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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 REPLY MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO COMPEL DISCOVERY

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The Steering Committee of the Intervenor-Respondents and Objectors ("Respondents") respectfully submits this reply memorandum in support of their motion to compel discovery.[1]

INTRODUCTION

The proponents of this settlement have made clear that they simply will not take up the fundamental point: the discovery the Respondents seek is relevant because the settlement proponents made it so. First, the Bank of New York Mellon ("BNYM" or "Trustee") requests a deferential standard of review, but fails to acknowledge that whether its actions are entitled to deference itself turns on factual questions. Second, BNYM and the Institutional Investors largely ignore that they have asked this Court in the Proposed Final Order and Judgment to make 18 factual findings. By asking the Court for these findings, the settlement proponents have placed their settlement negotiations, their good faith, and the settlement terms at issue.

The settlement proponents ask the Court for a determination that the negotiations were "arms-length," yet refuse to provide any information about their negotiations, claiming it is irrelevant. They ask this Court to approve BNYM's "actions . . . in entering into the Settlement Agreement in *all respects*," but refuse to disclose the Settlement Communications that would show whether BNYM considered actions to reduce its own Trustee liability while negotiating the settlement. They then ask this Court to approve the settlement itself "in *all respects*." This request necessarily calls for a ruling on the reasonableness of all the settlement terms, and specifically the settlement amount, but they refuse to provide even a modest sampling of loan

[1] The Steering Committee submits this memorandum in reply on behalf of all Respondents 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; The Segregated Account of Ambac Assurance Corporation; the Knights of Columbus and the other clients represented by Talcott Franklin P.C.; Cranberry Park LLC; Cranberry Park II LLC; City of Grand Rapids General Retirement System; City of Grand Rapids Police and Fire Retirement System; Retirement Board of the Policemen's Annuity and Benefit Fund of the City Of Chicago; and The Westmoreland County Employee Retirement System.

files which would provide the only direct test of the reasonableness of the discounts applied to Bank of America's and Countrywide's liability. In short, BNYM and the Institutional Investors request broad relief that will shield BNYM from any liability for its conduct arising before, or related to, the proposed settlement, while refusing any meaningful inquiry into that conduct.

In addition to groundlessly arguing that the Respondents' requested discovery is irrelevant, BNYM and the Institutional Investors also seek to shield critical information from discovery by claiming various privileges against other certificateholders. The settlement proponents' assertion of a common interest privilege fails because a mutual interest in achieving or obtaining approval of a settlement does not constitute a common interest. Their privilege claims also fail under the fiduciary exception. There is no question that the Trustee owes fiduciary duties to the certificateholders, or that the Institutional Investors were materially involved in negotiating the settlement on behalf of all 530 Covered Trusts. Good cause exists for ordering the disclosure of legal advice sought by the Trustee and the Institutional Investors while they were purportedly protecting the interests of certificateholders. Finally, the findings sought by the settlement proponents in the Proposed Final Order and Judgment have put at issue, and thus waived, any work product protection that might otherwise apply.

The discovery the Respondents seek is no broader than the relief the proponents request. BNYM and the Institutional Investors rely on class action settlement authority to justify limited discovery, but this is not a class. Rather, the settlement proponents, in initiating this non-class proceeding, invited all certificateholders to obtain information and object if necessary. In this setting, the procedural protections inherent in class actions have not been afforded to certificateholders, which heightens the need to ensure that relevant discovery is allowed. Consistent with the transparency that should accompany a proceeding of this magnitude, the

Court should compel the discovery sought by Respondents.

ARGUMENT

I. Respondents' Requested Discovery is Relevant to the Many Factual Issues This Court Must Resolve

Both the standard of review that the Court will apply as well as this Court's determination whether to enter the Proposed Final Order and Judgment ("PFOJ") are heavily dependent on a complete factual record. (*See* PFOJ, Doc. No. 7.)

Even under the standard of review articulated by BNYM, this Court will have to resolve four factual questions in determining whether it should afford any deference to the Trustee: (1) whether the Trustee acted dishonestly, (2) whether the Trustee acted with an improper even if not dishonest motive, (3) whether the Trustee failed to use its judgment, and (4) whether the Trustee otherwise acted beyond the bounds of a reasonable judgment.[2] *See In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. Cnty. 1980). The settlement proponents ask this Court to *assume* based on their *allegations* that none of these four conditions exist and to rule right now that the Court will therefore defer to BNYM's decision to enter the settlement. However, numerous Respondents have made substantial allegations to the contrary. The Court's standard of review determination must be based on a fully-developed factual record, not allegations.

Likewise, whether BNYM is entitled to the 18 judicial findings it seeks should be determined on a fully-developed factual record. If BNYM wanted to present a single issue to the Court, it could have done so by submitting a proposed final order and judgment that only asked

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[2] BNYM has justified its claim to a deferential standard of review by relying on cases that involve ordinary fiduciary trustees. *See, e.g.*, *In re Stillman*, 107 Misc. 2d 102; *In re First Deposit & Trust Co.*, 280 N.Y. 155 (1939). Even in *IBJ Schroder Bank & Trust, Co.*, upon which BNYM heavily relies, the trustee *admitted* that it owed fiduciary duties to the trust beneficiaries. (*See* IBJ Schroder Verif. Pet. ¶ 36, attached to Doc. No. 262 as Ex. A.) Here, by contrast, BNYM disclaims any fiduciary responsibility. As other courts have recognized, if BNYM is not a fiduciary trustee, there may be no reason to defer to its judgment. *See CFIP Master Fund, Ltd. v. Citibank, N.A., et al.*, 738 F.Supp.2d 450, 477 (S.D.N.Y. 2010) (questioning whether there was any "good reason to defer to [an indenture trustee's] decision. . . .").

this Court to rule that the Trustee had the authority to enter into the settlement, (PFOJ ¶ f), and that the decision to do so was within its discretion (*id.* ¶ g). Instead, BNYM submitted a total of 18 proposed findings it asks the Court to make, including:

- The Settlement Agreement was the result of a factual investigation. (*Id.* ¶ h.)
- The Trustee appropriately evaluated the underlying claims. (*Id.* ¶¶ i-j.)
- "The Trustee appropriately evaluated the terms, benefits and consequences of the Settlement[.]" (*Id.* ¶ i.)
- The negotiations were arms-length. (*Id.* ¶ j.)
- The Trustee acted in good faith and within the bounds of reasonableness. (*Id.* ¶ k.)
- All potentially interested persons had a full and fair opportunity to object. (*Id.* ¶ e.)

(*See* Summary of Findings BNYM Requests From This Court, attached hereto as Ex. 1.)

Respondents' requested discovery—including the Settlement Communications, discovery regarding the meaning and effect of terms in the Settlement Agreement, and loan files—is targeted at developing the factual issues relevant to both the standard of review and the requested relief. *See Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968) (discovery allowed into "any facts bearing on the controversy[.]"). As the parties' briefing over the last two weeks has made clear, many factual issues remain entirely undeveloped. Three such examples follow.

A. <u>Whether One or More Events of Default Occurred</u>

New York law and the PSAs are clear that upon an event of default, BNYM owes the trust beneficiaries heightened duties and is held to a prudent person standard. (Disc. Memo. at 23, Doc. No. 213-1.) If BNYM was concerned that an event of default had occurred, it would have been in its interest to negotiate protection from the event of default. Accordingly, if and when any events of default occurred bears on both the standard of review that should be applied to BNYM's conduct (whether it was conflicted) as well as the factual findings that BNYM seeks (such as whether it acted in good faith). Settlement Communications in particular, as well as other requested discovery, would shed light on whether BNYM improperly sought to negotiate

around one or more events of default, or its own potential liability.[3]

At least two potential events of default already appear to have been triggered here. First, on October 18, 2010, the Institutional Investors sent a Notice of Non-Performance to BNYM and BAC that, by their own admission, "started the running of a [sixty-day] clock toward the declaration of an Event of Default." (Inst'l Inv. Stmt. in Supp. of Stlmt. ¶ 68, Fed. Doc. No. 124.) Second, as recently recognized by the Southern District of New York, BNYM may have already been operating under an event of default as a result of BAC/CW's failures "to provide mortgage loan files in their possession, to cure defects in the mortgage loan files and/or to substitute the defective loans with conforming loans." *Retirement Bd. of the Policemen's Annuity and Ben. Fund v. Bank of New York Mellon*, 11 Civ. 5459 (WHP), 2012 WL 1108533, *8 (S.D.N.Y. Apr. 3, 2012) (Pauley, J.). Under the PSAs, BNYM owed duties directly to certificateholders to ensure that the mortgage loan files received from the master servicer contained all necessary and proper documentation and, if documentation was missing, to take steps to rectify the situation. (*See* PSA § 2.02.)

If BNYM negotiated the proposed settlement under the cloud of an event of default, it would have had its own liability (for its document-related failures) to consider and protect against when negotiating. Furthermore, if an event of default had occurred or was going to occur following the Institutional Investors' Notice of Non-Performance, then BNYM's attempt to "forbear" on events of default would unquestionably amount to a conflicted action. (Disc.

[3] BNYM and the Institutional Investors are wrong in asserting Respondents must show collusion. (Respondents' Opp. at 14-15, Doc. No. 244.) The "collusion" requirement is a creature of federal law, not New York state law, and is generally only applied in the class action context (which this is not). (*Id.*) Numerous circumstances here justify production of the Settlement Communications, including that many parties did not participate in settlement negotiations; the settlement proponents have provided incomplete and unresponsive discovery responses; and the certificateholders may not have been adequately represented in the negotiations. *See In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124-28 (7th Cir. 1979). Finally, even if collusion were required, there is pre-discovery evidence that elements of this settlement were collusive, including the settlement proponents' assertion of the common interest privilege, the forbearance of an event of default, and the Institutional Investors' $85 million attorney's fee.

Memo. at 23-24.) The existence of an event of default thus bears directly upon the standard of review this Court should apply. *See Milea v. Hugunin*, 24 Misc. 3d 1211(A), 2009 WL 1916400, *8 (Sup. Ct. Onondaga Cnty. June 1, 2009) (recognizing in an Article 77 proceeding that a conflicted trustee's conduct is subject to "strict scrutiny").

Similarly, whether an event of default exists is relevant to BNYM's requested relief and requires discovery. If this Court determines that BNYM negotiated and entered into the Settlement Agreement in an attempt to extinguish any liability it would otherwise have under an event of default, this calls into question whether BNYM acted in "good faith." (PFOJ ¶ k.) Whether the issues surrounding the events of default were discussed during the negotiations, and how the parties resolved them, will shed light on whether BNYM acted in good faith. Discovery of Settlement Communications is necessary to see whether the heavily compromised settlement amount was reached in part based upon a release of BNYM's own liability.

B. <u>Whether BNYM Was Acting "At the Direction" of the Institutional Investors</u>

In their briefs, both BNYM and the Institutional Investors deny that the Institutional Investors ever directed or instructed the Trustee to take action against BAC/CW. (BNYM's Opp. to Disc. Mtn. at 21, Doc. No. 263; Inst'l Inv. Opp. to Disc. Mtn. at 13-14, 20, Doc. No. 250.) There is significant evidence to the contrary. Whether the Institutional Investors gave instructions to the Trustee bears on whether BNYM took self-interested action in negotiating the indemnity "side letter," a factual issue that is essential to this Court's determination of the standard of review and that also impacts the relief sought by BNYM in the PFOJ.

The Institutional Investors, on behalf of the trusts in which they held at least 25% of the voting rights at the time, gave specific directions to the Trustee on at least three separate occasions in 2010—on June 17, August 20, and October 18. On June 17, 2010, they sent a letter to the Trustee instructing the Trustee to attend a meeting with them. (*See* Inst'l Inv. Stmt. in

Supp. of Stlmt. ¶ 63.) On August 20, 2010, by the Institutional Investors' own admission, they sent BNYM "a letter *instructing it to open an investigation of ineligible mortgages*." (*See id.* ¶ 64 [emphasis added]; *see also id.* ¶ 65 [BNYM "responded to the Institutional Investors' instruction."].) On October 18, 2010, the Institutional Investors sent BNYM and BAC a notice of non-performance, which contained further instructions directing BNYM to cure the deficiencies in its administration of the Trust. (*See id.* ¶ 66.)

These instruction letters initiated the series of events leading to whatever investigation and negotiation the Trustee conducted, and ultimately to the Settlement Agreement. These activities are defined in the "side letter" as the "Trustee Settlement Activities," for which the master servicer reassumed indemnification risk and which risk the Trustee then settled (i.e., the Trustee settled its own liability). This potential conflict thus impacts both the standard of review and the relief sought in the PFOJ. By taking inconsistent positions, the settlement proponents have invited a searching judicial inquiry into these facts.

C. Whether BNYM Actually Negotiated the Settlement Is Unclear

Even under the standard of review BNYM claims applies, BNYM is not entitled to deference if it failed to exercise its discretion in connection with the settlement. *See In re Stillman*, 107 Misc. 2d at 110 (trustee is not entitled to deference when the trustee "fails to use his judgment"). Furthermore, whether BNYM actually conducted the settlement negotiations, or improperly abdicated that authority, is also relevant to whether: the negotiations were "arms-length," the *Trustee* "acted . . . within its discretion," and the *Trustee* "appropriately evaluated the terms, benefits, and consequences of the Settlement." (PFOJ ¶¶ g, i, j.)

Based on statements made by the Institutional Investors and BNYM, there is substantial doubt as to whether BNYM exercised its discretion. The Institutional Investors' recent assertion that BNYM "struck its own deal with Bank of America," (Inst'l Inv. Opp. to Disc. Mtn. at 13), is

plainly inconsistent with prior representations by Institutional Investors' counsel that *the Institutional Investors* went "after [Bank of America] for a year to get this deal done." (Tr. of 8/5/11 Hrg. at 26:8-9, attached to Doc. No. 245 as Ex. 1.) BNYM also has placed its role in the negotiations at issue by stating that the Trustee "was presented with a settlement." (Tr. of 9/21/11 Hrg. at 9:8-10, attached to Doc. No. 245 as Ex. 2.) Indeed, it is hard to imagine how an $85 million attorney's fee could possibly be justified unless the Institutional Investors' counsel in fact had a large and material role in negotiating the settlement. Accordingly, discovery is needed to determine whether BNYM exercised its discretion.

II. Discovery Into the Meaning and Effect of the Settlement Agreement's Terms Is Necessary to Understand Those Terms and Make an Informed Judgment

Discovery is also needed into the meaning of the terms of the Settlement Agreement. For the Court to conclude that BNYM acted "within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts" and to approve the Settlement Agreement "in all respects," as BNYM requests, the Court must know what the Settlement Agreement actually means. (PFOJ ¶¶ k, n.) BNYM contends that the parol evidence rule precludes Respondents and this Court from examining this meaning, but BNYM misunderstands the rule. The "parol evidence rule prohibits the introduction of evidence outside a written agreement *for the purpose of varying or adding to such an agreement*[.]" *Katz v. Am. Tech. Indus., Inc.*, 96 A.D.2d 932, 932-33 (2d Dep't 1983) (emphasis added). In contrast, "where a party asserts that extrinsic evidence is necessary only to explain the meaning of the language employed in a provision of an agreement," the court may "allow some discovery on the issue[.]" *Garcia v. Benjamin Group Enter. Inc.*, 800 F. Supp. 2d 399, 404 (E.D.N.Y. 2011) (citing *Schlenger v. 310 Canal St. Corp.*, 272 A.D. 761 (1st Dep't 1947) (party may use parol evidence where such evidence "is necessary only to explain the meaning of the language

employed")). Here, the Respondents had no role in negotiating or drafting the Settlement Agreement and do not seek to alter the terms of the Settlement Agreement. Instead, Respondents only seek to understand them. The Court also needs complete information about the settlement terms to render judgment. Therefore, the parol evidence rule does not preclude discovery.

Even if the parol evidence rule applied, which it does not, the rule does not bar discovery as to the meaning of ambiguous terms. *See Stage Club Corp. v. West Realty Co.*, 212 A.D.2d 458, 459 (1st Dep't 1995) (parol evidence rule does not "preclude evidence to clarify an ambiguity[.]"). Notwithstanding BNYM's contention that the "Settlement Agreement speaks for itself," (*see* BNYM's Opp. to Disc. Mtn. at 6), there are numerous provisions of the proposed agreement that are ambiguous and that require discovery. Five such examples follow.

A. The Settlement Agreement Is Ambiguous as to How Much Money Any Trust Will Receive

Paragraph 3(c) of the Settlement Agreement purports to provide the "allocation formula," but is ambiguous with respect to several key terms. For example, the "Net Loss Percentage," which is a critical number for calculating the settlement amount that will flow to any trust, is defined to include an estimate of future losses, but how that estimate will be determined is not explained. (*See* SA § 3.) Nor does NERA's proposed computation method answer that question, it speaks only in generalities about the factors that NERA "will . . . take into account." (NERA's Proposed Computation Method Note at 2, Doc. No. 6.) The settlement is thus ambiguous regarding what is in the view of many Respondents the most important question: how much money any given Covered Trust will receive.

B. The Settlement Agreement Is Ambiguous as to Whether Entry of the PFOJ is a Condition Precedent to the Settlement Taking Effect

The Settlement Agreement is conditioned on "the Settlement Court enter[ing] in the Article 77 Proceeding . . . the [Proposed] Final Order and Judgment," or an order that

"conform[s] in all material respects" to the PFOJ. (SA § 2(a).) This provision is ambiguous because it is not clear—and indeed, leaves to the settlement proponents' discretion—which provisions of the PFOJ are "material," such that if altered by this Court's final order, the parties could walk away from the settlement. For example, it is unclear whether the parties could abandon the settlement if this Court converts the Article 77 proceeding, or if the Court were to enter a final order omitting some of the factual and legal findings that BNYM requests.

C. The Settlement Agreement Is Ambiguous as to When Bank of America Can Disregard the Servicing Improvements

The Settlement Agreement excuses Bank of America from providing any servicing improvement "if it becomes commercially impracticable for the Master Servicer to perform its obligations under this Paragraph 5 in a manner reasonably similar *to the intent thereof[.]*" (SA § 5(h) [emphasis added].) The vague term "commercially impracticable" is not defined anywhere in the Settlement Agreement. Further, the parties have conditioned Bank of America's ability to walk away from the servicing improvements on the settlement proponents' "intent" in drafting paragraph 5. (*See id.*) This places the Settlement Communications squarely at issue. Without this discovery, only the settlement proponents will be able to determine when and whether the Master Servicer can perform its obligations consistent with the settlement proponents' intent.[4]

D. The Settlement Agreement Is Ambiguous as to the Content and Effect of the Forbearance Agreements

Although paragraph 7 references "forbearance agreements" and provides they "shall remain in effect" for a certain time period, the Settlement Agreement is silent as to what those

[4] BNYM consistently touts the value of the servicing improvements in the Settlement Agreement as a reason for approving it. Yet there is a real question whether the servicing improvements add any actual value in light of the recent $25 billion national mortgage settlement. The provisions of the two settlements regarding loss mitigation and subservicing substantially overlap. Discovery into the value added by the servicing improvements (if any) is therefore necessary to evaluate the reasonableness of the settlement.

forbearance agreements say. (*See* SA § 7.) BNYM cannot maintain that the Settlement Agreement "speaks for itself" when it explicitly refers to agreements not contained in the Settlement Agreement and fails to disclose the content of those agreements. Such references to undisclosed documents plainly create ambiguity as to the meaning of the settlement terms.

E. The Settlement Agreement Is Ambiguous as to What Covered Trusts Will Be Excluded from the Settlement

The Settlement Agreement expressly discusses only one way a trust can become an Excluded Covered Trust: if BAC/CW decide to exclude a fully or partially wrapped trust pursuant to paragraph 3(d)(iv). But under the "blow-up provision" of paragraph 4(b), which permits BAC/CW to withdraw from the settlement if the unpaid principal balance of Excluded Covered Trusts reaches an undisclosed and secret amount, trusts that become Excluded Covered Trusts under Paragraph 3(d)(iv) because they are fully or partially wrapped are not counted. This raises the question of how a trust can become an Excluded Covered Trust *other than* by Paragraph 3(d)(iv), which is not answered on the face of the Settlement Agreement.

III. The Common Interest Privilege Does Not Apply Here and Cannot Be Used To Shield Production of Settlement Communications

Both the Institutional Investors and BNYM ignore well-settled case law governing the common interest privilege in arguing that the "obvious common interest" is "reaching a settlement[.]" (Inst'l Inv. Opp. to Disc. Mtn. at 10.) Courts consistently reject that basis for asserting the common interest privilege. *See Mt. McKinley Ins. Co. v. Corning, Inc.*, Index No. 602454/2002, 2009 WL 6978591 (Sup. Ct. N.Y. Cnty. Dec. 4, 2009) (a common interest in achieving approval of a proposed reorganization plan is insufficient to invoke the common interest privilege); *see also AMP Servs. Ltd. v. Walanpatria Found.*, Index No. 106462/04, 2008 WL 5150654 (Sup. Ct. N.Y. Cnty. Dec. 1, 2008) (Kapnick, J.) ("shared interest in the outcome of the underlying litigation is not sufficient to create a common interest."). Neither the

Institutional Investors nor BNYM offer any other common interest. The common interest privilege claim should accordingly fail.[5]

IV. The Fiduciary Exception to the Attorney-Client Privilege Applies Here

A. BNYM Cannot Escape its Fiduciary Obligations

Contrary to BNYM's argument, New York state courts recognize that indenture trustees are subject to the fiduciary duty of undivided loyalty. *Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 11 (1st Dep't. 1995) ("fidelity to the terms of an indenture does not immunize an indenture trustee against claims that the trustee has acted in a manner inconsistent with his or her fiduciary duty of undivided loyalty[.]"); *see also Dabney v. Chase Nat. Bank of City of N.Y.*, 196 F.2d 668, 671 (2d Cir. 1952) (an indenture trustee cannot "shake off the loyalty demanded of every trustee, corporate or individual"). The governing Pooling and Servicing Agreements likewise expressly state that the Trustee serves in a fiduciary capacity. (PSA § 3.05(e).) Accordingly, even indenture trustees are subject to the fiduciary exception. *See AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 340 (Sup. Ct. N.Y. Cnty. 1991) (an indenture trustee's communications with counsel were subject to the fiduciary exception).

Here, BNYM disclaims any fiduciary duties yet elsewhere claims entitlement to the deferential standard of review reserved for fiduciary trustees. (*See* Section I, fn. 2, *supra.*) When arguing for the standard of review, BNYM attempts to capitalize on the benefits of acting as a fiduciary and carefully avoids any reference to itself as an indenture trustee. (*See generally* BNYM's St. of Rev. Memo., Doc. No. 228.) Here, when ordinary fiduciary law no longer suits it, BNYM argues it is not a fiduciary and hence the fiduciary exception does not apply. BNYM

[5] In addition, neither BNYM nor the Institutional Investors have made *any* attempt to satisfy their burden that the Settlement Communications they are withholding are attorney-client privileged communications, which is the first required element for claiming the common interest privilege. *See Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.*, 215 F.R.D. 466, 470-71 (S.D.N.Y. 2003) (listing elements).

cannot have it both ways. BNYM either: (1) is a fiduciary and thus may be eligible for a deferential standard of review, but is subject to the fiduciary exception to the attorney-client privilege or (2) is not a fiduciary and thus is not entitled to any judicial deference for its decisions, but is also not subject to the fiduciary exception.

B. The Institutional Investors Acted in a Fiduciary Capacity

The Institutional Investors also take inconsistent positions in claiming they never "purported to act on behalf of all Certificateholders, the Trustee, or the Covered Trusts." (Inst'l Inv. Opp. to Disc. Mtn. at 13). Yet they admit going "after [Bank of America] for a year to get this deal done," (Tr. of 8/5/11 Hrg. at 26:8-9), and it is undisputed that the settlement negotiations covered all 530 trusts. Thus, to the extent BNYM failed to exercise its own discretion (*see* Respondents' Opp. at 8-10, Doc. No. 244) and to the extent the Institutional Investors assumed the authority ordinarily afforded to the Trustee (*see id.*), the Institutional Investors would be "impressed" with certain duties to other beneficiaries "that would otherwise be discharged by the Trustee." (Inst'l Inv. Opp. to Disc. Mtn. at 16 [emphasis omitted].)[6]

C. The Fiduciary Exception Applies Because There is Good Cause for Disclosure

BNYM takes the extraordinary position that "every one of the questions on which discovery is supposedly needed is answered by the Settlement Agreement itself." (BNYM's Opp. to Disc. Mtn. at 17.) As explained above, the Settlement Agreement does not speak for itself or answer all of the questions raised by the relief that BNYM requests. More importantly, BNYM admits that the information it considered and its evaluation of the settlement is relevant. (BNYM's Opp. to Disc. Mtn. at 2.) Yet BNYM shields most of that information with claims of attorney-client privilege. (*See* BNYM's Privilege Log, attached to Doc. No. 213-2 as Ex. 3.)

[6] This is one way in which this matter is distinguishable from those in which certificateholders have filed separate claims against BNYM.

Without discovery into BNYM's actual deliberations—which apparently occurred almost entirely through counsel—neither Respondents or this Court can know whether BNYM "appropriately evaluated" the claims being settled (PFOJ ¶ i); "appropriately evaluated" the terms, benefits, and consequences of the settlement (*id.*); or whether all of BNYM's "actions . . . in entering into the Settlement Agreement" should be approved "in all respects." (*Id.* ¶ 1).

Moreover, the Respondents' request for discovery is not unbridled. The communications to which the fiduciary exception applies are limited to communications that sought legal advice about the proposed settlement, and the Respondents have placed reasonable temporal limitations on their request: November 2010 to June 29, 2011. (*See* Disc. Memo. at 4).[7] Additionally, the serious allegations of conflict are good cause for disclosure. (*See id.* at 21-24.) BNYM's response to these allegations does not resolve the issues, but only confirms that there are questions of fact that require further inquiry and fulsome discovery.

Finally, BNYM argues that the Respondents are not entitled to any advice the Trustee sought "in order to defend itself against the conflicting claims of beneficiaries." (BNYM's Opp. to Disc. Mtn. at 25.) The Respondents do not seek communications where legal advice was sought solely for the Trustee's own benefit, but rather communications where legal advice was sought for the benefit of certificateholders during settlement negotiations. If BNYM contends that no such communications exist (i.e., that all legal advice was sought for its own benefit and protection) then its argument raises serious concerns about the Trustee's motives and actions during settlement negotiations. Otherwise, there should be some communications reflecting

[7] The Institutional Investors also argue that "none of the communications made *after* the October 18, 2010 Notice of Non-Performance falls within the fiduciary exception because *all of them* occurred after the Institutional Investors learned they might need to commence litigation." (Inst'l Inv. Opp. to Disc. Mtn. at 24 [emphasis in original]). This limitation on the fiduciary exception applies to anticipated litigation *against* the fiduciary such that the fiduciary must seek advice for its own protection. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc.2d 99, 115 (Sup. Ct. N.Y. Cnty. 2003) (where the court's limitation on the fiduciary exception related to anticipated litigation against the fiduciary). Here, neither of the "anticipated litigation" examples that the Institutional Investors cite—namely, this Article 77 proceeding or an action against BAC/CW—fall within this category.

advice sought for the benefit of certificateholders, and to which certificateholders are entitled.

V. The Work Product Doctrine Does Not Preclude Production

BNYM and the Institutional Investors waived their work product claims when they placed the reasonableness of the settlement and of BNYM's conduct at issue. *See generally Royal Indem. Co. v. Salomon Smith Barney, Inc.*, Index No. 125889/99, 2004 WL 1563259 (Sup. Ct. N.Y. Cnty. June 29, 2004). In *Royal Indem. Co.*, the plaintiff insurer sought discovery concerning settlement negotiations and other settlement materials. 2004 WL 1563259 at *2-*4. Defendants refused to produce those documents, asserting the attorney-client privilege, the work product doctrine, the joint defense privilege, and alleged settlement protections. *Id.* at *4-*7. These privilege claims failed because defendants placed the reasonableness of their conduct at issue and the documents were relevant to their conduct. *Id.* at *7-*8. Defendants could not argue that they acted reasonably, while also refusing "to disclose information that would either prove or disprove that threshold assertion." *Id.* at *8. Similarly here, the settlement proponents cannot claim work product to preclude discovery into the information they have placed at issue.

CONCLUSION

For the reasons set forth above, as well as those in the Memorandum in Support of the Order to Show Cause Why The Court Should Not Compel Discovery, Respondents respectfully request that this Court grant their motion to compel discovery.

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Respectfully submitted,

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EXHIBIT 1

Summary of Findings BNYM Requests From 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, 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.*)

(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 Respondents—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-o.); 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.)