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

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Kapnick, J.

THE TRUSTEE'S SUPPLEMENTAL MEMORANDUM OF LAW <u>REGARDING THE FIDUCIARY EXCEPTION</u>

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. The Trustee Is Not A Fiduciary. 2

A. BNYM's Relationship With The Objectors Is Contractual, Not Fiduciary. 2

1. The PSAs Do Not Create A Fiduciary Relationship. 2

2. BNYM Acted Pursuant To The Terms Of The PSAs. 5

B. BNYM Lacked The Characteristics Of A Fiduciary. 7

1. Contractual Discretion Does Not Make A Person A Fiduciary. 7

2. The Limited Duty Of Loyalty Does Not Trigger The Fiduciary Exception. 8

II. An Event Of Default Did Not Convert The Trustee Into A Fiduciary. 12

A. No Event Of Default Occurred. 12

B. The Trustee Is Not Under A Fiduciary Obligation After An Event Of Default. 13

III. Even If The Fiduciary Exception Were Applicable, It Requires A Showing Of Good Cause That The Objectors Have Not Made. 14

A. Availability From Other Sources 15

B. The Unlimited Breadth Of The Demand 17

C. The Untenable Theories Of Self-Dealing 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co.,
11 N.Y.3d 146 (2008) 2, 4, 9

AMBAC Indemnity Corp. v. Bankers Trust Co.,
151 Misc. 2d 334 (Sup. Ct. N.Y. Cnty. 1991) 10, 11, 14

ASR Levensversekering NV v. Breithorn ABS Funding P.L.C.,
Index No. 650557/09 (Sup. Ct. N.Y. Cnty. Oct. 17, 2011) 4

Asset Securitization Corp. v. Orix Capital Mkts., LLC,
12 A.D.3d 215 (1st Dep't 2004) 6

Bank of N.Y. v. River Terrace Assocs., LLC,
23 A.D.3d 308 (1st Dep't 2005) 2, 16

Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.,
No. 10–CV–0419, 2011 WL 2470226 (M.D. Fla. Mar. 17, 2011) 9

Bd. of Trustees of Aftra Ret. Plan v. JPMorgan Chase Bank, N.A.,
806 F. Supp. 2d 662 (S.D.N.Y. 2011)....................10

Beck v. Mfrs. Hanover Trust Co.,
218 A.D.2d 1 (1st Dep't 1995) 13, 14

Broad v. Rockwell Int'l Corp.,
642 F.2d 929 (5th Cir. 1981) 11

Calvin Klein Trademark Trust v. Wachner,
129 F.Supp.2d 248 (S.D.N.Y. 2001)....................8, 9

Celle v. Barclays Bank P.L.C.,
48 A.D.3d 301 (1st Dep't 2008) 4

CFIP Master Fund, Ltd. v. Citibank, N.A.,
738 F. Supp. 2d 450 (S.D.N.Y. 2010)....................9, 11, 19

Cottrill v. Sparrow, Johnson & Ursillo, Inc.,
74 F.3d 20 (1st Cir. 1996)....................7

Cox v. Adm'r U.S. Steel & Carnegie,
17 F.3d 1386 (11th Cir. 1994) 15

Dabney v. Chase Nat'l Bank,
196 F.2d 668 (2d Cir. 1952)....................9, 10, 11

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust,
43 A.D.3d 56 (1st Dep't 2007) 16

Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A.,
No. 95-CV-1924, 1996 WL 694345 (S.D.N.Y. Dec. 4, 1996) 3

EBC I, Inc. v. Goldman Sachs & Co.,
5 N.Y.3d 11 (2005) 4

Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.,
837 F. Supp. 2d 162 (S.D.N.Y. 2011)....................8, 9, 11, 14

Elliott Associates v. J. Henry Schroder Bank & Trust Co.,
838 F.2d 66 (2d Cir. 1988)....................7, 8

First Bank Richmond, N.A. v. Credit Suisse First Boston Corp.,
No. 07-CV-1262, 2008 WL 4410367 (S.D. Ind. Sept. 24, 2008) 9

Fitzpatrick v. AIG, Inc.,
272 F.R.D. 100 (S.D.N.Y. 2010) 17, 20

Garner v. Wolfinbarger,
430 F.2d 1093 (5th Cir. 1970) 15, 17

Gozlon–Peretz v. United States,
498 U.S. 395 (1991)....................3

H.C. Schmeiding Produce Co. v. Alfa Quality Produce, Inc.,
597 F. Supp. 2d 313 (E.D.N.Y. 2009) 11

Hazzard v. Chase Nat'l Bank of City of N.Y.,
159 Misc. 57 (Sup. Ct. N.Y. Cnty. 1936) 2, 3

HF Mgmt. Servs. LLC v. Pistone,
34 A.D.3d 82 (1st Dep't 2006) 7

Hoopes v. Carota,
142 A.D.2d 906 (3d Dep't 1988)....................2, 5, 10, 15

Howe v. BNYM,
783 F. Supp. 2d 466 (S.D.N.Y. 2011)....................14

In re 91st St. Crane Collapse Litig.,
31 Misc. 3d 1207(A) (Sup. Ct. N.Y. Cnty. Oct. 21, 2010) 15

TABLE OF AUTHORITIES
(continued)

Page

CASES (CONT'D)

In re Delta Air Lines, Inc.,
370 B.R. 537 (Bankr. S.D.N.Y. 2007),
aff'd sub nom. Ad Hoc Comm. of Kenton Cnty. Bondholders Comm. v. Delta Air Lines, Inc., 374 B.R. 516 (S.D.N.Y. 2007),
aff'd, 309 F. App'x 455 (2d Cir. 2009) 6

In re E.F. Hutton Sw. Props. II, Ltd.,
953 F.2d 963 (5th Cir. 1992) 19

In re LTV Secs. Litig.,
89 F.R.D. 595 (N.D. Tex. 1981) 15

In re Prudence-Bonds Corp.,
76 F. Supp. 643 (E.D.N.Y. 1948) 5, 8

In re W.T. Grant Co.,
699 F.2d 599 (2d Cir. 1983) 10

LaSalle Nat'l Bank Ass'n v. Lehman Bros. Holdings, Inc.,
237 F. Supp. 2d 618 (D. Md. 2002) 6

LaSalle Nat'l Bank Ass'n v. Nomura Asset Capital Corp.,
180 F. Supp. 2d 465 (S.D.N.Y. 2001) 5

Martin v. Valley Nat'l Bank of Ariz.,
140 F.R.D. 291 (S.D.N.Y. 1991) 2

Meckel v. Cont'l Res. Co.,
758 F.2d 811 (2d Cir. 1985) 3, 9

Mui v. Union of Needletrades, Indus. & Textile Emps., AFL-CIO,
No. 97-CIV-7270, 1998 WL 915901 (S.D.N.Y. Dec. 30, 1998) 2, 14, 17

Ne. Gen. Corp. v. Wellington Advisors,
82 N.Y.2d 158 (1993) 4, 5, 7

Nicholas Labs. Ltd. v. Almay, Inc.,
900 F.2d 19 (2d Cir. 1990) 3

Nunan v. Midwest, Inc.,
11 Misc. 3d 1052(A) (Sup. Ct. Monroe Cnty. 2006) 1, 14

Pane v. Citibank, N.A.,
19 A.D.3d 278 (1st Dep't 2005) 4

TABLE OF AUTHORITIES
(continued)

Page

CASES (CONT'D)

Peak Partners, L.P. v. Republic Bank,
191 F. App'x 118 (3d Cir. 2006) 10

Philip v. L.F. Rothschild & Co.,
No. 90-CV-0708, 1999 WL 771354 (S.D.N.Y. Sept. 29, 1999) 10

Riggs National Bank of Washington, D.C. v. Zimmer,
355 A.2d 709 (Del. Ch. 1976)....................5

Rodgers v. Roulette Records, Inc.,
677 F. Supp. 731 (S.D.N.Y. 1988) 7

Sanshoe Trading Corp. v. Mitsubishi Int'l Corp.,
122 Misc. 2d 585 (Sup. Ct. N.Y. Cnty. 1984) 7

Silvester v. Time Warner,
1 Misc. 3d 250 (Sup. Ct. N.Y. Cnty. 2003) 7

Stenovich v. Wachtell, Lipton, Rosen & Katz,
195 Misc. 2d 99 (Sup. Ct. N.Y. Cnty. 2003) 15, 17, 18

Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.,
No. 09-C-6904, 2010 WL 3324705 (N.D. Ill. Aug. 20, 2010) 3

Sterling Fed. Bank v. Credit Suisse First Boston Corp.,
No. 07-C-2922, 2008 WL 4924926 (N.D. Ill. Nov. 14, 2008) 9

United Republic Ins. Co. v. Chase Manhattan Bank,
168 F. Supp. 2d 8 (N.D.N.Y. 2001)....................9

United States v. Jicarilla Apache Nation,
131 S. Ct. 2313, 2320 (2011)....................1

United States v. Mett,
178 F.3d 1058 (9th Cir. 1999) 20

United States v. Reed,
601 F. Supp. 685 (S.D.N.Y. 1985) 4

Upjohn v. United States,
449 U.S. 383 (1981)....................1

Van Valkenburgh, Nooger & Neville Inc. v. Hayden Publ'g Co.,
33 A.D.2d 766 (1st Dep't 1969) 7

TABLE OF AUTHORITIES
(continued)

Page

CASES (CONT'D)

Ward v. Succession of Freeman,
854 F.2d 780 (N.D. Ill. 1988) 17

PRELIMINARY STATEMENT

The Objectors demand production of all of the Trustee's communications with its counsel, invoking the "controversial," "so-called 'fiduciary exception' to the attorney-client privilege." *Nunan v. Midwest, Inc.*, 11 Misc. 3d 1052(A), at *7 (Sup. Ct. Monroe Cnty. 2006). The Court should regard that demand with great skepticism. "The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law.'" *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320 (2011) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)). As a general matter, "[t]he privilege recognizes that sound legal advice . . . serves public ends" and that too expansive a requirement to disclose communications with counsel "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 389, 392. And in this case, the attempt to override the privilege is especially dubious: the Objectors, who constitute a small minority of Certificateholders, invoke an exception meant to protect the interests of beneficiaries of a fiduciary relationship, even though they hope to use the materials thus disclosed to *defeat* the wishes of the vast majority of Certificateholders, who affirmatively support, or at least have no objection to, the Settlement that is the subject of this action.

The Objectors' demand rests on three premises: that the Trustee *is* a fiduciary; that an Event of Default occurred, triggering heightened duties for the Trustee; and that the Objectors have demonstrated good cause to compel production of each requested document. In fact, however, every one of these premises is wrong. As we show below, the fiduciary exception has no application here and, even if it did, the requisite good cause has not been shown to support its application. We respectfully submit that the Objectors' motion should be denied.

ARGUMENT

I. The Trustee Is Not A Fiduciary.

A. BNYM's Relationship With The Objectors Is Contractual, Not Fiduciary.

1. The PSAs Do Not Create A Fiduciary Relationship.

Needless to say, the fiduciary exception applies only when the entity asserting the attorney-client privilege is in fact a fiduciary. *See*, *e.g.*, *Bank of N.Y. v. River Terrace Assocs., LLC*, 23 A.D.3d 308, 311 (1st Dep't 2005); *Mui v. Union of Needletrades, Indus. & Textile Emps., AFL-CIO*, No. 97-CIV-7270, 1998 WL 915901, at *1 (S.D.N.Y. Dec. 30, 1998). As courts have explained in describing the exception's rationale, "a fiduciary has a duty of disclosure to the beneficiaries *whom he is obligated to serve as to all of his actions*" (*Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep't 1988) (emphasis added)); given this duty, a fiduciary "cannot subordinate the interests of the beneficiaries, directly affected by the advice sought, to his own private interests under the guise of the privilege." *Id. Accord*, *e.g.*, *Jicarilla*, 131 S. Ct. at 2321-22; *Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991).

But that essential prerequisite to application of the exception is absent here: BNYM is *not* a fiduciary. That point should not be controversial. It is fundamental that "the corporate trustee has very little in common with the ordinary trustee." *AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (quoting *Hazzard v. Chase Nat'l Bank of City of N.Y.*, 159 Misc. 57, 83-84 (Sup. Ct. N.Y. Cnty. 1936)). Indeed, counsel for Walnut Place and other of the Objectors himself informed the Second Circuit that "this trustee is an indenture trustee, *not a fiduciary trustee*." *See* comments of O. Cyrulnik, 4/13/12 Ingber Aff., Ex. C (2/15/12 Hr'g Tr. at 23:15-16) (emphasis added).

This distinction is of central importance. BNYM's duties and obligations as Trustee are set by contracts that state in unambiguous terms that the Trustee is subject to *no* implied

covenants or obligations. Section 8.01 of the PSAs thus provides that, before an Event of Default, the Trustee "shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement," and "no implied covenants or obligations shall be read into this Agreement against the Trustee." PSA §§ 8.01, 8.01(i).[1] For decades, courts applying New York law have held that a trustee appointed under contracts containing such language "has his rights and duties defined, *not by the fiduciary relationship*, but *exclusively* by the terms of the agreement." *Hazzard*, 159 Misc. at 83-84 (emphasis added).[2] *Cf. Jicarilla*, 131 S. Ct. at 2323 (although "the relevant statutes denominate the relationship between the Government and the Indians a 'trust,' . . . that trust is defined and governed by statutes rather than the common law").

The Objectors therefore are wrong in contending that determination of a trustee's fiduciary status is in all cases "a question of fact." Obj. Br. 5. To the contrary, "where parties have entered into a contract, courts look to that agreement 'to discover . . . the nexus of [the

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[1] Only one of the hundreds of references to the Trustee in the contracts uses the term "fiduciary"—Section 3.05, which provides that "[t]he Trustee *in its fiduciary capacity* shall not be liable for the amount of any loss incurred in respect of any investment or lack of investment of funds held in the Certificate Account, the Supplemental Loan Account, the Capitalized Interest Account or the Distribution Account and made in accordance with this Section 3.05." (Emphasis added.) This refers to the Trustee's handling of funds received under the securitized mortgages, as to which the Trustee stands as a fiduciary. That the term "fiduciary" is used solely in that one limited connection, and not elsewhere, strongly suggests that the PSAs did not otherwise intend to make the Trustee a fiduciary. *See generally Gozlon–Peretz v. United States*, 498 U.S. 395, 404 (1991); *Nicholas Labs. Ltd. v. Almay, Inc.*, 900 F.2d 19, 21 (2d Cir. 1990) (use of a term in one part of a contract but not another shows parties intended the term not to apply where omitted). Tellingly, the Objectors have not argued in their Supplemental Memorandum that this provision somehow makes the Trustee a fiduciary.

[2] *See*, *e.g.*, *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985) ("Unlike the ordinary trustee . . . an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement."); *Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A.*, No. 95-CV-1924, 1996 WL 694345, at *5 (S.D.N.Y. Dec. 4, 1996) (Mukasey, J.) ("plaintiff's claim for breach of the prudent person standard, breach of fiduciary duty and negligence based on the trustee's pre-petition non-feasance must fail"); *Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09-C-6904, 2010 WL 3324705, at *7 (N.D. Ill. Aug. 20, 2010) ("Indenture trustees are held to a different standard than trustees in other contexts"; dismissing claim under New York-law PSA).

parties'] relationship and the particular contractual expression establishing the parties' interdependency." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19-20 (2005) (quoting *Ne. Gen. Corp. v. Wellington Advisors*, 82 N.Y.2d 158, 160 (1993)) (alteration in *EBC*); *see also id.* at 162, 164 (imposing a fiduciary duty "would inappropriately propel the courts into reformation of . . . agreements between commercially knowledgeable parties"). Courts go beyond the contract only where, as in *EBC*, "the complaint alleges a[] . . . relationship that was independent of the . . . agreement" (*id.* at 20); when "the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." *Id.* (quotation and alteration omitted). *Accord, e.g.*, *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302 (1st Dep't 2008) ("The breach of fiduciary duty claim was properly dismissed as the agreement 'cover[s] the precise subject matter of the alleged fiduciary duty'") (quoting *Pane v. Citibank, N.A.*, 19 A.D.3d 278, 279 (1st Dep't 2005)). The Objectors do not argue that there is any non-contractual relationship here.[3]

Thus, the Objectors' assertion that the Trustee "cannot *shake off* [a fiduciary] duty by the terms of an indenture" (Obj. Br. 11 (emphasis added)) incorrectly assumes that there *is* a duty *to* "shake off"; here, the contracts are the *only* source of the Trustee's duties. As in *ASR Levensversekering NV v. Breithorn ABS Funding P.L.C.*, the Objectors, "each highly sophisticated commercial entities, chose . . . to interpose . . . the Trustee between them. . . .

[3] The cases cited by Objectors (at Obj. Br. 5) are all consistent with this rule. *AG Capital* held that a trustee was not a fiduciary because the plaintiffs "cannot point to any provision in the indentures that places fiduciary obligations on State Street." 11 N.Y.3d at 157. After positing that another fiduciary theory might be "fact-specific," the Court of Appeals found that the theory failed because the defendant "never became a secured party representative, *as defined by the CTA*." *Id.* at 158 (emphasis added). *EBC*, as noted above, held that a "relationship that was independent of the . . . agreement" was necessary for the defendant to be a fiduciary. 5 N.Y.3d at 20. And *United States v. Reed* countenanced a finding of a fiduciary relationship explicitly because of "the absence of an express relationship." 601 F. Supp. 685, 717 (S.D.N.Y. 1985).

Plaintiffs are bound by the agreements that they made." Index No. 650557/09, op. at 7 (Sup. Ct. N.Y. Cnty. Oct. 17, 2011) (emphasis added); *see also Ne. Gen.*, 82 N.Y.2d at 162, 164 ("If Wellington wanted fiduciary-like relationships or responsibilities, it could have bargained for and specified for them in the contract."). That is enough to dispose of the issue here. BNYM is not a fiduciary, has no "duty of disclosure" to "beneficiaries whom [it] is obligated to serve as to all of [its] actions" (*Hoopes*, 142 A.D.2d at 910)—and therefore is not subject to the fiduciary exception to the attorney-client privilege. *See Riggs Nat'l Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976) (citing *In re Prudence-Bonds Corp.*, 76 F. Supp. 643 (E.D.N.Y. 1948), and recognizing that New York law "emphasizes the necessity of having the corporate trustee free to *exercise its own judgment after consulting with counsel* and that such freedom should be unhindered by the threat of future disclosure of the attorney-client communication") (emphasis added).

2. BNYM Acted Pursuant To The Terms Of The PSAs.

The Objectors are similarly off-base when they attempt to escape the compelling force of the PSAs' language by contending that BNYM did not act pursuant to the contractual terms when it entered into the Settlement. Obj. Br. 8-9. Pursuant to the PSAs, the representations and warranties that the Seller is alleged to have breached—and that prompted the Settlement—were made *to the Trustee*: "Countrywide hereby makes the representations and warranties set forth in [various schedules] . . . to the Depositor, the Master Servicer, and the Trustee." PSA § 2.03(a) (citations to the PSAs are to the CWALT 2006-OA19 PSA, Exhibit G to the 6/29/11 Ingber Affirmation). The PSAs further state that "[t]he Depositor hereby assigns, transfers and conveys to the Trustee all of its rights with respect to the Mortgage Loans. *Id.* § 2.04.

This language gives the Trustee "the power to bring suit to protect and maximize the value of the interest thereby granted." *LaSalle Nat'l Bank Ass'n v. Nomura Asset Capital Corp.*,

180 F. Supp. 2d 465, 471 (S.D.N.Y. 2001); *see also Asset Securitization Corp. v. Orix Capital Mkts., LLC*, 12 A.D.3d 215, 215 (1st Dep't 2004) ("Th[e] authority [to sue on behalf of the trust] is committed solely to the trustee of the pooled loans"); *LaSalle Nat'l Bank Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 633 (D. Md. 2002) ("Section 2.01 of the PSA in this case . . . grants [trustee] the authority to institute this action as the real party in interest.").[4] By the same token, the right to settle claims exercised by the Trustee in this proceeding is not "extra-contractual conduct" (Obj. Br. 9); it is "[i]mplicit in the authority to commence proceedings to remedy defaults." *In re Delta Air Lines, Inc.*, 370 B.R. 537, 548 (Bankr. S.D.N.Y. 2007), *aff'd sub nom. Ad Hoc Comm. of Kenton Cnty. Bondholders Comm. v. Delta Air Lines, Inc.*, 374 B.R. 516, 527 (S.D.N.Y. 2007), *aff'd,* 309 F. App'x 455 (2d Cir. 2009). Nothing here is inconsistent with the understanding that the contracts, and not implied fiduciary obligations, regulated the Trustee's actions—and therefore that the fiduciary exception does not apply.[5]

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[4] The Objectors err in asserting (Obj. Br. 8) that "[t]he 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." In fact, the PSAs and SSAs do not expressly authorize BNYM to sue. The power to enforce the contracts through litigation, like the power to enforce them through settlement, is implied from the Trustee's status as a party to the contracts, its ownership of the Mortgage Loans, and its receipt of representations and warranties. If the Trustee is entitled to *litigate* claims, it must be entitled to settle them. The only remedy that the PSAs and SSAs provide *expressly* is the right, independent of litigation, to demand repurchase of individual loans. PSA § 2.03(c).

[5] Unsurprisingly, then, *none* of the authorities holding that PSA trustees have power to sue or settle rest that conclusion on fiduciary status; rather, they recognize the trustee's discretionary power to bring suit based solely on the contracts. *See also* BNYM's Motion Regarding the Standard of Review and the Scope of Discovery (doc. 228). In fact, counsel for certain of the Objectors has made just that point. In *Walnut Place LLC v. Countrywide Home Loans, Inc.*, counsel "acknowledge[d] that the repurchase right does not belong to the certificate holders. It belongs to the Trustee." Sup. Ct. N.Y. Cnty. No. 650497/11, 12/8/2011 Hr'g Tr. at 14.

B. BNYM Lacked The Characteristics Of A Fiduciary.

1. Contractual Discretion Does Not Make A Person A Fiduciary.

Although that is enough to dispose of the Objectors' argument, it is not the only thing wrong with their theory. Wholly apart from the controlling contractual terms, the Objectors misstate what makes a fiduciary. They thus contend that BNYM's "wide discretionary authority" automatically gives it fiduciary status. Obj. Br. 5, 10 n.5. But although the Objectors are correct that "discretion is a *sine qua non*"—that is, a *necessary* condition—"of fiduciary duty" (*id.* at 6 (quoting *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 74 F.3d 20, 22 (1st Cir. 1996)), it is not a *sufficient* condition: business relationships that include discretion are routinely held *not* to be fiduciary in nature. "Unless parties can show a separate duty other than to perform under the contract, no fiduciary relationship between them is established." *Silvester v. Time Warner*, 1 Misc. 3d 250, 257 (Sup. Ct. N.Y. Cnty. 2003); *see Rodgers v. Roulette Records, Inc.*, 677 F. Supp. 731, 739 (S.D.N.Y. 1988).

For example, a publisher who acts as an author's agent and agrees to use "best efforts" to promote her work is not a fiduciary. *See Van Valkenburgh, Nooger & Neville Inc. v. Hayden Publ'g Co.*, 33 A.D.2d 766, 766 (1st Dep't 1969). Despite the publisher's discretion, this is "a purely commercial relationship and a purely commercial transaction." *Id*. Likewise, an investment bank that agrees to find and present candidates for a purchase, sale, or merger is not a fiduciary. *Ne. Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 160 (N.Y. 1993); *see also HF Mgmt. Servs. LLC v. Pistone*, 34 A.D.3d 82, 86 (1st Dep't 2006) (underwriter not a fiduciary); *Sanshoe Trading Corp. v. Mitsubishi Int'l Corp.*, 122 Misc. 2d 585, 587 (Sup. Ct. N.Y. Cnty. 1984) (independent sales agent not a fiduciary); *Silvester*, 1 Misc. 3d at 257 (record company's ability to agree to distribution agreements did not establish fiduciary relationship).

This principle applies with full force to indenture trustees. In *Elliott Associates*, for

example, the governing agreements gave the indenture trustee broad discretion in carrying out its contractual responsibilities. *See* 838 F.2d 66, 72 (2d Cir. 1988). But the Second Circuit nevertheless held that, "so long as the trustee fulfills its obligations under the express terms of the indenture, it owes the debenture holders no additional, implicit pre-default duties or obligations except to avoid conflicts of interest." *Id.* at 71. *See also Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 193 (S.D.N.Y. 2011) (dismissing fiduciary-duty claim based on trustee's discretionary "decision not to subsequently terminate" servicer); *Calvin Klein Trademark Trust v. Wachner*, 129 F. Supp. 2d 248, 250 (S.D.N.Y. 2001) (agreement "to take action to protect the [trade]Marks . . . is an arm's-length contract between sophisticated parties that will not be held to entail fiduciary duties absent some express agreement to that effect"). Indeed, *Prudence-Bonds* acknowledged the *need* for the trustee to exercise judgment as a reason *not* to vitiate the privilege.

> [T]he court cannot and should not close its eyes, solely because of the interest of bondholders, to the other important right of such a corporate trustee, with its large responsibility, to seek legal advice and nevertheless act in accordance *with its own judgment* . . . . If this is not so, the experience in *management and best judgment by such a corporate trustee* is put aside and counsel will not be free to give what is then believed to be proper legal advice, all of which, in the end may result in harm to the bondholders.

76 F. Supp. at 647 (emphasis added); *Riggs*, 355 A.2d at 714 ("emphasiz[ing] the necessity of having the corporate trustee free to exercise its own judgment after consulting with counsel" as reason to respect privilege). The same conclusion applies here.

2. The Limited Duty Of Loyalty Does Not Trigger The Fiduciary Exception.

The Objectors are similarly mistaken in their contention that the limited implied duty to avoid conflicts of interest somehow turns BNYM into a fiduciary in all respects. Obj. Br. 10-13.[6]

[6] BNYM has never denied the existence of this implied duty, as Objectors contend at Obj. Br. 10 n.6. *See* S.D.N.Y. Doc. # 102.

Courts consistently distinguish this implied-in-law duty of securitization trustees from fiduciary duties of the sort that could trigger the fiduciary attorney-client exception. As recently as 2008, the Court of Appeals made expressly clear that not every non-contractual duty is fiduciary in nature, holding that "the alleged breach of such [an implied-in-law] duty neither gives rise to *fiduciary* duties nor supports the reinstatement of plaintiffs' . . . causes of action" for breach of fiduciary duty. *AG Capital*, 11 N.Y.3d at 157 (emphasis in original); *see also Calvin Klein*, 129 F. Supp. 2d at 250 (contractual duty of good faith "is far removed, however, from the much higher duties created by a fiduciary relationship"). *Id.* at 158.[7] Judge Sullivan's decision last year in *Ellington* again confirmed that "an indenture trustee's duty is governed solely by the terms of the indenture, with two exceptions: a trustee must (1) avoid conflicts of interest, and (2) perform all basic, non-discretionary, ministerial tasks with due care. These two pre-default obligations are not construed as '*fiduciary* duties.'" 837 F. Supp. 2d at 191-92 (quoting *AG Capital*, 11 N.Y.3d at 157) (emphasis in original) (internal citations omitted).

In particular, the duty of loyalty on which the objectors rely (Obj. Br. 11) is narrower than the duty imposed on fiduciaries. "Unlike an ordinary trustee, an indenture trustee's duty is not undivided loyalty. It is the duty . . . 'not to profit at the possible expense of [its] beneficiary.'" *United Republic Ins. Co. v. Chase Manhattan Bank*, 168 F. Supp. 2d 8, 15 (N.D.N.Y. 2001) (quoting *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 670 (2d Cir. 1952)). *See*

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[7] *See also Bankers Ins. Co. v. DLJ Mortg. Capital, Inc.*, No. 10–CV–0419, 2011 WL 2470226, at *5 (M.D. Fla. Mar. 17, 2011) ("That duty [to perform ministerial tasks with due care], however, is not a 'fiduciary' duty."); *Sterling Fed. Bank v. Credit Suisse First Boston Corp.*, No. 07-C-2922, 2008 WL 4924926, at *15 (N.D. Ill. Nov. 14, 2008) ("Nor does Plaintiff offer any evidence, contractual or otherwise, suggesting that Bank of New York's responsibilities toward the certificateholders [under a PSA] rose to the level of fiduciary duties in any event."); *First Bank Richmond, N.A. v. Credit Suisse First Boston Corp.*, No. 07-CV-1262, 2008 WL 4410367, at *15 (S.D. Ind. Sept. 24, 2008) ("as BNY points out, an indenture trustee generally owes only a duty to perform its ministerial duties with due care, but does not owe a fiduciary duty to certificateholders.") (internal citations omitted).

Meckel, 758 F.2d at 816 ("An indenture trustee is not subject to the ordinary trustee's duty of undivided loyalty."); *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 475 (S.D.N.Y. 2010) (Rakoff, J.) ("the Second Circuit has disregarded 'bald assertions of conflict,' and has instead required a showing that the trustee 'personally benefitted' from the disputed action").[8] The indenture trustee thus is not obliged to advance the beneficiary's interests in "all of his actions" (*Hoopes*, 142 A.D.2d at 910), the obligation that supports the presumption that "the trustee[] had obtained the legal advice as 'mere representative[]' of the beneficiaries." *Jicarilla*, 131 S. Ct. at 2321 (citation omitted).

Even *Dabney*, upon which the Objectors principally rely (Obj. Br. 11-12), endorsed only this limited view of the duty of loyalty: it dictates that an indenture trustee may not "profit at the possible expense of his beneficiary." 196 F.2d at 670. Lest there be any doubt on this point, the Second Circuit—the court that decided *Dabney*—noted that "*Dabney* stands for the proposition that a trustee must refrain from engaging in conflicts of interest," but expressly held that the decision "simply does not support the broader proposition that an implied fiduciary duty is imposed on a trustee to advance the financial interests of the debenture holders during the period prior to default." *Elliott Assocs.*, 838 F.2d at 73; *see also AMBAC Indemnity Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 338 (Sup. Ct. N.Y. Cnty. 1991) ("I am not persuaded, though, at least not yet, that Judge Hand [in *Dabney*] intended to state that the indenture trustee is an ordinary trustee, with broad fiduciary duties."); *cf. Bd. of Trustees of Aftra Ret. Plan v. JPMorgan Chase Bank, N.A.*, 806 F. Supp. 2d 662, 687 (S.D.N.Y. 2011) (Scheindlin, J.)

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

(expressing doubt that "*Dabney* is still good law").[9]

This limited implied duty is not at issue here. The contrast of the situation at bar with *Dabney* is instructive. The Trustee in *Dabney* was accused of competing directly with its own beneficiary-noteholders in making claims against an insolvent issuer. *See Elliott Assocs.*, 838 F.2d at 73. In that context, *Dabney* "essentially [held] that a trustee or insider should not distribute to himself his own share if he has reason to know there will not be enough for the other creditor-beneficiaries." *H.C. Schmeiding Produce Co. v. Alfa Quality Produce, Inc.*, 597 F. Supp. 2d 313, 319 (E.D.N.Y. 2009). Likewise, in *AMBAC*, the plaintiff "charge[d] that Bankers Trust invaded trust accounts and wrongfully appropriated to its own use funds from an account designated for bond redemption and that Bankers Trust charged excessive fees and paid them to itself in advance of payment of superior obligations." 151 Misc. 2d at 340.

The allegation here (that BNYM acted unreasonably) is materially different; there could not be any assertion that BNYM diverted opportunities from the trust beneficiaries to itself. And cases presenting allegations similar to those here—including those involving trustee indemnities—have found no conflict and no fiduciary duty. For instance, in *CFIP Master Fund*, Judge Rakoff rejected the claim that an indenture trustee was conflicted "because it executed the indemnification agreements with [a party adverse to the trust]." 738 F. Supp. 2d at 475. Just as the PSAs do here, in *CFIP* "the trust agreements make clear that the Trustee was not expected to expend its own funds or risk liability, . . . so it was reasonable for U.S. Bank to seek indemnification [from CGML] once it became clear that there was a dispute between the Fund

[9] *See also In re W.T. Grant Co.*, 699 F.2d 599, 612 (2d Cir. 1983) (discussing *Dabney* and concluding that "[a]s the Fifth Circuit en banc recently concluded, New York authority runs contrary to the assertion 'that an indenture trustee has a duty, fiduciary or otherwise, to seek for the holders of debentures any benefits that are greater than those contractually due them'") (quoting *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 959 (5th Cir. 1981)).

and CGML." *Id.*; *see also Ellington*, 837 F. Supp. 2d at 187 (rejecting claim that trustee was conflicted because it "should have terminated [a loan servicer] when it learned of its misconduct . . . and, instead proceeded to 'engineer[] a release for itself'"). The Objectors' attempt to premise fiduciary status on the duty to avoid conflicts is directly contrary to precedent.

II. An Event Of Default Did Not Convert The Trustee Into A Fiduciary.

Alternatively, the Objectors contend that the Trustee is a fiduciary because the PSAs require it to act "prudently" after an Event of Default. That theory is incorrect, both because no Event of Default occurred and because the prudence standard is contractual, not fiduciary.

A. No Event Of Default Occurred.

For this alternative theory to have force, of course, the Objectors must show that an Event of Default occurred. But they do not even attempt to make such a showing. Instead, they simply assert conclusorily that "[i]t cannot credibly be claimed here than an event of default did not occur" because "[b]illions of dollars of defective loans were not repurchased . . . materially affecting the rights of Certificateholders." Obj. Br. 14. They are careful not to say *why* that constituted an Event of Default. In fact, it did not: the duty to repurchase loans falls on the Seller, not the Master Servicer, and an Event of Default arises only as a result of certain specified breaches *by the Master Servicer*. *See* PSA § 7.01.[10]

Moreover, no Event of Default occurred here because of the forbearance agreements that tolled the cure period, and thus forestalled default, during negotiation of the Settlement. The

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[10] For this reason, Judge Pauley's non-binding decision in *Retirement Board* (quoted at Obj. Br. 15) (made without briefing by either party on whether an Event of Default had occurred under the PSAs) was incorrect. Judge Pauley relied on three duties—to transfer mortgage files, to cure defects in those files, and to repurchase loans—all of which are duties of the Seller or Depositor, not of the Master Servicer. The Florida court's decision in *Bankers Insurance*, meanwhile, did not "reject[] the notion" that a cure period was possible (Obj. Br. 15); it held that it could not consider the forbearance agreements on a motion to dismiss because the plaintiffs had chosen not to disclose their existence in the complaint. M.D. Fla. 11-cv-1630, 7/5/12 Order at 19.

Objectors' suggestion that the forbearance agreements may be disregarded (Obj. Br. 15) is wrong for two reasons. First, the Certificateholders that provided the Notice of Non-Performance had the power to toll the cure period or withdraw the Notice. The PSAs thus contemplate that an "Event of Default [may] have been cured *or waived*." PSA § 7.03(b) (emphasis added). This is for good reason: Certificateholders who provide notice may conclude, for example, that triggering an Event of Default is no longer in the interests of the Trusts. If the Objectors had wished for a different result, they—along with other investors holding 25% of the Voting Rights—could have served their own notice of non-performance on the Master Servicer. But Objectors who lack the requisite holdings to serve their own notice may not invoke one that was served and then withdrawn or tolled by *other* Certificateholders; if they could, it would permit a small minority to hold the Trusts hostage, nullifying the 25% requirement.

Second, the PSAs do not require that a *final* cure be implemented during the 60-day window. To the contrary, the PSAs provide that an Event of Default occurs only if the failures[11] "continue[] unremedied." PSA § 7.01(ii). Here, following the Notice of Non-Performance, the Trustee negotiated and then entered into a Settlement that not only releases the alleged breaches that formed the basis for the putative Event of Default, but also provides an enormous payment and significant contractual servicing improvements. Those allegations are irreconcilable with the notion that the breaches "continue[d] unremedied."

B. The Trustee Is Not Under A Fiduciary Obligation After An Event Of Default.

In addition, the Objectors would be wrong even if an Event of Default had occurred. To be sure, the Trustee would then be subject to a "prudent person" duty, but its obligations would remain contractual; no common law fiduciary duty would be activated. This "relatively minor

[11] Here, there were only *allegations* of failures by the Master Servicer. Those allegations were hotly disputed by Countrywide.

change in the legal landscape, if change it is," leaves the "trustee's obligation . . . still circumscribed by the indenture." *Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 13 (1st Dep't 1995). Even those courts that advert to fiduciary duties in this context are careful to say that the post-default contractual standard "resembles" or "is akin to" a fiduciary duty, not that trustees actually *are* fiduciaries after an event of default. *See, e.g.*, *Ellington Credit Fund*, 837 F. Supp. 2d at 191-92. While the contracts require that, after default, the Trustee exercise its contractual powers prudently, nothing in that requirement supports a presumption that the Trustee consults counsel "as 'mere representative[]' of the beneficiaries" (*Jicarilla*, 131 S. Ct. at 2321)—the premise of the fiduciary exception to the attorney-client privilege.

The Objectors are mistaken in claiming (Obj. Br. 16) that BNYM has ever argued otherwise. BNYM has never disputed the post-default prudent-person duty, but has at all times recognized it to be contractual, not fiduciary, in nature. *See Howe v. BNYM*, 783 F. Supp. 2d 466, 483 (S.D.N.Y. 2011) ("Following an event of default, the duties of a trustee are to act prudently '*but only in the exercise of those rights and powers granted in the indenture*.'") (quoting *Beck*, 218 A.D.2d at 11) (emphasis added).

III. Even If The Fiduciary Exception Were Applicable, It Requires A Showing Of Good Cause That The Objectors Have Not Made.

The fiduciary exception therefore has no application here at all. But even if it somehow were held to apply, the exception could permit disclosure only if the Objectors demonstrate good cause as to any given document. *See Mui*, 1998 WL 915901, at *1-*2 ("The burden of establishing good cause to pierce the attorney-client privilege, is on the [party seeking discovery]."); *AMBAC*, 151 Misc. 2d at 340 (upholding privilege because plaintiff failed to show good cause); *Nunan v. Midwest, Inc.*, No. 2004/00280, 11 Misc.3d 1052(A), 2006 WL 344550, at *7 (Sup. Ct. Monroe Cnty. Jan. 10, 2006) (same). The Objectors cannot make that showing.

A. Availability From Other Sources

One prerequisite to disclosure is that "the information sought was highly relevant to and may be the only evidence available on" the issue. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 114 (Sup. Ct. N.Y. Cnty. 2003); *see also In re LTV Secs. Litig.*, 89 F.R.D. 595, 608 (N.D. Tex. 1981). But the Objectors do not even assert that this element is satisfied. They say only that the documents are "relevant and necessary," not that they are the "only evidence available." Obj. Br. 16. That is for good reason. Privileged documents plainly are not the "only evidence available" for the Objectors to use in making their case: The Objectors already have the Settlement Agreement, the materials that the Trustee considered and on which it bases the defense of its decision to enter into the Settlement (including two reports of legal experts), and all the communications that it and its counsel had with Countrywide. Nor can the Objectors support their assertion of relevance. The best that they can do is speculate that BNYM's counsel might have "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." *Id.* at 17.[12] But they provide no reason to think that counsel actually made such statements. Their interest in chartering a fishing expedition is no substitute for the requisite *showing* of relevance.

Moreover, the privileged documents would not be relevant even if their contents were as

[12] In addition, if such documents existed, they all would relate to BNYM's duties under the PSAs, not actions for the benefit of Certificateholders. In other words, they would not be subject to the exception. *See, e.g.*, *Hoopes*, 142 A.D.2d at 911-12 (exception would not apply to advice sought "as a defensive measure regarding potential litigation over his disputes with the trust beneficiaries"). This, among other issues, would need to be resolved through *in camera* review if the exception does apply, and BNYM reserves all objections relating to specific documents. The exception also does not apply to attorney work product, the protection of which "is absolute." *In re 91st St. Crane Collapse Litig.*, 31 Misc. 3d 1207(A), at *2 (Sup. Ct. N.Y. Cnty. Oct. 21, 2010); *see also Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1423 (11th Cir. 1994) ("the Fifth Circuit has held that the *Garner* doctrine does not apply to attorney work product. We agree.").

the Objectors hypothesize. Whether BNYM *actually* had fiduciary duties (let alone whether its counsel thought that it did) is relevant only to this discovery motion and has nothing to do with the Trustee's consideration of the Settlement and, according to the Objectors, could only entitle the Trustee's decision to even *greater* deference. (For that same reason, the Objectors' Requests 23-25, for business intake forms and other documents going back many years for each of the 530 trusts—which are supported by similar speculation that BNYM's internal emails might contradict the PSAs—are irrelevant (as well as immensely burdensome and time-wasting).)

Nor would the Trustee's receipt of documents "question[ing]" the settlement make its decision unreasonable or in bad faith. A recent decision of the First Department is dispositive on this point. Addressing an indemnitor's challenge to its indemnitee's settlement, the court rejected an identical demand to invade the privilege, holding that the need to prove "good faith" did not put those documents at issue and that mere "theoretical possibilit[ies]" did not overcome privilege:

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

Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust, 43 A.D.3d 56, 67 (1st Dep't 2007)

(emphasis added and citations omitted); *see also River Terrace*, 23 A.D.3d at 311. The same analysis applies here: the good faith and reasonableness of the Trustee's decision to settle can be determined on the basis of non-privileged documents, and the Objectors lack any "specific grounds to suspect" bad faith or to think that privileged documents "would be the only way to lay bare such suspected bad faith."

The Objectors have it backwards when they assert that "simply because the Intervenors have *some* relevant [non-privileged] discovery certainly does not preclude them from obtaining *further* relevant [privileged] discovery." Obj. Br. 17. While that may be true in other contexts, the rule is the opposite when it comes to the attorney-client privilege: even a possibility that the same information is already available weighs heavily against vitiating the privilege, and courts reject such demands where it is "not free from doubt that the information [the other parties] seek to obtain from . . . counsel cannot be secured from other sources so that the attorney-client privilege can remain intact." *Mui*, 1998 WL 915901, at *2; *see also Ward v. Succession of Freeman*, 854 F.2d 780, 786 (N.D. Ill. 1988). Here, the Objectors have not even tried to show that the documents that they already have are inadequate.

B. The Unlimited Breadth Of The Demand

The Objectors must also show that "the information sought is . . . *specific*." *Stenovich*, 195 Misc. 2d at 114 (emphasis added). *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1104 (5th Cir. 1970) (courts should consider extent to which party seeking to pierce privilege is "blindly fishing"). But here, the Objectors manifest no restraint at all. They seek *all* of the Trustee's privileged communications with counsel, purporting to limit that request only be excluding documents that could not be subject to the fiduciary exception in the first place, such as those concerning advice that "BNYM sought for [its] own benefit." Obj. Br. 18. *See Fitzpatrick v. AIG, Inc.*, 272 F.R.D. 100, 111 (S.D.N.Y. 2010) ("if the role of . . . attorneys was to advise [a

fiduciary] as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception”). This is not a “specific” request.

C. The Untenable Theories Of Self-Dealing

Finally, persons seeking to pierce the attorney-client privilege under the fiduciary exception also must advance a colorable claim of self-dealing or conflict of interest. *See*, *e.g.*, *Stenovich*, 195 Misc. 2d at 114. The Objectors’ two theories on this score are baseless..

1. The first theory seems to be that (1) the Trustee had an indemnity from the Master Servicer under the PSAs, (2) the Institutional Investors gave the Trustee a “direction” to negotiate a settlement, which voided the Master Servicer’s indemnity as to actions within the scope of the direction, and (3) the Trustee then entered into the Settlement Agreement to obtain an indemnity from the Master Servicer—the same indemnity that the Trustee already had under the PSAs—that would cover any expenses or liability that the Trustee incurred for *entering into the Settlement Agreement*. Motion to Compel Discovery (“Motion”) (Doc. 213) 22-23.

That theory is nonsensical for at least four reasons. First, it acknowledges that the Trustee ended up where it began, with an indemnity from the Master Servicer. PSA § 8.05 (emphasis added).[13] The pre-existing indemnity plainly covered settlement-related activity—it applied to all expenses “in connection with the performance of any of the Trustee’s duties hereunder.” There is no logic in the notion that the Trustee would have given up its indemnity by accepting a direction to enter into a settlement, just so that it could get that same indemnity back in the settlement.

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[13] Even if the Objectors did not intend to acknowledge the point, there can be no dispute that Section 8.05 provides an expansive indemnity from the Master Servicer: “The Trustee . . . shall be indemnified by the Master Servicer and held harmless against *any loss, liability or expense (including reasonable attorney’s fees)* . . . (c) *in connection with the performance of any of the Trustee’s duties hereunder*, other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence.”

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

Third, the carve-out from the PSA indemnity is limited to acts "taken at the *direction* of the Certificateholders," not "at the suggestion" or "with the assent" of Certificateholders. The Objectors have no evidence that the Institutional Investors ever gave the Trustee a direction, because they did not. The only document that the Objectors cite is a Notice of Non-Performance, which plainly is not a direction. Motion 22 n.11. The Objectors point to nothing in that letter that purports to "direct" any "action of the Trustee."

Fourth, as a matter of law it is not a conflict of interest for a trustee to obtain an indemnity. *See CFIP Master Fund*, 738 F. Supp. 2d at 475; *In re E.F. Hutton Sw. Props. II, Ltd.*, 953 F.2d 963, 972 (5th Cir. 1992) ("the Second Circuit takes a strict view of conflict" and no conflict exists unless there is "a clear possibility of this evident from the facts of the case, *e.g.*, where the indenture trustee is a general creditor of the obligor, who is in turn in financial straits").

2. The Objectors' second theory, that the Trustee entered into the Settlement Agreement to avoid an Event of Default, fares no better. Motion 23-24. The Objectors assert that it was the *Trustee's* duty to cure any Event of Default (*id.* at 23), but that is wrong. The defaults that the Notice of Non-Performance described were all alleged breaches by the Master Servicer, and the Notice concluded by demanding "that the *Master Servicer* immediately cure" them. 4/13/12 Ingber Aff. (Doc. 264), Ex. D. Indeed, the Trustee expressly has no "responsibility or liability for any action or failure to act by the Master Servicer," nor is it "obligated to supervise the

performance of the Master Servicer." PSA § 3.03. Moreover, the assertion that the Settlement "improperly unwound" potential Events of Default (Motion 24) is insupportable. The PSAs expressly contemplate that a default may be "cured or waived." PSA § 7.03(b). Here, the Settlement Agreement resolved claims based on those alleged breaches. If the Settlement is not approved, of course, the alleged breaches would remain outstanding, but if a negotiated payment and agreement to adhere in the future to materially more stringent servicing standards do not cure a servicer breach, it is hard to see what would.

In addition, the Objectors' justification for seeking these documents contradicts the basis on which they claim them to be discoverable. They argue that the Trustee entered into the Settlement to limit its own liability. *See* Mot. to Convert to Plenary Action (Doc. 226), at 12-13. But "[i]f the role of . . . attorneys was to advise [a fiduciary] as to how to protect its own interests when they potentially diverged from those of the beneficiaries of any fiduciary relationship, then communications to that end are not subject to the fiduciary exception." *Fitzpatrick v. AIG, Inc.*, 272 F.R.D. 100, 111 (S.D.N.Y. 2010). It is the Objectors' burden to "make [a] showing that the corporate attorneys and their privileged communications, which [the Objectors] are targeting *en masse*, did not play this protective advisory role for" the recipient of the advice. *Id.* at 111-12. Here, the Objectors' theory makes it impossible for them to make such a showing.

If there were any doubt on this score, "where attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure." *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999). But this is not a hard case.

CONCLUSION

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

Dated: July 27, 2012
New York, New York

Respectfully submitted,

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