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,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

SUPPLEMENTAL MEMORANDUM OF LAW REGARDING THE BANK OF NEW YORK MELLON'S STATUS AS A FIDUCIARY AND THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

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INTRODUCTION

On April 3, 2012, the Steering Committee of the Intervenor-Respondents and Objectors ("Intervenors") moved pursuant to CPLR § 3124 to compel the production of certain documents being withheld by The Bank of New York Mellon ("BNYM" or "Trustee") and the Institutional Investors on claims of relevance and privilege. Resolution of several issues in that motion remain unresolved, including whether the Court should compel BNYM to produce communications with counsel between approximately November 2010 to June 29, 2011 with regard to the proposed Settlement based on the fiduciary duty exception to the attorney-client privilege. Pursuant to the Court's instructions during the June 14, 2012 hearing, the Intervenors now submit supplemental briefing on whether BNYM possesses fiduciary duties sufficient to invoke the fiduciary duty exception to the attorney-client privilege, including whether the Court should compel BNYM to produce documents shedding light on its duties and obligations as Trustee to the Covered Trusts.[1]

In order to justify shielding communications with counsel sought *on behalf of the beneficiaries* of the 530 separate trusts involved in the proposed Settlement (the "Covered Trusts"), BNYM claims that its duties are narrowly confined by the Pooling and Serving Agreements ("PSAs") and Sale and Servicing Agreements ("SSAs") to the Covered Trusts, and that nothing in the agreements suggest they have any fiduciary duties. In making this argument, however, BNYM exalts form over substance, overlooks well-established New York law that examines an entity's actions in determining fiduciary status, and ignores that its actual conduct in this case ventures deeply into fiduciary territory. This is demonstrated by BNYM's decision to

[1] The Steering Committee submits this supplemental memorandum on behalf of all Intervenors 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.

initiate this Article 77 proceeding and pursue broad relief, ostensibly on behalf of the beneficiaries (or "Certificateholders") of the Covered Trusts. Indeed, BNYM asks the Court to bless a settlement that would bind and ultimately extinguish the rights of every Certificateholder to the Covered Trusts specifically on the grounds that it has acted *on behalf of and in the best interests of* the Certificateholders under its purported wide discretionary authority to do so. This extraordinary discretion, and the corresponding judicial deference sought by BNYM in requesting approval of the proposed Settlement, is the *sine qua non* of fiduciary status. Until and unless BNYM recognizes its actual role as a fiduciary in vouching for a proposed Settlement for the purported benefit of the Certificateholders, the Court should refrain from even considering whether to sign off on the settlement. Accordingly, BNYM's conduct demonstrates that it both had and exercised fiduciary authority and responsibility sufficient to invoke the fiduciary exception.

BNYM also seeks to avoid its duty to disclose attorney communications to its beneficiaries by arguing that, as a "securitization" trustee, "corporate" trustee, and for certain trusts (17 of the 530 Covered Trusts to be specific) an "indenture" trustee, it does not owe any fiduciary duties to the beneficiaries of the Covered Trusts.[2] BNYM again exalts form over substance and is wrong as a matter of law. However they label themselves, or whatever veil they seek to clothe themselves in, BNYM is still a trustee, and at an irreducible minimum must abide by its duty of loyalty and to avoid conflicts of interest. These duties are sufficient to invoke the fiduciary duty exception to the attorney-client privilege under New York law. *AMBAC Indem. Corp. v. Bankers Trust Co*., 151 Misc.2d 334, 336 (Sup. Ct. N.Y. Cnty. 1991).

[2] "Securitization" and "corporate" trustees are labels BNYM uses intermittently and interchangeably in its pleadings to describe its role with respect to Covered Trusts for which it is not designated an "indenture" trustee in the PSAs and SSAs. BNYM conflates those terms, as discussed in further detail below, as it does not call itself an "indenture" trustee for the vast majority of the Covered Trusts.

To be sure, the fiduciary duty exception to the attorney-client privilege stands for the sensible principle that beneficiaries of a trust are permitted to obtain their trustee's communications with counsel with regard to affairs pertaining to the trust. The reason is straightforward: the communications are for the *benefit* of the beneficiaries, who have a legal right of access to the communications. This is not a controversial proposition, and has long been the law in New York and elsewhere. *Hoopes v. Carota*, 142 A.D.2d 906, 909-10 (3d Dep't. 1988); *U.S. v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2320 (2011). Because BNYM's communications with counsel with regard to the proposed Settlement clearly pertain to trust administration, they fall within the fiduciary duty exception.

Furthermore, BNYM lacks a legitimate basis for withholding documents from which the scope of its duties, responsibilities and conduct can be determined. Fiduciary status is an inherently factual determination based on a functional test. As one court put it in the context of determining fiduciary status under ERISA, a statute based on the common law of trusts, "If it Talks Like a Duck … and Walks Like a Duck ... It is a Duck." *Donovan v. Mercer*, 747 F.2d 304, 308-09 (5th Cir. 1984). Thus, discovery bearing on BNYM's own assessment of its responsibilities, and documents demonstrating the extent to which BNYM performed fiduciary duties, are plainly relevant to the factual determination at the heart of this Article 77 proceeding – whether BNYM in fact, functioned in a fiduciary capacity. Thus, the Intervenors also request that the Court compel production of Requests for Production No. 23, 24 and 25, all of which seek discovery of documents related to the Trustee's duties and obligations to the Covered Trusts.

In sum, because the fiduciary duty exception applies to the legal advice BNYM sought on behalf of Certificateholders regarding the proposed Settlement, and because documents pertaining to BNYM's duties, responsibilities and conduct are relevant to determining whether

BNYM satisfies the functional test for fiduciary status—and thus, should be held to the standards of a fiduciary—the Court should grant the Intervenor's motion to compel these materials.[3]

I. ARGUMENT

A. BNYM Has Fiduciary Duties Sufficient To Trigger The Fiduciary Exception To The Attorney-Client Privilege

Under New York law, 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 to compel disclosure. *See Hoopes*, 142 A.D.2d at 910 (recognizing that the exception exists because "a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all of his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought, to his own private interests under the guise of the privilege"); *see also AMBAC*, 151 Misc. 2d at 336 ("The principle is surely not a controversial one. A trustee of the normal type is a fiduciary for beneficiaries of the trust and will not be permitted to shield completely his communications with counsel from those who ultimately would be affected by the advice given.").

BNYM contends that the fiduciary duty exception does not apply to its communications with its counsel regarding the proposed Settlement, because it does not owe any fiduciary duties to the Certificateholders of the Covered Trusts. Instead, as a trustee under any of the labels BNYM uses ("securitization," "corporate" or "indenture"), its duties are limited to those set forth in PSAs and SSAs, which it contends do not include any fiduciary duties. BNYM is wrong. First, fiduciary status is a question of fact under New York law, and courts accordingly look to

[3] The Intervenors also refer the Court to the arguments made with respect to the fiduciary exception issue in their underlying Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery, *see* Doc. No. 213-1 at 18-24, as well as those made in their reply, *see* Doc. No. 278 at 12-15.

an entity's conduct in determining fiduciary status. Thus, irrespective of the terms of the PSAs and SSAs, BNYM's conduct in entering into the proposed Settlement is a classic example of a trustee exercising "*de facto* control and dominance" over its beneficiaries, thereby giving rise to fiduciary duties. Second, regardless of the label it assigns to itself, New York law requires BNYM to abide by the duties of loyalty and to avoid conflicts of interest, which are sufficient to invoke the fiduciary exception. Finally, the PSAs and SSAs themselves impose fiduciary duties on BNYM after an event of default, which has occurred as evidenced by the proposed Settlement, which purports to cure the default. Accordingly, the fiduciary duty exception applies to BNYM's communications with its counsel regarding the proposed Settlement.

1. BNYM's Conduct In Seeking Approval Of The Proposed Settlement Based On Its "Wide Discretionary Authority" Establishes Fiduciary Status

Regardless of the terms of the PSAs and SSAs, BNYM is subject to the fiduciary duty exception to the attorney client privilege because it *functioned* as a fiduciary specifically with regard to the proposed Settlement. Under well-established New York law, whether BNYM is a fiduciary is a question of fact. *See AG Capital Funding Partners, L.P. v. State St. Bank*, 11 N.Y.3d 146, 158 (2008) ("[W]hether a fiduciary relationship exists necessarily involves a fact-specific inquiry.") "[I]t is fundamental that fiduciary 'liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation.'" *EBC I, Inc. v. Goldman, Sachs & Co*., 5 N.Y.3d 11, 20 (2005) (quoting Restatement [Second] of Torts § 874, Comment b); *see also U.S. v. Reed*, 601 F.Supp. 685, 717 (S.D.N.Y. 1985) ("[E]ven in the absence of an express agreement, it may properly determined that a confidential [fiduciary] relationship existed[.]") *rev'd in part on other grounds by* 773 F.2d 477 (2d Cir. 1985).

For this reason, fiduciary status is a matter of function, i.e., if an entity undertakes actions that are fiduciary in nature, it is a *de facto* fiduciary. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" *EBC*, 5 N.Y.3d at 19 (quoting Restatement [Second] of Torts § 874, Comment a). The term fiduciary "is a very broad one. It is said that the relation exists, and that relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another." *Mobil Oil Corp. v Rubenfeld*, 339 N.Y.S.2d 623, 632 (1972) *rev'd on other grounds by* 48 A.D.2d 428.

Exercise of "*de facto* control and dominance" over another suffices to give rise to a fiduciary relationship. *People v. Joseph Stevens & Co., Inc.*, 31 Misc. 3d 1223(A), at *31 (Sup. Ct. N.Y. Cnty. 2011) (citing *U.S. v. Szur*, 289 F.3d 200, 210 (2d Cir. 2002)); *AG Capital*, 11 N.Y.3d at 158 ("A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other."). Furthermore, as many courts have observed in the context of ERISA—a statute as mentioned previously is based on the common law of trusts—"discretion is a *sine qua non* of fiduciary duty." *Cottril v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20, 22 (1st Cir. 1996); *Hamilton v. Carell*, 243 F.3d 992, 998 (6th Cir. 2001); *see also Kriegel v. Bank of America, N.A.*, 2010 WL 3169579, at *14 (D. Mass. Aug. 10, 2010) (applying principle outside the context of ERISA).

Here, BNYM purports to have had and exercised discretion *in spades.* While certainly not required to do so under any PSA or SSA, BNYM made the decision to endorse and urge the

approval of a proposed Settlement orchestrated by Bank of America and the Institutional Investors, affirmatively seek judicial approval of the proposed Settlement, bind and relinquish the rights of all Certificateholders, and press for significant additional findings in the Proposed Final Order and Judgment ("PFOJ") BNYM has presented to the Court. These additional findings in the PFOJ leave no room for debate. BNYM claims to have exercised broad discretion as the trustee of the Covered Trusts, and seeks the Court's determination that it exercised its discretion appropriately. Specifically, as the Intervenors have pointed out to the Court consistently, BNYM asks the Court to make the following findings, among others:

(1) **The "Within the Trustee's Discretion Finding:** "… the decision whether to enter into the Settlement Agreement … is a matter within the *Trustee's discretion*." (PFOJ, ¶ g.) (emphasis added).

(2) **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.) (emphasis added).

(3) **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.) (emphasis added).

(4) **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.*) (emphasis added).

(5) **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.*) (emphasis added).

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

(7) **The "Extinguished Rights" Finding:** BNYM seeks to *forever bar and enjoin all certificate holders—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.) (emphasis added).

Moreover, the Verified Petition repeatedly contends that the Settlement was achieved for the benefit and "in the best interests" of the trusts (*see* Verified Petition, Doc. No. 1, ¶¶ 10, 61, 62, 92); is "advantageous" to the trusts (*see id.*, ¶¶ 10, 58, 59, 92), and that in making these determinations, BNYM exercised its "independent" and/or "good faith judgment" on behalf of the trusts (*see id.*, ¶¶ 1, 58, 77, 81, 92).

According to BNYM itself, through the exercise of its discretion as trustee of the Covered Trusts, it evaluated the Settlement, made the decision purportedly within its discretion to enter into it, and pursue an order that bound and relinquished the rights of all beneficiaries, including those, like the Intervenors, who had no role, or say in the matter, and whose interests were controlled by BNYM with regard to the proposed Settlement. These are not ministerial actions of a trustee devoid of fiduciary authority, but, rather, quintessential fiduciary functions. *See*, *e.g.*, *U.S. v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) ("One acts in a 'fiduciary capacity' when 'the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.'") (quoting *Black's Law Dictionary* 564 (5th ed. 1979)).

While BNYM has gone through great pains to argue that it only took those actions specifically authorized by the PSAs and SSAs, and, hence, has not undertaken any duties outside of the agreements, this simply is not true. The PSAs and SSAs authorize BNYM to commence litigation on behalf of the Certificateholders—something BNYM has not actually done—but say not one word about BNYM's authority to enter into a settlement that binds the beneficiaries of

530 separate trusts, and obtain the broad relief requested in the PFOJ. This is extra-contractual conduct that BNYM has opted to pursue, it claims, for the benefit of the Certificateholders.

Finally, BNYM's refrain in this Article 77 proceeding that its decision to enter into the proposed Settlement was within its discretion and is entitled to deference itself demonstrates BNYM fiduciary status.[4] The type of judicial deference sought by BNYM is traditionally reserved to fiduciaries in their capacity as trustee for the beneficiaries they serve. Indeed, in the cases cited by BNYM to justify this deferential standard, the courts recognize that the trustee, in seeking approval of a certain course of conduct from the court, is doing so in its fiduciary capacity on behalf of its trust beneficiaries. *See* Doc. No. 228 at 7 (citing *In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. Cnty. 1980)) and *In re First Deposit & Trust Co.*, 280 N.Y. 155, 163 (1939)). Even in *In re IBJ Schroder Bank & Trust Co.*, No. 101530/1998, slip op. (Sup. Ct. N.Y. Cnty. Aug. 16, 2000)—a case heavily relied upon by BNYM is justifying the existence and appropriateness of this Article 77 proceeding—the trustee admitted that it "owes a fiduciary duty to all the Beneficiaries to act in good faith and with reasonable prudence in conserving and protecting the Trust Estate it owed fiduciary duties to the beneficiaries." *See* Doc. No. 262, Ex. A, IBJ Schroder Verified Petition, ¶ 36.

Frankly, it is difficult to understand how BNYM could not be acting in a fiduciary capacity when it determined to settle billions of dollars of liability affecting hundreds of trust in a single settlement. BNYM's denial of fiduciary status is remarkable when one considers that if BNYM is right, a multi-billion dollar settlement engineered by some certificate holders (including insiders Blackrock and Goldman Sachs), but binding on all, was not reviewed by

[4] *See, e.g.,* Doc. No. 228 at 3 ("[T]he sole issue before the Court is whether the Trustee's decision to settle was within the bounds of a reasonable exercise of discretion by the Trustee. This is a deferential standard: the Court may not substitute its judgment for that of the Trustee[.]"); *see also id.* at 9 (arguing that its decision to enter into the proposed Settlement reflects "the Trustee's discretion, the deference owed to its decisions, and the limited nature of the Court's review of the Trustee's exercise of its discretion.").

anyone who claimed to represent the interests of and owe fiduciary duties to the many Certificateholders who were not privy to the settlement negotiations. A class-type settlement without any fiduciary for the "class" would likely be a first and hardly seems sensible or appropriate. Put simply, the deference BNYM seeks is part and parcel of its status as a fiduciary.[5] As such, BNYM cannot shield its communications with counsel with regard to the proposed Settlement from the beneficiaries on whose behalf BNYM purportedly was acting.

2. Whatever BNYM Calls Itself—"Securitization," "Corporate" Or Indenture Trustee—It Owes Fundamental Fiduciary Duties To The Beneficiaries Of The Covered Trusts Pursuant To The PSAs And SSAs

As explained by BNYM in its original filings accompanying its Verified Petition, "[a]ll but seventeen of the Trusts are evidenced by separate contracts known as [the PSAs] *under which BNY Mellon is the trustee*. The remainder of the Trusts are evidenced by *indentures* and related [SSAs] *under which BNY Mellon is the indenture trustee*." Doc. No. 11, Ingber Affirm., ¶ 3 (emphasis added). Thus, BNYM calls itself a trustee for 513 of the Covered Trusts, and an indenture trustee for the remaining 17 of the Covered Trusts, and argues that the same standards apply to it, irrespective of the labels used in any particular Covered Trust. Further, BNYM argues that it has the same powers under and has taken the same acts on behalf of all of the Covered Trusts. Nonetheless, BNYM argues that it does not owe any fiduciary duties to the beneficiaries of the Covered Trusts. This is incorrect.

Regardless of the labels used, every trustee, including an indenture trustee, owes fundamental duties to the beneficiaries of a trust that cannot be contracted away.[6] Two specific

[5] The Intervenors do not suggest that BNYM is entitled to the deferential standard they are arguing for, but their assertion that such a standard applies is certainly evidence of BNYM's view of themselves as a fiduciary.

[6] Notably, BNYM has already conceded this point in federal court, but has now changed course to vehemently argue that no such duties exist in an effort to shield relevant discovery. *See Bank of New York Mellen v. Walnut Place, LLC*, 819 F. Supp. 2d 354, 364 (S.D.N.Y. 2011) ("As BNYM has conceded, New York trustees owe certain common law duties to trust beneficiaries that *cannot be waived*.") (emphasis added).

duties recognized by New York law are the duty of loyalty and the duty to avoid conflicts of interest. With respect to the former, New York has long held that an indenture trustee, like any other trustee, cannot shake off this duty by the terms of an indenture. For example, Judge Learned Hand recognized that:

> The duty of a trustee, not to profit at the possible expense of his beneficiary, *is the most fundamental of the duties which he accepts when he becomes a trustee*. It is part of his obligation to give his beneficiary his *undivided loyalty*, free from any conflicting personal interest; an obligation that has been nowhere more jealously and rigidly enforced than in New York where these indentures were executed.

Dabney v. Chase Nat. Bank of City of N.Y., 196 F.2d 668, 670 (2d Cir. 1952) (emphasis added). In rejecting the argument that an indenture trustee's duties are circumscribed by the terms of the indenture, Judge Hand held that the courts of New York had not "given any countenance to the notion that, so far as a corporation sees fit to assume the duties of an indenture trustee, it can shake off the loyalty demanded of every trustee, corporate or individual." *Id*. at 671. Indeed, "a trust for the benefit of a numerous and changing body of bondholders appears to [the court] to be preeminently an occasion for a scruple even greater than ordinary … We should be even disposed to say that without this duty [of loyalty] there could be no trust at all." *Id*. at 670-71.

Courts have subsequently followed this reasoning to reject the notion that an indenture trustees' duties are purely contractual. *See United States Trust Co. of N.Y. v. First Nat'l Bank*, 57 A.D.2d 285, 295-96 (1st Dep't 1977) (adopting *Dabney* and rejecting an indenture trustee's argument that its duties were defined solely by the indentures because the "fiduciary obligation of loyalty" could not be contracted away); *Beck v. Mfrs. Hanover Trust Co*., 218 A.D.2d 1, 10 (1st Dep't 1995) (recognizing that a trustee had fiduciary responsibilities to trust beneficiaries that were broader than the obligations specified in the indentures). In *Beck*, the court specifically rejected the line of cases—many of which have been previously cited by BNYM—that suggested

an indenture trustee's duties were confined to those set forth in the contract, and held that "*it has more recently been held* that 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 [its] fiduciary duty of *undivided loyalty* to trust beneficiaries." *Id*. at 11 (emphasis added).

In addition to the fiduciary obligation of undivided loyalty, indentures also have the fiduciary duty to avoid conflicts of interest. *See Elliot Assocs. v. J. Henry Shroder Bank & Trust Co*., 838 F.2d 66, 71 (2d Cir. 1988) ("[T]he trustee must nevertheless refrain from engaging in conflicts of interest."); *AMBAC*, 151 Misc. 2d at 338-39 ("[T]he trustee is at all times obligated to avoid conflicts of interest with the beneficiaries."); *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F.Supp.2d 450, 475 (S.D.N.Y. 2010) ("[I]ndenture trustees are subject to an implied duty to refrain from engaging in conflicts of interest.") (internal quotations and citation omitted). *AMBAC* further recognizes that *even before an event of default*, indenture trustees have "a fiduciary duty not to advance its own interests at the expense of the bondholders." *AMBAC*, 151 Misc. 2d at 340.

Given these duties, and its own statements, among other things, BNYM cannot refute that it owes, at a minimum, certain fiduciary duties to the Certificateholders to the Covered Trusts, irrespective of the terms of the controlling PSAs or SSAs. This is sufficient under New York law to invoke the fiduciary exception. *AMBAC*, 151 Misc. 2d at 336. Indeed, in *AMBAC*, Judge Bear concluded based on these same fiduciary duties that "to the extent that Bankers Trust sought legal advice about the transactions or events on which AMBAC founds its charges that

Bankers Trust violated its duty of loyalty, the resultant documents … would come within the reach" of the fiduciary exception. *AMBAC*, 151 Misc. 2d at 340.[7]

Likewise, in this case, BNYM owes the beneficiaries of the Covered Trusts, at a minimum, the duties of loyalty and to avoid conflicts of interest, and the Intervenors seek legal communications about a proposed Settlement that may have violated these duties or otherwise demonstrate BNYM's compliance with such duties. Moreover, legal advice with regard to the proposed Settlement, like the Settlement itself, ostensibly was on behalf and for the benefit of the beneficiaries of the Covered Trusts. Thus, they are precisely the types of legal communications that trustees, even indenture trustees, cannot shield from the beneficiaries of the trusts.

3. Under The Relevant PSAs And SSAs, BNYM Cannot Dispute That Its Duties Are Heightened After An Event Of Default, Which Has Occurred Here

BNYM is also a fiduciary sufficient to invoke the fiduciary exception because the PSAs and SSAs state that BNYM owes the duty of prudence—a classic fiduciary duty—to all Certificateholders in the event of default. For example, § 8.01 of the PSAs state, "[i]n case an Event of Default has occurred and remains uncured, the Trustee shall … use the same degree of care and skill in their exercise as a *prudent* person would exercise or use under the circumstances on the conduct of such person's own affairs." Ingber Affirm., Ex. G, Doc. No. 11 (emphasis added); *see also id.*, Ex. H, SSA, § 6.01 ("If an Event of Default … has occurred and is continuing, the Indenture Trustee shall … use the same degree of care and skill in their exercise as a *prudent* person would exercise or use under the circumstances in the conduct of such person's own affairs.") (emphasis added).

[7] The Court ultimately did not, however, compel Bankers Trust to produce this discovery on the grounds that it failed to meet the good cause prong of the fiduciary exception. *See AMBAC*, 151 Misc. 2d at 340. As set forth below, the Intervenors satisfy the good cause standard. In any event, *AMBAC* stands for the proposition that indenture trustees have duties sufficient to invoke the fiduciary exception.

These provisions of the PSAs and SSAs are consistent with New York law. *See, e.g., Beck*, 218 A.D.2d at 12 ("[S]ubsequent to an obligor's default … it is clear than the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture."); *see also Magten Asset Mgt. Corp. v. Bank of N.Y.*, 15 Misc. 3d 1132(A), at 7 (Sup. Ct. N.Y. Cnty. 2007) ("An indenture trustee's post-default duty is significantly higher than its pre-fault duty."). The imposition of such duties is consistent with "sound public policy," as there is no reason "to allow indenture trustees the benefit of broad exculpatory provisions to excuse their failure to exercise those powers they possess pursuant to the indenture prudently in order to mitigate or obviate the consequences of default." *Beck*, 218 A.D.2d at 12. Accordingly, post-default, BNYM must abide by the additional fiduciary duty of prudence.

BNYM's response in this regard is two fold: They contend no event of default has occurred, and even if one has, they still lack any fiduciary duty. Neither position holds water. Pursuant to Section 7.01(ii) of the PSAs, an Event of Default is defined as:

> [A]ny failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement, which failure materially affects the rights of Certificateholders, that failure continues unremedied for a period of 60 days after the date on which written notice of such failure shall have been given to the Master Servicer by the Trustee or the Depositor, or the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates

See Ingber Affirm., Ex. G. It cannot credibly be claimed here that an event of default did not occur. Billions of dollars of defective loans were not repurchased in violation of the PSAs and SSAs, materially affecting the right of Certificateholders. Furthermore, BNYM (and BofA) had notice of the default no later than October 2010, and long after 60 days later, the problem has not been cured.

BNYM's position appears to be that no actual event of default occurred because it entered into a "forbearance" or "tolling agreement" to extend the period in which it purportedly had an opportunity to "cure" defaults in order to avoid an actual Event of Default under Section 7.01(ii). Putting aside that the PSAs and SSAs nowhere authorize BNYM to enter into such an agreement, BNYM again exalts form over substance. The reason a trustee—even an indenture trustee—owes heightened duties once an event of default has occurred is that a default puts the trust assets at risk, and the Certificateholders are then dependent on the trustee to protect their interests. *See Beck*, 218 A.D.2d at 12 ("[I]f an indenture trustee is under no enforceable obligation to act prudently to preserve and manage the trust assets in the event of default, *and so to provide some reasonable assurance that the bondholders eventually receive their due*, it may be asked whether the indenture does in fact secure the payment of anything.") (emphasis added). These exact concerns were implicated here, triggering BNYM's fiduciary obligations under the contracts and New York law. *See*, *e.g.*, *Ret. Bd. of the Policemen's Annuity & Ben. Fund v. Bank of New York Mellon*, 2012 WL 1108533, at *8 (S.D.N.Y. Apr. 3, 2012) (noting that Plaintiffs had sufficiently alleged in a case involving identical PSAs to the ones involved here that "Countrywide and Bank of America breached the PSAs by failing 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") (internal quotations omitted); *Bankers Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 2594341, at *10 (M.D. Fla. July 5, 2012) (rejecting the notion in a case involving identical PSAs to the ones implicated here that a "cure period" tolled an event of default under the PSAs and upholding allegations that an event of default had occurred).

Finally, BNYM argues that even in the event of default, it owes no fiduciary duties to the Certificateholders. *See* June 14, 2012 Transcript at 81:6-8 ("We have argued in this case … that

we are not a fiduciary before or after an event of default."). This argument cannot be squared with the PSAs and SSAs, and is contrary to settled New York law discussed previously. Perhaps for this reason, BNYM previously has argued otherwise. *See* Doc. No. 263 at 14 (noting that following an event of default, "trustees are subject to a heightened 'prudent person' standard of care."). Thus, for this reason as well, BNYM possessed sufficient fiduciary duties to be subject to the fiduciary duty exception to the attorney-client privilege.

B. Good Cause Exists To Compel Disclosure

The fiduciary exception also requires the party seeking disclosure to establish good cause. *See Hoopes*, 142 A.D.2d at 910. Good cause exists where: (1) the moving party is directly affected by the decisions the fiduciary made on his attorneys' 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 and not advice on past actions; (4) claims of self-dealing and conflict of interest are colorable, and (5) the information sought is relevant and specific. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 114 (Sup. Ct. N.Y. Cnty. 2003); *Hoopes*, 142 A.D.2d at 910-11. As set forth in the Intervenors underlying briefing on this issue, *see* Doc. No. 213-1 at 20-24; Doc. No. 278 at 13-15, these elements are all satisfied.

First, all Certificateholders are obviously directly affected by the settlement and by the decisions that BNYM made on the advice of counsel while negotiating the settlement. If the Court approves the proposed settlement, the Certificateholders will clearly be bound by its terms.

Second, communications between BNYM and its counsel with regard to the settlement are both relevant and necessary for the Intervenors to evaluate whether the settlement was negotiated in good faith, at arm's length, for the benefit of the Certificateholders, and whether BNYM itself recognized that it functioned as a fiduciary for the Certificateholders with the

consequent duties, responsibilities and obligations. If, by way of example, counsel informed BNYM that it had fiduciary duties, or questioned the process utilized by BNYM to evaluate the settlement, or the bona fides of the agreement itself, the beneficiaries of the Covered Trusts on whose behalf the Trustee has purported to act, are entitled to review these communications.

Presumably, BNYM will point to its recent production of Settlement Communications to suggest that the Intervenors now have sufficient discovery to weigh the merits of the proposed Settlement. However, consistent with BNYM's claim of attorney-client privilege, that production entirely redacts any conversation between BNYM and its outside counsel regarding the settlement negotiations or terms of the settlement. Yet BNYM has consistently conceded that its conduct and its evaluation of the settlement are relevant to the ultimate issues to be decided by the Court. *See* Doc. No. 263 ("The Trustee agrees that its *evaluation* of the claims and the Settlement is discoverable . . .") (emphasis in original). Thus, BNYM is using the attorney-client privilege to almost entirely shield—from its beneficiaries and this Court—the one area of information that even it concedes is relevant. In any event, simply because the Intervenors have *some* relevant discovery certainly does not preclude them from obtaining *further* relevant discovery that it is entitled to. Nothing in the CPLR suggests that the broad and liberal scope of discovery should be limited in this way.

Third, the communications reflect advice BNYM sought regarding the proposed settlement from November 2010 until the consummation of the proposed settlement on June 29, 2011. These communications concern a prospective action (whether to enter into the settlement), rather than any communications regarding past actions, and concern affairs of the trust.

Fourth, there are colorable claims that BNYM engaged in self-dealing and conflicts of interest. As set forth in the Intervenors' underlying motion to compel, *see* Doc. No. 213-1 at 22-

24, there are at least three potential examples where BNYM appears to have a conflict of interest and are receiving benefits to which they are either not entitled to or are otherwise not accorded to the other Certificateholders.[8]

Lastly, the communications are highly specific. The Intervenors seek only communications and documents between BNYM and their counsel that reflect advice sought on the benefit of all Certificateholders, rather than those BNYM sought for their own benefit. The Intervenors have also placed reasonable temporal limitations on their request, as they seek communications only from November 2010 through June 29, 2011. Accordingly, the Intervenors respectfully submit that the fiduciary duty exception applies to BNYM's communications with counsel regarding the proposed Settlement and good cause is shown for production of the discrete set of communications sought by the Intervenors.[9]

C. The Court Should Compel Further Discovery Related To BNYM's Role In Acting On The Certificateholders' Behalf

As discussed above, New York law recognizes that a party's fiduciary status is a factual determination. *See*, *e.g.*, *AG Capital*, 11 N.Y.3d at 158 ("[W]hether a fiduciary relationship exists necessarily involves a fact-specific inquiry."); *Langford v. Roman Catholic Diocese of*

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[8] Notably, to the extent the evidence reveals that BNYM is operating under a conflict of interest, the burden shifts to BNYM to prove the overall fairness of the transaction. It is well established under New York law that where a fiduciary has a conflict of interest with respect to a decision or transaction, the burden of proving the entire fairness of that decision or transaction shifts to the fiduciary. *See Benedict v. Amaducci*, No. 92-5239, 1993 WL 87937, at *7 (S.D.N.Y. Mar. 22, 1993) (citing cases); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 973-74 (2d Cir. 1989). These principles apply with equal force in Article 77 proceedings. *See Milea v. Hugunin*, 2009 WL 1916400, at *8 (N.Y. Sup. Ct. June 1, 2009) (holding that courts "must look, with careful scrutiny and/or with scrutiny with special care to see whether or not the trustee/beneficiary's acts became infected by his or her conflict of interest with the other trust beneficiaries").

[9] BNYM's additional argument that these communications are protected under the work-product doctrine should similarly be rejected. The word-product doctrine does not apply "where a party advances claims or defenses that place protected information 'at issue,' that is, where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information." *Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 4 Misc. 3d 1006(A), at *7 (Sup. Ct. N.Y. Cnty. June 29, 2004) (internal quotations and citation omitted). This "at issue" exception clearly applies in this case, where BNYM is placing their conduct of approving the proposed settlement directly at issue for the Court.

Brooklyn, 177 Misc. 2d 897, 901 (Sup. Ct. Kings Cnty. 1998) ("[T]he jury would have to be able to determine that a fiduciary relationship existed and premise this finding on neutral facts."); *Sergeants Benev. Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107, 110 (1st Dep't 2005) (where a party relies on another's expertise, such "allegations are sufficient to raise a factual issue regarding the existence of a fiduciary duty"); *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122 ("[A]ny inquiry into whether [a fiduciary relationship] exists is necessarily fact-specific to the particular case."). Because of the fact-specific nature of this inquiry, BNYM should be compelled to produce documents evincing its duties and responsibilities on behalf of the Covered Trusts. It is untenable for BNYM to argue that it owes no fiduciary duties to the Covered Trusts, while at the same time withholding the very documents that would show the full extent of its conduct on behalf of the Covered Trusts. Hence, in addition to producing communications with counsel under the fiduciary exception, BNYM should also be ordered to produce documents responsive to Requests for Production No. 23, 24 and 25, which seek production of non-privileged documents relevant to BNYM's position as Trustee to the Covered Trusts. These requests specifically seek:

> **Request No. 23**: All documents concerning Your acceptance of, and commencement of your position as Trustee for the Covered Trusts, including, but not limited to, business acceptance forms and valuations concerning the acceptance of the position of Trustee in the Covered Trusts.
>
> **Request No. 24**: All minutes of any internal BNY Mellon committee, group, or department responsible for overseeing BNY Mellon's trusteeship of the Covered Trusts.
>
> **Request No. 25**: All documents concerning whether You have any fiduciary duties to the Covered Trusts or to the beneficiaries of the Covered Trusts.

See Doc. No. 214, Rollin Affirm., Exhibit 1 at 23-24.[10]

[10] To be clear, the Intervenors seek this discovery in addition to and independent of BNYM's obligation to produce relevant communications with its counsel under the fiduciary duty exception to the attorney-client privilege

BNYM has objected to these requests on the grounds that, among other things, they are irrelevant to the question of whether BNYM's decision to enter into the proposed Settlement was reasonable. However, the relevance of these documents is obvious. As explained by the Intervenors in the recent June 14, 2012 hearing, these requests seek nonprivileged documents regarding BNYM's obligations as a trustee, including regular business forms outlining the scope of BNYM's duties, trust committee documents relating to their obligations to the Certificateholders, and any other communications or documents discussing the Trustee's responsibilities in its capacity as trustee to the Covered Trusts.

Furthermore, these documents will indeed shed light on and are relevant to the question of whether BNYM's decision to enter into the settlement was reasonable. In order to fully and fairly evaluate the settlement and determine whether the trustee acted consistent with its duties and obligations to its beneficiaries, it is necessary to determine whether BNYM recognized it was a fiduciary, or engaged in conduct which caused it to possess fiduciary duties. Therefore, respectfully, BNYM should be ordered to produce the documents so that, in particular, its internal assessment and understanding of its duties does not remain a closely guarded secret.

II. CONCLUSION

For the above reasons, the Intervenors respectfully request that the Court order BNYM to produce communications between BNYM and its counsel seeking legal advice about the proposed settlement while it was being negotiated (from approximately November 2010 to June 29, 2011), and produce documents responsive to the Intervenors' Requests for Production Nos. 23, 24 and 25 regarding BNYM's duties and obligations as trustee of the Covered Trusts.

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discussed above. There is no reason for the Trustee to withhold documents that shed light on BNYM's duties to the Certificateholders on the grounds of relevance.

DATED: July 18, 2012

RESPECTFULLY SUBMITTED,

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