . ." (*Id.* ¶ j.)

(12) **The "Acted in Good Faith" Finding:** "The Trustee acted in good faith . . . in determining that the Settlement Agreement was in the best interests of the Covered Trusts." (*Id.* ¶ k.)

(13) **The "Acted Within its Discretion" Finding:** "The Trustee acted . . . within its discretion . . . in determining that the Settlement Agreement was in the best interests of the Covered Trusts." (*Id.*)

(14) **The "Acted Within the Bounds of Reasonableness" Finding:** "The Trustee acted . . . within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts." (*Id.*)

(15) **The "Binding on all Parties" Finding:** "[T]he Parties [to the Settlement Agreement] are directed to consummate the Settlement . . . ." (*Id.* ¶ m.)

(16) **The "Extinguished Rights" Finding:** BNYM seeks to forever bar and enjoin all certificateholders—which includes the Intervenors—from ever seeking relief: (1) from BAC/CW for their conduct in originating, selling, delivering, servicing, and failing to maintain proper documentation for the mortgage loans held by the Covered Trusts, (*id.* ¶ n.); and (2) from BNYM for "any claims arising from or in connection with the Trustee's entry into the Settlement . . . ." (*Id.* ¶ p.)

(17) **Approval of the Trustee's Decision:** "[T]he Court hereby approves the actions of the Trustee in entering into the Settlement Agreement in all respects." (*Id.* ¶ l.)

(18) **Approval of the Settlement:** "The Settlement Agreement is hereby approved in all respects, and is fully enforceable in all respects." (*Id.* ¶ n.)

Thus, BNYM's recent representation that it only asks this Court for a single ruling on whether its "decision to settle was within the bounds of a reasonable exercise of discretion," (March 12 Letter at 3), is flatly contradicted by the express terms of the PFOJ.

Significantly, the settlement proponents *voluntarily* petitioned this Court. BNYM could have attempted settlement without seeking court approval. Had BNYM attempted to settle, it certainly could have been faced with suits from certificateholders. By asking this Court to make rulings clearly aimed at precluding future lawsuits, BNYM seeks to extinguish the

certificateholders' valuable litigation rights. *See Ahlers v. Ecovation, Inc.*, 74 A.D.3d 1889, 1890 (4th Dep't 2010) ("[A] derivative claim is a property right." (quotations omitted)) (applying Delaware law).[5] Those rights cannot and should not be extinguished without a full and fair opportunity for the certificateholders to understand the process that led to the settlement, the terms of the Settlement Agreement, and the effect of those terms. *Cf. D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 563 N.Y.S.2d 659, 664 (N.Y. 1990) (collateral estoppel requires a full and fair opportunity to litigate the issues to be precluded). Thus, through the rulings BNYM asks this Court to make, BNYM has affirmatively placed at issue the settlement terms and the process by which the settlement terms were reached.

II. BNYM and the Institutional Investors Should Be Ordered To Produce Settlement Communications

A. The Settlement Communications are Relevant

New York law provides that settlement materials are discoverable if "material and necessary" to a party's case. *Masterwear Corp. v. Bernard*, 298 A.D.2d 249, 250 (1st Dep't 2002); *see also Masterwear Corp. v. Bernard*, 3 A.D.3d 305, 307 (1st Dep't 2004) ("'[S]ettlement agreement,' as used in our prior order, was intended to refer to all of the 'confidential documents' sought[.]"); *NYP Holdings, Inc. v. McClier Corp.*, 836 Index No. 601404/04, 2007 WL 519272 (Sup. Ct. N.Y. Cnty. Jan. 10, 2007) (ordering the production of settlement materials, including negotiations, except for documents submitted to a mediator).

Courts routinely hold that where a settlement is at issue, the negotiations leading to the settlement are relevant and discoverable. In *NYP Holdings*, for example, the court held that because the settling party had to demonstrate the reasonableness of the settlement, it had to produce, among other things, the settlement negotiations. *Id.* at *1, *4. Similarly, courts have

[5] In addition to any derivative claims, certificateholders may have direct claims that are impacted and potentially undermined by the proposed settlement.

held in the class action context that "the conduct of the [settlement] negotiations [is] relevant to the fairness of the settlement" and that a refusal to allow discovery into the negotiations can constitute an abuse of discretion. *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979). As recognized by the Seventh Circuit, parties excluded from settlement negotiations need discovery into the negotiations to understand "[t]he options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement." *Id.* at 1125 (quotations omitted).

Here, the Intervenors did not participate in the settlement negotiations. As such, neither the Intervenors nor this Court can possibly evaluate whether BNYM is entitled to the broad findings it seeks from this Court. Thus, the Settlement Communications may be the only evidence of among other things: (1) the roles that BNYM and the Institutional Investors played in the negotiations; (2) the process by which BNYM purportedly evaluated the underlying claims and the terms of the settlement; (3) the compromises that were made in reaching the terms; and (4) whether BNYM and/or the Institutional Investors negotiated for individual benefits to the detriment of the trusts and other beneficiaries. The Settlement Communications are necessary for the Intervenors to knowingly evaluate the settlement and determine whether to object to its approval or not.

BNYM's claim that the Settlement Communications are irrelevant is also defeated by its own voluntary production, which includes a (very small) handful of communications from the Institutional Investors' counsel to BNYM. A review of those documents reveals that Settlement Communications bear directly on the various findings BNYM asks this Court to issue. By producing a limited portion of the Settlement Communications, BNYM has effectively conceded the relevance of Settlement Communications and cannot continue to claim all Settlement

Communications are categorically irrelevant. Indeed, this type of selective disclosure is not permitted under New York law. *See Vill. Bd. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) ("[S]elective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications.").

B. The "Common Interest Privilege" Does Not Protect the Settlement Communications From Disclosure

BNYM and the Institutional Investors also have claimed that their Settlement Communications are protected from disclosure under the common interest privilege.[6] A claimant of the common interest privilege must demonstrate that: (1) the communications at issue are protected by the attorney-client privilege; (2) the privilege holder shares a common legal interest with the party with whom the information was shared; and (3) the statements for which protection is sought were designed to further that interest. *See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 470-71 (S.D.N.Y. 2003). Importantly, "the common interest rule is narrowly construed." *GUS Consulting GmbH v. Chadbourne & Parke LLP*, 20 Misc. 3d 539, 541 (Sup. Ct. N.Y. Cnty. 2008) (Kapnick, J.).

BNYM and the Institutional Investors have not, and cannot, satisfy the requirements for the common interest privilege. As a threshold matter, neither BNYM nor the Institutional Investors have produced a privilege log that properly itemizes the withheld Settlement Communications or otherwise establishes that they are protected by the attorney-client

[6] BNYM has not specified what timeframe it claims is covered by the purported privilege. The Institutional Investors claim the common interest privilege over all communications with BNYM beginning in November 2010. The Institutional Investors' common interest claim expands to include BAC/CW after the Settlement Agreement was entered on June 29, 2011, in order to shield all communications with BAC/CW from discovery. (*See* Ex. 4 to Rollin Aff.)

privilege.[7] Even if they were attorney-client privileged communications, BNYM's and the Institutional Investors' shared interest in obtaining approval of the proposed settlement is insufficient to invoke the common interest privilege. *See AMP Servs. Ltd. v. Walanpatrias Found.*, Index 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.*, Index 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."). Additionally, the fact that BNYM, the Institutional Investors and BAC/CW were adversaries when negotiations began and will revert to adversaries if the settlement is not approved, further undercuts the common interest privilege. *See generally Mt. McKinley*, 2009 WL 6978591 (rejecting claim of common interest privilege between a manufacturing company's successor and certain asbestos claimants, as the "substantial risk the parties would revert to adversaries . . . call[ed] the expectation of confidentiality into question.").

Assuming *arguendo* that BNYM and the Institutional Investors shared a common legal interest during the settlement negotiations, the other certificateholders in the Covered Trusts (or at least the subset of Covered Trusts on whose behalf the Institutional Investors were expressly negotiating) would share that common interest and should accordingly also be privy to the Settlement Communications. As Trustee, BNYM owes fiduciary duties to *all* of the certificateholders in the 530 Covered Trusts, not just the Institutional Investors. All of the certificateholders have an interest in obtaining compensation from BAC/CW for their losses, and

[7] BNYM's privilege log itemizes communications between BNYM personnel and BNYM counsel, but does not appear to list communications with the Institutional Investors and/or BAC/CW. (*See* Ex. 3 to Rollin Aff.) The Institutional Investors' privilege log lists only the broadest categories of information—including Settlement Communications—but does not itemize the withheld documents as required by New York law. (*See* Ex. 4 to Rollin Aff.) *See In re Comprehensive Habilitation Servs. v. Attorney General of N.Y.*, 278 A.D.2d 557, 558 (3d Dep't 2000).

all of the certificateholders' rights are impacted by the settlement. There is nothing unique about the status or interests of the Institutional Investors that justifies BNYM's claim of a common interest privilege with them to the exclusion of the other certificateholders who are also beneficiaries of BNYM in its role as trustee of each of the 530 trusts.

Finally, even if the Settlement Communications were privileged (which they are not), BNYM and the Institutional Investors have placed them at-issue by seeking judicial approval of the proposed settlement and have consequently waived any privilege that would otherwise exist. *See generally Royal Indemnity Co. v. Salomon Smith Barney, Inc.*, Index No. 125889/99, 2004 WL 1563259, at *7-8 (Sup. Ct. N.Y. Cnty. June 29, 2004) (defendants waived their privilege claims over settlement-related materials by placing the reasonableness of their conduct at issue). BNYM and the Institutional Investors cannot on one hand seek declarations that BNYM acted reasonably, in good faith, and within its discretion, and on the other hand refuse "to disclose information that would either prove or disprove th[ose] threshold assertion[s]." *Id.* at *8.

BNYM's and the Institutional Investors' attempt to withhold production of Settlement Communications is without merit. The Settlement Communications are relevant and not protected under the common interest privilege. Accordingly, the Intervenors are entitled to discovery into the Settlement Communications and this Court should order their production.

III. Documents and Information Relevant to the Meaning, Effect, and Reasonableness of the Settlement Terms, Including Loan Files, are Discoverable

BNYM has asked this Court to affirmatively approve of the proposed settlement "in all respects"—which necessarily means approving all of the terms of the settlement—and to rule that BNYM "appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled." (PFOJ ¶ i.) Yet BNYM has taken the position that any information relating to the underlying claims being settled is irrelevant because

it has no bearing on BNYM's decision-making process. (*See generally* Ex. 1 to Rollin Aff.; *see also* March 12 Letter at 6.) Among other things, BNYM has refused production of loan files on the basis of this rationale.[8] (*See generally* Ex. 1 to Rollin Aff.; *see also* March 12 Letter at 6.) BNYM's narrow interpretation of discoverable information cannot be reconciled with the broad scope of the relief it seeks. *See generally* Section I, *supra* (list of BNYM's requested findings).

BNYM asks this Court to approve a settlement that will extinguish all underlying claims in exchange for three key terms: (1) the $8.5 billion settlement amount; (2) cures on document exceptions; and (3) supposed improvements in loan servicing. Whether BNYM acted reasonably and in good faith in negotiating and accepting each of these terms cannot possibly be evaluated without meaningful discovery.

A. The Intervenors Should be Provided with Sufficient Information to Assess the Reasonableness and Quantification of the Settlement Amount and the Trustee's Conduct Related Thereto

The Settlement Agreement purports to settle actual and anticipated losses exceeding $100 billion for what the settlement proponents claim to be $8.5 billion. Assuming the settlement amount is in fact $8.5 billion, it falls short of the fundamentally flawed and understated $8.8-$11.0 billion range that BNYM's purported expert, Brian Lin, determined was reasonable. (*See* RRMS Advisors Opinion, dated June 7, 2011, at 7, Fed. Doc. No. 126-2.) Mr. Lin (and by extension BNYM) reached a conclusion about the reasonableness of the settlement amount based on not much more than assumptions regarding the breach rates of the Countrywide loans held by the Covered Trusts and other assumed variables. Yet evidence exists that the quality of the Countrywide loans was far worse than assumed by BNYM and Mr. Lin. The Institutional

[8] The Intervenors also issued a non-party *subpoena duces tecum* on Bank of America requesting a sampling of loan files. Bank of America has custody of and access to those files, per representations made by its counsel during meet and confer sessions. Bank of America has likewise refused to produce any loan files, claiming they are irrelevant to the issues in this proceeding.

Investors themselves stated that the breach rate may be as high as 60%, and that the liability may exceed $30 billion. (*See* Institutional Investors' Statement in Support of Settlement and Consolidated Response to Objections ["Institutional Investors' Statement in Support of Settlement"] ¶ 29, Fed. Doc. No. 124.) If the true breach rate is significantly higher than that assumed by BNYM, it would cast considerable doubt on the reasonableness of BNYM's decision to agree to the settlement amount and the process BNYM undertook in reaching that decision.[9] Even under the standard of review articulated by BNYM, therefore, the loan files should be made available to Intervenors so that they may test whether the assumptions Mr. Lin and BNYM made were reasonable.[10]

Separately, there is a real question about how much of the $8.5 billion settlement cap will actually be allocated to the Covered Trusts. The Settlement Agreement suggests—though does not expressly state—that BAC/CW (through its Master Servicer) will withhold or repossess an undisclosed portion of the settlement amount through reimbursement of servicing and other advances. (*See* Settlement Agreement § 3(d)(i), Doc. No. 3). The Settlement Agreement also allows BAC/CW to exclude an undisclosed number of Covered Trusts in which any one or more of the tranches is insured and to retain those trusts' allocable shares of the settlement amount. (*See id.* § 3(d)(iv).) Thus, without discovery of documents and information concerning the meaning, effect, and reasonableness of the settlement terms, there is no way to know the actual settlement amount or to which trusts it will be paid.

[9] Indeed, Mr. Lin acknowledges that the data he used for his report did not even originate from any loan files that actually comprise the securities owned by the Covered Trusts, but rather from publicly available third-party sources. Significantly, similar publicly-available third-party sources reveal breach rates far greater than what Lin suggests.

[10] The Intervenors seek a manageable and relatively small sample of loans in the Covered Trusts. The Intervenors' request for loan files as originally drafted was more expansive than it is now. Through meet and confers with Bank of America and BNYM the Intervenors have significantly narrowed their request.

B. The Intervenors Should be Provided with Sufficient Information to Assess the Reasonableness and Quantification of the Document Cure Provision and the Trustee's Conduct Related Thereto

Section 6 of the Settlement Agreement outlines BAC/CW's obligation to cure certain deficiencies in the mortgage collateral files. This provision, however, drastically narrows the rights and remedies available to certificateholders under the governing agreements, and its ultimate effect is uncertain.

The governing agreements require the BAC/CW Master Servicer to cure, replace, or repurchase any mortgage loan that did not originally satisfy the strict documentation requirements for loans in the particular transaction. However, under the Settlement Agreement, BNYM narrowed and then released BAC/CW's document-related liabilities at the expense of the Covered Trusts and the holders therein by limiting the circumstances under which BAC/CW would be required to compensate certificateholders for document deficiencies. The effect of the document cure provision is uncertain and discovery into the meaning, effect, and reasonableness of that provision along with other settlement provisions, is necessary to evaluate the findings BNYM requests.

C. The Intervenors Should be Provided with Sufficient Information to Assess the Reasonableness and Quantification of the Servicing Improvements and the Trustee's Conduct Related Thereto

Section 5 of the Settlement Agreement establishes certain servicing improvements to be performed by Bank of America as Master Servicer. However, some or all of the improvements may never take effect.

According to the settlement proponents, the Settlement Agreement will increase loan performance through loan modifications and other loss mitigation strategies. (*See* Institutional Investors' Statement in Support of Settlement ¶¶ 47-50; *see also* BNYM's Consolidated Responses to Objections at 23-24, Fed. Doc. No. 126.) However, according to the Settlement

Agreement itself, "nothing herein shall be deemed to create an obligation on the part of the Master Servicer to offer any modification or loss mitigation strategy to any borrower." (Settlement Agreement § 5(d).) Thus, Bank of America as Master Servicer may not be obligated to modify loans or otherwise mitigate certificateholders' losses.

Additional questions surround the extent to which 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. As to the former, Bank of America may decline to perform the servicing improvements if, by operation of some law or publicly disclosed contract, it becomes commercially impracticable to do so. (Settlement Agreement § 5(h).) As to the latter, the National Mortgage Settlement supersedes any conflicting provision in section 5 of the Settlement Agreement. (*See* National Mortgage Settlement, *available at*, www.nationalmortgagesettlement.com.) Therefore, neither the Intervenors nor the Court can evaluate whether and to what extent the servicing improvements will go into effect without robust discovery of documents and information relevant to the meaning, effect, and reasonableness of the settlement terms and the underlying claims.

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The judicial process is designed to afford parties reasonable certainty before they are expected to voluntarily forego valuable legal rights. Accordingly, the Intervenors respectfully request that the Court compel BNYM and the Institutional Investors to produce all documents and information relevant to the meaning, effect, and reasonableness of the settlement terms and the claims to be settled under those terms.

IV. The Fiduciary Exception to the Attorney-Client Privilege Requires Disclosure of BNYM's and the Institutional Investors' Communications With Counsel Seeking Legal Advice About the Proposed Settlement During the Settlement Negotiations

A fiduciary may not withhold communications with its attorney on the basis of the attorney-client privilege where: (1) the fiduciary sought legal advice for the benefit of the party seeking disclosure as a result of a fiduciary relationship and (2) good cause exists for disclosure. *Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep't 1988); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 112 (Sup. Ct. N.Y. Cnty. 2003). Both elements are met here. Accordingly, neither BNYM nor the Institutional Investors can claim the attorney-client privilege over communications with counsel which sought legal advice regarding the settlement.

A. BNYM and the Institutional Investors Are Fiduciaries to the Intervenors With Regard to the Proposed Settlement

1. BNYM Negotiated the Settlement As a Fiduciary to All Certificateholders

BNYM negotiated the proposed settlement, and brings this proceeding for approval of the settlement, solely in its capacity as Trustee of the Covered Trusts. A trustee has a fiduciary obligation of undivided loyalty to the beneficiaries of the trust which, in this case, are all of the certificateholders. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.). The Pooling and Servicing Agreements, which govern the majority of the Covered Trusts, recognize BNYM's role as a fiduciary. (*See, e.g.*, CWALT 2004-2CB Pooling and Servicing Agreement § 3.05(e), Doc. No.11-1, Ex. A-17 to Ingber Affidavit ["PSA"] ["The Trustee *in its fiduciary capacity* . . ."] [emphasis added].) The Institutional Investors also acknowledge BNYM's role as a fiduciary. (*See generally* Replacement Memorandum of the Institutional Investors in Response to Walnut Place Motion to Intervene at 4, Doc. No. 42 ["[U]nless the Trustee's action in settling the claims is so unreasonable as to amount to a breach *of its fiduciary duty*, certificateholders have no right to object . . . ."].) Even if, as BNYM has argued, BNYM is considered an indenture trustee

under the PSAs, New York holds indenture trustees to the fiduciary duty of loyalty. *United States Trust Co. of N.Y. v. First Nat'l City Bank*, 57 A.D.2d 285, 296 (1st Dep't 1977) (discussing *Dabney v. Chase Nat'l Bank*, 196 F.2d 668 (2d Cir.1952)). BNYM recognized as much before Judge Pauley. *Bank of New York Mellon v. Walnut Place*, --- F.Supp.2d ---, 2011 WL at 4953907, *9 (S.D.N.Y. Oct. 19, 2011) ("As BNYM has conceded, New York trustees owe certain common law duties to trust beneficiaries that cannot be waived.").

Accordingly, BNYM engaged in settlement negotiations in its fiduciary capacity as Trustee, and any legal advice BNYM sought from counsel during negotiation of the settlement about the proposed settlement was necessarily obtained for the benefit of the trust beneficiaries, including Intervenors. The first requirement for the fiduciary exception to the attorney-client privilege is therefore satisfied as to BNYM.

2. The Institutional Investors Likewise Assumed a Fiduciary Role in Settling Claims on Behalf of All Certificateholders

The Institutional Investors did not negotiate only for themselves, but for all certificateholders in all 225 trusts in which they held 25% or more of the voting rights. The Institutional Investors and their counsel ostensibly saw an opportunity to try to negotiate a settlement on behalf of other certificateholders in all of the 530 Covered Trusts, including those with which it did not have a formal attorney-client relationship and in trusts in which they lacked the voting rights to do so. By attempting to negotiate on claims that belonged to all Covered Trusts (or even just the 225 trusts), the Institutional Investors purported to act in a representative capacity. *See generally Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09 C 6904, 2010 WL 3324705, at *6 (N.D. Ill. Aug. 20, 2010) (describing the plaintiff certificateholder's claims as derivative because the "claims [were] predicated on duties that BNYM owes to all certificateholders," and the certificateholder "has been injured by virtue of owning interests in

the trusts injured by BNYM's alleged breaches."); *see also Velez v. Feinstein*, 87 A.D.2d 309, 315 (1st Dep't 1982) (further illustrating the principle that when holders sue for losses to the whole trust, they are suing derivatively on behalf of the trust); *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 477 (S.D.N.Y. 2010) (same). The Institutional Investors' actions as representatives of other certificateholders gave rise to obligations that were fiduciary in nature and that subject them to the fiduciary exception to attorney-client privilege claims. *See Stenovich*, 195 Misc. 2d at 112 ("[The fiduciary exception] has been applied to a variety of relationships that are fiduciary in nature."); *cf. Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949) ("a stockholder who brings suit on a cause of action derived from the corporation assumes a position . . . of a fiduciary character.").

The Institutional Investors' obligations to other certificateholders are buttressed by section 10.08 of the PSAs. Under section 10.08, known as the common-benefit clause, all certificateholders covenanted not to "obtain or seek to obtain priority over or preference to any other" certificateholder. (*See* PSA § 10.08); *see also Anderson v. Anderson*, 248 N.W. 35, 37 (Minn. 1933) ("[O]ne beneficiary cannot prejudice the rights of another by making a settlement."). Thus, advice received by the fiduciary Institutional Investors from counsel during the negotiation of the settlement relating to the proposed settlement was sought—or should have been sought—on behalf of all certificateholders.

B. Good Cause Exists Necessitating Disclosure

Under *Hoopes v. Carota*, the fiduciary exception to the attorney-client privilege applies where good cause exists for disclosure. 142 A.D.2d at 910. Good cause may be found where: (1) the moving party is directly affected by the decisions the fiduciary made on his attorney's advice; (2) the information sought may be the only evidence of whether the fiduciary's actions

were in furtherance of the beneficiary's interests; (3) the communications relate to prospective actions not advice on past actions; (4) claims of self-dealing and conflict of interest are at least colorable; and (5) the information sought is relevant and specific. *Stenovich*, 195 Misc. 2d at 114 (citing *Hoopes*, 142 A.D.2d. at 910-11).

Good cause exists here. As in *Hoopes*, all the beneficiaries of the 530 Covered Trusts have an identical interest in the advice that BNYM and the Institutional Investors sought from their respective counsel regarding the terms and negotiation of the settlement. All of the certificateholders—not just the Institutional Investors—are directly affected by the settlement and by the decisions that BNYM and the Institutional Investors made on the advice of counsel while negotiating the settlement. *See id.* The Intervenors seek a limited universe of documents, namely, communications reflecting the legal advice that BNYM and the Institutional Investors sought from their respective counsel regarding the settlement during the negotiations (which covers from approximately November 2010 until June 29, 2011). Furthermore, BNYM's and the Institutional Investors' advice from counsel regarding the proposed settlement concerned a prospective action on the part of BNYM and the Institutional Investors—whether to enter the settlement—not past actions. *See id.* Additionally, BNYM's and the Institutional Investors' communications with counsel 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. *See id.*

Finally, and perhaps most importantly, there is evidence of self-dealing and conflicts of interest. On the face of the Settlement Agreement, both BNYM and the Institutional Investors are receiving benefits to which they are not entitled or that are not accorded to the other certificateholders. Three such examples follow.

1. *The Settlement Proponents Purport to Rearrange Their Respective Liabilities by Shifting Trustee Liabilities to the Master Servicer and Then Releasing Them Through the Settlement Agreement*

Under the governing agreements, the Trustee is generally entitled to indemnification from the Master Servicer, BAC/CW, *except* for "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 [under the PSAs] or *incurred by reason of any action of the Trustee taken at the direction of Certificateholders.*" (PSA § 8.05 [emphasis added].) Thus, when the Institutional Investors directed the Trustee with respect to the settlement and the Trustee acted thereupon[11] they effectively relieved the Master Servicer of its indemnification obligations. At that point, the cost of and risk for settlement shifted to the Trustee (or in the event the Trustee required indemnification from the Institutional Investors under section 8.02(iii) of the PSAs, to the Institutional Investors).

Subsequently, however, the Trustee and BAC/CW executed settlement-related documents in an effort to recast the Institutional Investors' directions as non-directions. (*See* Side Letter attached to Settlement Agreement at 2, Doc. No. 3, Ex. C [The Master Servicer "confirm[s] that [it] view[s] the Institutional Investor Agreement and any letter or correspondence from the investors or their counsel which requests that the Trustee take the Trustee Settlement Activities, or any portion thereof, as not being the equivalent of a direction from the investors for purposes of the indemnity."].) Apparently the settlement proponents sought to shift indemnification risk for the Trustee's settlement activities from the Trustee or the Institutional Investors to the Master Servicer under the general indemnification provision of the PSAs. Thereafter, the Trustee

[11] As one example of the directions that spurred the Trustee into its settlement-related activities, the Institutional Investors "warned that a failure to cure" the deficiencies identified in the October 18, 2010 Notice of Non-Performance "would constitute an Event of Default under the Governing Agreements." (*See* BNYM's Verified Petition ¶ 34, Doc. No. 1.) There is additional evidence but BNYM has placed restrictions on the use and disclosure of those documents such that the Steering Committee is not permitted to present them to the Court at this time.

released the Master Servicer for any of its liabilities. (*See* Settlement Agreement § 9.)

Under the ordinary application of the PSAs, the Trustee (or the Institutional Investors, if the Trustee required indemnification from them) would be liable for the Trustee's post-direction settlement activities. However, if the liability shift to the Master Servicer is deemed effective, no one will be accountable to certificateholders for the Trustee's settlement-related misconduct, of which there are significant allegations. (*See* AIG's Verified Petition to Intervene, Doc. No. 131; *see also* N.Y. Attorney General's Verified Pleading in Intervention ¶ 36, Doc. No. 104.) Those claims would fall within the Master Servicer's release.

2. *BNYM and The Institutional Investors' Reversal of Events of Default*

On October 18, 2010, counsel for the Institutional Investors issued a widely-publicized "Notice of Non-Performance" with respect to the trusts in which they held at least 25% of the voting rights at the time. This notice began the running of a sixty-day cure period. (*See* PSA § 7.01.) If the Trustee did not cure the servicing deficiencies identified in the notice, an event of default under the applicable PSAs would occur. *Id.* After an event of default, the PSAs impose expanded fiduciary duties on the Trustee, *see BNP Paribas Mortg. Corp. v. Bank of Am., N.A*, 778 F. Supp. 2d 375, 401 (S.D.N.Y. 2011), including, 60 days thereafter, notice of the default to all certificateholders. (*See* PSA § 7.03.)

It appears that negotiations with the Trustee and/or BAC/CW began shortly after the notice was served, but the Trustee has not—to this day—cured the default. Instead, the Institutional Investors apparently agreed to withdraw the default in a series of letter agreements referred to in the Settlement Agreement. (Settlement Agreement § 7.) Those letter agreements have not been produced. Importantly, nothing in the PSAs allows for forbearance or withdrawal of default-effectuating notices or avoidance of the Trustee's associated duties. Yet, if the

Settlement Agreement is approved, the Notice of Non-performance will be deemed withdrawn, (Settlement Agreement § 8,) and the default effectively and improperly unwound.

3. *The Institutional Investors' Attorney's Fees*

The Institutional Investors negotiated provisions under which they do not have to pay their own attorneys' fees—rather, Bank of America is footing a potential $85 million fee—while all other certificateholders have to pay their own attorneys' fees.

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The fiduciary exception factors weigh particularly heavily against BNYM, which has produced a 35-page privilege log withholding hundreds of communications between counsel and the businesspersons who evaluated and ultimately decided to enter the proposed settlement. (*See* Ex. 3 to Rollin Aff.) BNYM admits that, at a minimum, the information it considered and its deliberations about the settlement are relevant. (*See* March 12 Letter at 4-5.) Under the fiduciary exception, BNYM may not keep the certificateholders—who are the beneficiaries of the Covered Trusts—in the dark on how and why it entered into the settlement by claiming the attorney-client privilege over its communications with counsel concerning the settlement. The Intervenors therefore respectfully request that, pursuant to the fiduciary exception, this Court order BNYM and the Institutional Investors to produce all communications with counsel during the settlement negotiations that sought legal advice pertaining to the Settlement Agreement.

CONCLUSION

For the above reasons, the Intervenors respectfully request that this Court rule:

(1) that all communications and documents exchanged between or among BNYM, the Institutional Investors, and BAC/CW during negotiation, consummation, and Court submission of the proposed settlement ("Settlement Communications") are relevant, not privileged, and must be produced;

(2) that a sampling of loan files, together with all other information relevant to the meaning, effect, and reasonableness of the settlement terms, is discoverable and must be produced; and

(3) that the fiduciary exception to the attorney-client privilege applies to communications between BNYM and its counsel, and the Institutional Investors and their counsel, when they were seeking legal advice about the proposed settlement (from approximately November 2010 to June 29, 2011).

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